GUERRILLA WAR AGAINST THE THREE STRIKES LAW

Introduction: What's Left After *Ewing*, *Carmony I* and the Defeat of Prop. 66?

I begin with the assumption that I am "preaching to the choir" with my basic two part premise. First, that California's Three Strikes Law is a fundamentally unjust law, particularly when 25 to life sentences are imposed on persons with two prior strikes and a current non-serious felony, and especially when the current offense is a minor crime such as simple possession of drugs, petty theft with a prior, or section 290 registration violations. And second, that as both conscientious zealous advocates for our clients and as crusaders for justice itself, we should do (and have done) everything within our power, ability, and imagination to fight the unjust consequences of this law with respect to our clients.

The battles and skirmishes over this law during the first twelve years of its shameful existence have taken up a considerable amount of our time and efforts, as well as those of the courts and our adversaries. We can, of course, be grateful for one small victory early on in *Romero*, [1] which at least gave sentencing judges the authority to alleviate the injustice of the law on a case-by-case basis. Of course, this left our clients at the mercy of the worst prosecutors (e.g., Santa Clara County) and the worst judges (e.g., many Santa Clara County jurists) to decide who will suffer the horrendous injustice of a first-degree-murder-like sentence for a minor current crime, and LWOP-equivalent sentences for any kind of current serious felony crime or crimes.

Unfortunately, the hope from *Romero* proved to be thin indeed, as shown by the Supreme Court's next two cases on the subject, *Williams* and *Carmony I*.[2] *Williams* put stark limits on a trial court's ability to grant *Romero* relief under Penal Code section 1385, requiring reversal of such favorable rulings in cases where the defendant is deemed within the "spirit" of the Three Strikes law (i.e., vengeance against wrongdoers). And *Carmony I* made it virtually impossible to challenge, as an abuse of discretion, a trial court's decision to deny *Romero* relief even for a very minor current crime.

Worse yet, two other great hopes for limiting the effect of the Three Strikes law were dashed in recent years. After some promising early Ninth Circuit rulings, Eighth

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[1] *People v. Superior Court (Romero)* (1996) 13 Cal.3d 497.

[2] *People v. Williams* (1998) 17 Cal.4th 148; *People v. Carmony* (2004) 33 Cal.4th 367.

Amendment disproportionality challenges to the Strikes law were rejected by the U.S. Supreme Court's narrow majority decisions in *Ewing v. California* (2003) 538 U.S. 11 and *Lockyer v. Andrade* (2003) 538 U.S. 63, which upheld 25 and 50 to life sentences under the Strikes law for current crimes of petty theft with a prior. The following year, the California electorate, after a last minute media blitz by then-popular Terminator-turned-Governor Schwarzenegger, narrowly defeated Proposition 66, which would have corrected many of the most unjust parts of the Strikes law.

It's hard to deny the triple whammy effect of *Williams-Carmony I*, *Ewing-Andrade*, and the defeat of Prop. 66. For the time being, at least, we appear to be stuck with the full-blown, ill-conceived and patently unjust Three Strikes law. And we are stuck, for the most part, with the often arbitrary filtering process of prosecutors and trial judges to select who among our clients will catch a break and end up with something less than the draconian 25 to life sentence mandated for third strikers.

However – and this whole article and presentation are predicated upon that "however" – we know that there are some different forces at work between the lines in the war against the injustice of the Three Strikes law. There are other, less direct ways of attacking the unjust effect of the Three Strikes law which can be utilized to challenge life sentences against our clients. And while there are many persons in robes sitting on the trial and appellate court bench who are more than happy to impose and uphold life sentences under the Strikes law, we also know that there are others who, like us, see the effects of this law as arbitrary and unfairly punitive.

The purpose of this seminar article and presentation is to be a call for continued battle against the Three Strikes law. While full-blown strategic war against this law has been defeated for now by the courts and a frightened electorate, it is our duty to keep up a tenacious "guerrilla war" against the Strikes law on behalf of our clients. And the ingenuity of our guerilla tactics can sometimes be the difference between a near-certain lifetime of imprisonment or a chance for freedom and hope for our clients.

The Operative Premise of this piece is that there are at least some judges in trial and appellate courts who, like us, believe the Three Strikes law is unjust, especially as applied to defendants whose current crimes are minor felonies; and that these judges are looking for ways to undo the unjust effects of the Strikes law without defying precedent. Additionally, there are some situations where we can win reversals of three strikes sentences even without sympathetic judges on the bench just by the strength of our arguments.

Here then is a non-exhaustive catalogue of tactical challenges to the Strikes law.

I. *ROMERO*: WHAT CAN YOU DO WHEN IT'S DENIED?

In *Carmony I*, the California Supreme Court held that only in rare, extraordinary situations, where no reasonable jurist could disagree that the defendant falls outside the spirit of the Three Strikes law, will a trial court's decision not to grant *Romero* relief constitute an abuse of discretion. (*Carmony I*, 33 Cal.4th at pp. 378-379.) The practical effect of *Carmony I* is to virtually eliminate any argument that denial of a *Romero* motion is an abuse of discretion. So, in order to attack a *Romero* denial with any hope of success, other strategies have to be employed. What follows are some suggested approaches, and examples of how they work.

A. **Attacking the Manner in Which Discretion Is Exercised**.

The key to a successful attack on a *Romero* denial is to focus not on the *substance* of the trial court's exercise of discretion – i.e., that this judge wouldn't grant *Romero* where most reasonable jurists would have done so (an argument seemingly foreclosed by *Carmony I*) – but on the *form* of the exercise of discretion. Typically, this means attacking the trial court's failure or refusal to consider proper factors or consideration of improper factors or reliance upon factually or legally incorrect grounds.

One needs to be creative in identifying such situations and in raising arguments which appear to be something more than a thinly disguised claim that the trial court's outrageously unfair decision was an abuse of discretion. Here are a few suggested approaches, most based on actual cases, some of which were successful, but many of which were not.[3]

[3]Most of the results described below are from unpublished cases. As such, they are helpful for thinking through issues, but provide no authority for citation purposes, and no sure guide as to whether a subsequent appellate panel will follow the same course as the favorable or unfavorable result in the prior case.

Category 1: Trial Court Which States It's Denying *Romero* Because it Would Be an Abuse of Discretion, or an Unauthorized Sentence, If It Granted Relief.[4]

It's obvious that many judges feel bad when they deny a *Romero* motion, or at least have a guilty conscience. Sometimes a judge will make an apologetic comment in the course of denying a motion to strike priors. The comment may sound something like, "Gee, I can't grant your *Romero* motion because it would be an abuse of discretion for me to dismiss the strike priors . . ."; or that *Romero* relief was precluded because there was "no wiggle room" in the case; or that if *Romero* relief was to be granted it would surely be reversed by an appellate court.

An arguably meritorious attack on such a ruling can be fashioned based on the contention that the case in question is *not* one in which any grant of *Romero* relief would be an abuse of discretion, *a la Williams*, but rather a case "on the bubble," in which a proper exercise of discretion could lead to *either* a grant or a denial of *Romero* relief. In such a claim, one argues that the known facts about the current crime, the strike prior or priors, and the defendant's background, character and prospects, are such that a different reasonable trial judge could have granted *Romero* relief, and one in which such a grant of relief would have been upheld on review as a proper exercise of section 1385 discretion.

As such, the argument goes, the trial court which based its decision on a conclusion that it would be a reversible abuse of discretion to grant *Romero* relief could not have properly exercised its discretion. When a trial judge starts off by concluding that his or her judicial hands are tied, it is akin to the situation where a court erroneously concludes that a particular sentence is mandatory when it is, in fact, discretionary. In both cases, the decision is an abuse of discretion under the settled rule that "[a] court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

Variations on this sort of argument have also come up. In one case, the trial judge denied *Romero* relief with this absurd comment: "Based on the testimony, the evidence

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[4]I admit, this is my pet issue; and I also concede it has never gone anywhere. But dang it, I'm right about this one and think I should win, so I'm putting it first even though it may not deserve it.

presented, the Court finds that the defendant has not sustained his burden of proof in order to require the Court to exercise its discretion in striking the strike in this matter." Here, it was argued that the Court misunderstood the scope of its discretion when it took the misguided view that the narrow grounds for *Romero* relief described in *Williams* somehow put a burden of proof on the defense to show entitlement to dismissal of a strike under section 1385.

Unfortunately, this argument has not met with any notable success – yet. What the appellate courts have done, in unpublished opinions, is to ignore the actual posture of the claim and treat it as if it was a straight-out challenge to the court's exercise of discretion. In one early case, I recall Justice Cottle, during oral argument, effectively agreeing with me that this was a case that was "on the bubble," which could have gone either way in terms of *Romero* relief being granted or denied, but then asking me why I thought denial was an abuse of discretion. In effect, the unpublished opinions in these cases concluded that the trial judges may have *said* they were denying relief because it would be an abuse of discretion, but what they really *meant* was that in their judgment discretion should not be exercised on behalf of this defendant, a decision which was an acceptable exercise of discretion under the record in the particular case. In not one of these cases did the Court of Appeal conclude that it would have, in fact, been an abuse of discretion, *a la Williams*, to grant *Romero* relief.

Since we are only losing this issue because of sleight of hand trickery by the appellate courts, I would suggest that this avenue of argument be pursued when it comes up. ¡Venceremos![5]

Category 2: Trial Court Considers Improper Factors in Exercise of Discretion or Fails to Consider Proper Factors.

This next groups of challenges arises out of language in *Romero* and *Williams*, which discuss what can and cannot be considered in exercise of 1385 discretion in Three Strikes law cases. (*Williams*, *supra*, 17 Cal.4th at p. 160-161.) Included, as a negative example of what cannot be considered is "a personal antipathy for the effect that the three strikes law would have on [a] defendant . . ." which "ignor[es] . . .defendants background, the nature of his present offenses, and other individualized considerations." (*Id*., at p. 159, quoting

[5]Sample briefing on this issue is available on request to bill@sdap.org.

Romero, *supra*, 13 Cal.4th at pp. 530-531, internal quotations omitted.) A converse holding is suggested in *Carmony I* , i.e., that denial of *Romero* relief is an abuse of discretion "where the trial court considered impermissible factors in declining to dismiss." (*People v. Carmony* (2004) 33 Cal.4th 367, 378, citing *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.) As *Gillispie* explains, there is "no valid distinction between a failure to exercise discretion and a failure to exercise discretion in a lawful manner." *Gillispie* provides an example, albeit hypothetical, e.g., that "the record may show that the court was motivated by considerations that violate the guarantee of equal protection under the law, such as bias related to the defendant's race or national origin. . . ." (*Ibid*.)

Sub-Category a: Consideration of Improper Factors.

The best example of this is *People v. Cluff* (2001) 87 Cal.App.4th 991, which is sometimes incorrectly described as the only case to find an abuse of discretion in failure to grant *Romero* relief, but is really a case where there was a lack of substantial evidence to support the stated reason for denying *Romero*. *Cluff* found a refusal to grant *Romero* relief to be an abuse of discretion because the trial court denied the request based on a factor which had no support in the record, i.e., the court's conclusion that Cluff had deliberately sought to evade the sex registration requirements, when the record actually showed a mere technical or inadvertent violation of the law.

A trio of Sixth District cases further illustrate this sub-category of abuse of discretion. In the *O'Brien* case, Alex Green, with help from SDAP Assistant Director Dallas Sacher, won an unpublished reversal based on Judge Lisk's erroneous conclusion that one of the defendant's prior crimes was a "secret strike." In reviewing the defendant's criminal history, Judge Lisk noted that there was a petty theft from Santa Barbara County which, he concluded, would have been charged as an *Estes* robbery[6] in Santa Clara County; Judge Lisk then included the existence of this "secret strike" as a one of his stated reasons for denying *Romero* relief. In an unpublished decision reversing the *Romero* denial, the Sixth District found this conclusion erroneous as a matter of law because the facts showed that it wasn't an *Estes* robbery, in that the defendant ditched the property before force was used to make his getaway. Thus the trial court's reliance on a fact that was contrary to the actual record

[6]*People v. Estes* (1983) 147 Cal.App.3d 23.

in this case led to an unpublished full reversal of the defendant's Three Strike sentence and remand for new *Romero* hearing.

A similar issue is now pending in the *Thimmes* case, handled by panel attorney Gloria Cohen, again assisted by Dallas. In *Thimmes*, the trial judge based his order denying *Romero* relief in a second strike case in part on his conclusion that the defendant was on notice when he committed his strike, a criminal threat under Penal Code section 422, that any additional felony would lead to a doubled sentence and credit limits. In fact a criminal threat under section 422 wasn't a strike until Proposition 21 was enacted in 2000, whereas the defendant's criminal threat crime was committed in 1999. Thus the defendant was not on notice after his conviction that he was subject to the Strikes law, and this basis for the trial court's refusal to exercise section 1385 discretion is not supported by substantial evidence.[7]

A third unpublished win in the Sixth District in the *Rubiales* case did not require an IAC finding. In that case, SDAP Staff Attorney Jonathan Grossman persuaded the Court that the trial court's conclusion that the defendant was malingering his mental illness had no support in the record. The Court of Appeal reversed because the record actually established, without dispute, that Rubiales was not malingering but had severe mental illness problems which involved factors favorable to a grant of *Romero* relief.

Sub-category b: Court's Refusal or Failure to Consider Favorable Evidence.

The converse of a court's reliance upon improper factors, or ones not supported by evidence, is an affirmative refusal to consider facts or information which is favorable to a grant of *Romero* relief. Of course, the two concepts are often related. In the aforementioned *Rubiales* case, for example, the trial court's unsupported "malingerer" finding caused the court to refuse to consider salient information about the defendant's mental problems which explained his criminal conduct and made him arguably outside the spirt of the Three Strikes Law.

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[7]Take note that both the above Sixth District cases raised the claim by means of an allegation of ineffective assistance of counsel. In each case, counsel failed to object to the use of a factor unsupported by the record. Since the issue concerned the sentencing court's exercise of discretion, an objection was required under *People v. Scott* (1994) 9 Cal.4th 331 to preserve the issue for appellate review. Since counsel failed to make a meritorious objection at sentencing which had a strong likelihood of resulting in a more favorable sentence, the issue could be raised as IAC at sentencing.

Cruz. My own *Cruz* case provides another example of a court's refusal to consider favorable evidence. Trial counsel put together an incredibly moving portrait of Mr. Cruz's tragic childhood of abuse, neglect and early exposure and addiction to drugs and alcohol. At the *Romero* hearing, Judge Ahern commented that the horrific facts concerning the defendant's upbringing "could bring tears to someone's eyes . . ."; however, the judge added, he had to "put aside" these facts and decide the *Romero* request based on Cruz's criminal history, then denied the request, sentencing Cruz to a 25 to life term for a current crime of simple possession of drugs outside his own house. The court commented that it could not be guided by "sympathy" for the defendant, but had to decide the motion on "other reasons."

I argued in the appeal that the trial court's rulings amounted to a refusal to consider pertinent facts about appellant's background and character, which are a required part of the *Romero* calculus under *Williams*. I federalized this argument under case law recognizing a Fourteenth Amendment Due Process right to have the entity deciding sentence consider sympathetic facts about the defendant. While "sympathy" is a factor which the factfinder at a trial should not consider, a series of U.S. Supreme Court capital cases make it clear that defendant is constitutionally entitled to have the sentencing body consider any "sympathy factor" raised by the evidence before it.'" (*People v. Easley* (1983) 34 Cal.3d 858, 876, quoting *People v. Robertson* (1982) 33 Cal.3d 21, 57-58; see *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plurality opinion).)

The best example of this principle is *Eddings v. Oklahoma* (1982) 455 U.S. 104, where the trial judge in a capital case announced that he was precluded, as a matter of law, from considering the defendant's "violent background," i.e., "mitigating evidence of Eddings's family history . . ." exemplified by the fact that he was slapped around and beaten by his father. (*Id*., at p. 113 & fn. 8.)

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf.

(*Id*., at pp. 113-114.)

The principle advanced in the foregoing cases stems not simply from the unique and ultimate penalty involved in capital cases, but from the distinction between the function of

a court as arbiter of guilt, on the one hand, and sentencer, on the other.

> A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant – if not essential – to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.

(*Williams v. New York* (1949) 337 U.S. 241, 247; U.S. Const., 14th Amend.) The due process holding in *Williams* was a key predicate to the plurality opinion in *Lockett*, requiring individualized consideration of any aspect of a defendant's character and record proffered as mitigating factors. (*Lockett*, *supra*, 438 U.S. at p. 604.)

Unfortunately for Mr. Cruz, this meritorious argument fell on deaf ears, with the Court of Appeal concluding in an unpublished opinion that Judge Ahern had actually considered the *facts* about Cruz's background, and that his comments simply indicated that he was avoiding being "swayed by sympathy" in his *Romero* decision. This conclusion made little sense because the record showed that the trial judge specifically stated that he wold "put aside" the sad but sympathetic facts about defendant's social history and decide the *Romero* motion based on "other reasons" and the defendant's "criminal history." The Due Process argument will be presented in a federal habeas petition, to be raised in addition to the Eighth Amendment claim in that case.

Sub-category (c): A Creative *Garcia* Spin.

In *People v. Garcia* (1999) 20 Cal.4th 490, the California Supreme Court held that a trial court's authority under section 1385 and *Romero* includes the power to vacate some or all of a defendant's strikes "on a count-by-count basis," holding that section 1385 expressly permits a court to strike priors as to one or more, but not all, of the defendant's current charged crimes. (*Id*., at pp. 496-502.) In *England*, another of my own Three Strikes cases, the defendant was looking at a 50 to life sentence for a first criminal episode of simple possession of meth, and a second incident where he recklessly evaded the police in a high speed car chase, then led them on a foot chase which proximately caused serious injury to a police officer. Sensing that it was futile to argue *Romero* abuse of discretion as to the second set of crimes, I focused my argument on the denial of *Garcia* relief as to the simple possession charge. An argument focused on this aspect of the ruling made sense because

Judge Lee's stated reasons for denying *Romero* relief relied entirely on the more serious criminal conduct of the second incident, and said nothing about Mr. England's drug use in the first incident.

The argument went something like this: *Garcia* points out that under *Williams*, the sentencing judge deciding a *Romero* request must pay attention to "'individualized considerations . . . such as the nature and circumstances of the defendant's present felonies. . . ." In many cases, *Garcia* noted, this factor can "differ considerably" as to various charged counts, and "[a] court might therefore be justified in striking prior conviction allegations with respect to a relatively minor current felony, while considering those prior convictions with respect to a serious or violent current felony." (*Garcia*, *supra*, at p. 499, quoting *Williams*, *supra*, at pp. 159, 161.) In Mr. England's case, I pointed out in considerable detail that virtually every *Romero* factor concerning the simple possession charge was highly favorable to the exercise of discretion on England's behalf. The aspect of the trial court's sentencing decision which refused to grant partial *Romero* relief under *Garcia* as to the simple possession charge, I argued, was unreasoned and arbitrary since Judge Lee's lengthy comments explaining his reasons for denying *Romero* relief mention not one word about this earlier, minor offense, focusing exclusively on the second incident.

Perhaps more importantly under *Garcia,* the court's comment about the "guarded" nature of appellant's "current prospects" failed to consider, as *Garcia* teaches, that the focus for purposes of limited *Garcia* relief should have been on appellant's prospects *after* serving the minimum 25 year term which he would have received if the strikes were dismissed only as to the drug possession charge. (*Garcia*, *supra*, 20 Cal.4th at p. 500.) From this it could be concluded that the court's comments indicated it in no manner gave serious consideration to striking priors only as to the earlier, minor felony. I then went through all the pertinent factors towards exercise of partial *Romero* relief under *Garcia*, and concluded that the trial court's refusal to grant such relief was an abuse of discretion, requiring reversal.

This argument too proved unsuccessful in the direct appeal.[8] The court of appeal

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[8]Is anyone sensing a pattern here? Robinson loses a creative argument, then uses this article as a way of venting his frustration? But isn't that what preaching to the choir is all about? Besides, like any zealous advocate, I really do believe my novel arguments have merit, and that it's just a matter of time and luck before someone, somewhere, succeeds with these arguments.

simply presumed that since the trial judge knew about *Garcia*, and declined to exercise its discretion to grant such relief, and because this result was one that a reasonable judge could make, there was no abuse of discretion. Once again, this was an unpublished decision, and thus the issue in a related case could be presented anew and argued vigorously.

B. **Attacking IAC in Failing to Present an Adequate *Romero* Motion, i.e., the Lack of Investigation, Failure to Present Mental Health Evidence or Other Mitigating Factors.**

By now we have all countless times read the boilerplate *Romero* motion used by the Santa Clara Public Defender's Office. There's the standard summary of the same cases from the late 90's, a summary of the defendant's social history and background (which is generally pretty well done), and then no more than one or two paragraphs about why *Romero* should be granted in this case. In many cases, the lack of an effectively argued written *Romero* motion makes no meaningful difference: your client is the Three Strikes Poster Boy, and the most elegantly researched and written motion in the world wouldn't persuade the best judge in the county to grant *Romero* relief.

But other times, the case you're handling on appeal is one which cried out for *Romero* relief. In those situations, it's incredibly frustrating that counsel for the defendant did virtually nothing of substance to advocate for a favorable *Romero* result. Sometimes, this can translate into a cognizable habeas argument about counsel's ineffectiveness.

Take one of my cases, for example. We'll call the client Bobby Gomez (even though that isn't his name), because the habeas in this case has yet to be filed. Bobby is arrested for simple possession, and has three prior strikes, two from the same bank robbery with no weapon used, the other from a typical break-the-window, grab it and run residential burglary. No physical violence is used in any of the priors, and no one is injured. Bobby's arguably meritorious motion to suppress is denied, and Bobby, on the advice of his public defender counsel, enters an "open" guilty plea to the simple possession charges, with the promise of a *Romero* hearing. The written *Romero* motion features the boilerplate legal argument, but lacks the expected summary of Bobby's background, social history and prospects. There is a two sentence comment about the fact that Bobby has been diagnosed with bipolar mania, which is now in remission thanks to medication, but no other mental health information or evaluations. After uninspired argument by counsel, the conservative sentencing judge denies *Romero* and sentences Bobby to 25 to life – a virtual LWOP term for this forty year old

defendant. What can you do? Obviously, raise the suppression motion on appeal, and an Eighth Amendment claim. But can anything be done about the *Romero* denial?

What I've been doing is investigating and putting together a habeas petition based on the *Romero* motion that counsel failed to make. It turns out that Bobby has a long history of mental health diagnoses, beginning with hyperactivity and prescribed use of Ritalin and amphetamine from childhood, and graduating to a diagnosis, made nearly a decade before his current crime, of bipolar mania. Documents obtained from prison, jail, and hospital records show beyond dispute that his bipolar mania diagnosis is quite legitimate. The jail records in particular tell an amazing story from his incarceration for the current crime, demonstrating that he behaves in an incredibly bizarre fashion when not properly medicated, but does quite well when he gets his medication. Mental health experts, who could have prepared reports or testified at the *Romero* hearing, would have explored the links between bipolar mania and both self-medication with illegal drugs and criminal conduct, putting the whole picture of Bobby's strikes and current crime in a far different light than the paucity of favorable facts presented at the *Romero* hearing.

The goal here is to fashion a habeas which includes all of this material – in effect, putting forward the *Romero* facts and argument that effective counsel should have presented – explaining how effective counsel would have investigated and presented this material, and why there is a reasonable probability of a more favorable outcome, i.e., a grant of *Romero* relief, but for counsel's failure to effectively represent the client at the *Romero* hearing.

Jonathan Grossman put together a habeas like this in the *Rubiales* case, arguing that counsel was ineffective in failing to present a full picture of the defendant's mental illness and its connections to his current and past criminal behavior. Although the *Rubiales* case was won on direct appeal, one can't underestimate the effect of a habeas in connection with it in that case, or in your own.

Finally, as noted above, in cases like the *O'Brien* and *Thimmes* cases mentioned above, IAC must be raised, either on direct appeal or by a habeas, where the trial court's *Romero* denial is based on an improper factor, or on facts not shown by substantial evidence, but trial counsel fails to object.

II. EIGHTH AMENDMENT PROPORTIONALITY ANALYSIS: SIGNS OF LIFE.

After the Supreme Court's decisions in *Ewing* and *Andrade*, Eighth Amendment

attacks on Three Strikes' punishments as cruel and unusual appeared dead in the water. There were, however, some slivers of hope. In *Ewing*, a clear majority of the Court upheld the concept of narrow proportionality review of non-capital sentences. (See *Ewing*, *supra*, 538 U.S. at p. 20-22, plur. opin. of O'Connor, J. and at pp. 35-37, diss. opin. of Breyer, J.) And, surprisingly enough, a different majority concluded that the 25 to life sentence imposed on Mr. Ewing for stealing golf clubs was grossly disproportionate to the charged offense. (See *Ewing*, *supra*, at pp. 38-52, diss. opin. of Breyer, J., joined by Ginsburg, Stevens & Souter, JJ.; see also *Ewing* at p. 31, conc. opin. of Scalia, J., concluding that the plurality's discussion of Ewing's punishment "in all fairness, does not convincingly establish that 25-years-to-life is a 'proportionate' punishment for stealing three golf clubs.") Because Justice Scalia does not recognize the proportionality principle embraced by seven of his colleagues, neither of these sets of numbers added up to a majority in favor of defendant Ewing's Eighth Amendment claim. However, this confusing amalgam of opinions signifies that the matter is far from settled, and that Eighth Amendment proportionality arguments in noncapital cases, such as those involving the Three Strikes Law, continue to have vitality, and must be judged on a case-by-case basis.

Since *Ewing* and *Andrade*, most Eighth Amendment claims under the Three Strikes Law have been flatly rejected in unpublished opinions in state and federal court. However, two favorable developments, one in federal court, and the other in state court, provide some encouragement, and should spur us on to continue to raise cruel and/or unusual punishment arguments in Strikes cases in which the denial of *Romero* appears particularly unfair.

A. **The Ninth Circuit and *Ramirez*.**

The first favorable development came in *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, a case which signaled the intention of the Ninth Circuit to continue to look seriously at Eighth Amendment proportionality arguments for persons sentenced under the Three Strikes Law. After reviewing recent Eighth Amendment jurisprudence, including *Ewing* and *Andrade*, the majority in *Ramirez* found that Ramirez's sentence of 25 to life for shoplifting a two hundred dollar VCR with two robbery priors was grossly disproportionate to the nature of the current offense and offender. The court stressed the fact that Ramirez's two robbery priors, for which he received probation and a one year jail term, were his only criminal conduct of note, and that he had never been to state prison before, concluding that "[t]he gravity of Ramirez's criminal history . . . pales in comparison to the lengthy recidivist

histories discussed above in *Solem*, *Ewing*, and *Andrade*." (*Id*., at p. 769.) Based on the minor nature of the current crime and the unusually limited criminal history of the defendant, the Ninth Circuit concluded that Ramirez had "the extremely rare case that gives rise to an inference of gross disproportionality. . . ." (*Id*., at p. 770, citing *Harmelin v. Michigan* (1991) 501 U.S. 957, 1005, conc. opin. of Kennedy, J.)

The ensuing intra-jurisdictional and inter-jurisdictional comparisons by the court in *Ramirez* led, as it should from any fair court, to a conclusion that the sentence violated the gross disproportionality principle of the Eighth Amendment. (*Id*., at pp. 770-773.) The Ninth Circuit then easily overcame the final hurdle under AEDPA, concluding that the analysis of the state Court of Appeal was deficient under controlling Supreme Court authority because it was not informed by requisite objective factors involved in proper proportionality analysis, in that the state appellate court failed entirely to consider "(1) the nonviolent nature of Ramirez's three crimes, none of which involved a weapon; (2) his minimal criminal history, comprised of one felony conviction for petty theft with a prior and two felony convictions charged in one criminal complaint to which he pleaded guilty; and (3) that he had been incarcerated on but one occasion for six months in county jail – not state prison – before he was sentenced to 25 years to life." (*Id*., at p. 775.) The court then granted habeas relief.

Reyes v. Brown (9th Cir. 2005) 399 F.3d 964 was a second favorable post-*Ewing* Ninth Circuit case. The majority in *Reyes* concluded that it could not rule out gross disproportionality under the Eighth Amendment for a 25 to life sentence based on a current felony conviction for perjury. The court noted that the act in question, making false statements in a DMV application, is separately punishable under California law as a misdemeanor, pointing out that this demonstrated that Reyes's act "is viewed by society as among the less serious offenses." (*Id*., at p. 967, quoting *Solem v. Helm* (1983) 463 U.S. 277, 296.) The majority noted that Reyes's first strike, for residential burglary, was not a violent offense. With respect to the second strike, an adult conviction for robbery, the majority in *Reyes* found that there was an inadequate record from the district court on which to determine the nature and character of the offense. Since a finding that this was not a particularly serious or violent crime could lead to a grant of habeas relief under the authority of *Ramirez*, the Ninth Circuit remanded the case to the district court for further hearing regarding the nature of Reyes's prior robbery conviction. (*Id*., a pp. 968-969.)

B. ***Carmony II***. The second favorable development occurred in a state appellate court, in the same *Carmony* case which produced the unfortunate state Supreme Court opinion in *Carmony I* that slammed the door on meaningful review of a trial court's denial of *Romero* relief. In *Carmony II*[9], the Third District struck down a 25 to life sentence under the Three Strikes law for a technical violation of the section 290 sex registration laws, finding the punishment to be cruel and/or unusual under both the state and federal constitutions. After noting that any violation of section 290 was a felony offense, and thus subject to the provisions of the Three Strikes Law, the court in *Carmony* II described the defendant's violation of the law – a failure to update his registration within five days of his birthday when he had registered at the same address a month earlier – as a "passive nonviolent, regulatory offense that posed no direct or immediate danger to society." (*Id*., at p. 1078.)

Carmony II reminds us of an important principle of Eighth Amendment jurisprudence. While recidivism is a factor which can legitimately justify increases in punishment, the emphasis of proportionality analysis must be the current offense. (*Id*., at p. 1079.)

> Past offenses do not themselves justify imposition of an enhanced sentence for the current offense. (*Ewing*, *supra*, 538 U.S. at p. 26 (lead opn. of O'Connor, J.).) The Double Jeopardy Clause prohibits successive punishment for the same offense. (*Ex Parte Lange* [(1874) 85 U.S. 163,] 173; *Witte v. United States* [(1995) 515 U.S. 389,] 395-396.) The policy of the clause therefore circumscribes the relevance of recidivism. (*Duran v. Castro* [(E.D. Cal. 2002) 227 F.Supp.2d 1121,] 1131, citing *Monge v. California* (1998) 524 U.S. 721, 729.) To the extent the "punishment greatly exceeds that warranted by the aggravated offense, it begins to look very much as if the offender is actually being punished again for his prior offenses." (*Duran v. Castro*, *supra*, 277 F.Supp.2d at p. 1130.)

(*Carmony II*, *supra*, at p. 1080.)

A similar argument can be presented in both 290 cases similar to *Carmony* and in simple drug possession cases, such as the above-cited *Duran v. Castro* case, which are arguably victimless offenses involving technical violations of the law in which an addict

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[9]*People v. Carmony* (2005) 127 Cal.App.4th 1066, rev. den. 6-29-05.

possesses the means of satisfying his addiction.[10]

Carmony II accepts the rather indisputable point that the 25 to life sentence imposed in California for recidivist minor offenders is grossly excessive when compared to the laws of every other state, or to punishments imposed under California law for much more serious crimes outside of the Strikes law context. (*Carmony II*, *supra*, 127 Cal.App.4th at pp. 1081-1082.)

> A one-size-fits-all sentence does not allow for gradations in culpability between crimes and therefore may be disproportionate to the crime when, as here, the crime is minor and the penalty severe. Many of the current offenses committed by Three Strike offenders are serious or violent offenses or felonies posing far greater threats to the public's safety and involving far greater culpability than the offense committed by defendant. Thus, the analysis under this criteria also supports our conclusion that the sentence is disproportionate to the gravity of the offense.

(*Carmony II*, *supra*, at p. 182.)

C. **Conclusion: Keep Those Cruel and/or Unusual Arguments Coming**.

After *Ramirez*, *Reyes*, and *Carmony II*, it's clear (for the time being at least) that Eighth Amendment proportionality challenges still have a chance to be successful. If your client's current crime is minor and his criminal record, including the strikes, is not terribly violent or numerous, *Ramirez* is your model. If the strike priors are more problematical, but your client has an extremely minor, technical type of felony crime, *Carmony II* provides your best guide.

Finally, as a matter of sensible practice, we should continue to raise cruel and/or unusual punishment" challenge under the state Constitution as well as under the Eighth Amendment. The California Supreme Court has yet to grant review or decide a case based on a challenge to a Three Strikes sentence as "cruel or unusual punishment" under Article 1, section 15 of the California Constitution. The state Supreme Court's somewhat

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[10]Indeed, as the district court judge in *Duran* points out, "The possession of a small amount of heroin carries no more threat of violence than does addiction to heroin, for which imprisonment is proscribed by the Eighth Amendment. See *Robinson v. California* [(1962) 370 U.S. 660, 667]. Indeed, as a matter of common experience, an addict who is not in possession of narcotics likely poses a greater risk to the community than one who possesses the means to satisfy his or her craving." (*Duran v. Castro*, *supra*, 227 F.Supp.2d at p. 1128.

surprising denial of review in *Carmony II* could signal a willingness to take on such a claim under the state standard some time in the near future.

III. **ATTACKING PRIORS**

Many of the most successful challenges to Three Strikes Sentences have been based on attacks on the prior convictions which underlie the invocation of the Strikes Law. I will not say much about this subject in this article, or in my presentation, because SDAP Executive Director Michael Kresser is addressing the topic directly in his material and presentation. As such, I will simply present the following outline of points to cover this extremely important sub-topic for my purposes.

Point 1: Always obtain copies of the documents used to prove the truth of a prior conviction, and review them very carefully. Special care should be used any time one or more of your client's strike priors is for an out-of-state conviction, or for a crime which is not, in-and-of-itself, a strike without proof of additional facts beyond the "fact of" the conviction, i.e., personal use of a weapon or infliction of great bodily injury, the residential character of a burglary, etc. If it's a foreign prior, carefully research the elements under the other state's law, as they will frequently be missing elements of a California serious felony. Sufficiency challenges to proof of strikes have met with considerable success.

Point 2: If your client admitted the truth of a strike prior, get copies of the discovery provided by the prosecution to prove the strikes, particularly when the strike is a crime such as an old second degree burglary, a violation of Penal Code section 245(a)(1), or an out-of-state conviction. I can personally recall at least half a dozen such cases where review of the prosecution's discovery on the prior showed that the crime was not really a strike, at least on the record provided, leading to successful claims for habeas relief based on counsel's ineffectiveness in not contesting the sufficiency of proof and for persuading his or her client to admit a strike which was, in fact, not really provable as a strike. Sample writs are available.

Point 3: Be sure to explore, raise, and preserve various federal constitutional claims in connection with proof of prior convictions, e.g.,

Subpoint a: The *Apprendi* jury trial right as to proof of prior convictions, particularly

as to elements of prior convictions beyond the "fact of" the prior conviction[11];

Subpoint b: Juvenile strike priors should be challenged as inadequate based on the lack of a jury trial right in connection with the adjudication of such juvenile offenses;[12] and

Subpoint c: If you're successful in arguing insufficiency of evidence, assert a double jeopardy bar to retrial of the strike, arguing that the *Apprendi* line of cases effective overrules *Monge v. California* (1998) 524 U.S. 721.[13]

IV. FINDING WINNABLE ISSUES THAT CAN GET STRIKES CONVICTIONS REVERSED.

A significant number of Three Strikes sentences are reversed on appeal or habeas based on grounds relating to trial or sentencing error that's not directly tied to the Strikes law. In many cases, the reversals and remands can lead to less than Three Strike plea bargains, dismissal of strikes, or trials which result in a reduced sentence. Obviously, as advocates we must always focus on such issues on our client's behalf. It has to be the case, at least with some appellate justices, that the existence of an unjust and arbitrarily lengthy life sentence is a factor which may influence in our favor a reviewing court's determination of issues involving jury instructions, counsel's ineffectiveness at trial, or procedural errors of a constitutional dimension. What follows, to give you a picture of how this can happen, is a randomly selected set of examples.

1. In the ***Magnan*** case, Dallas Sacher obtained an OSC on a habeas petition based on trial counsel's failure to produce exculpatory evidence at trial, leading to reversal of a Three Strikes sentence in a drug case. Magnan was convicted of possessing less than a gram of heroin and possessing methamphetamine for sale. The meth was found in a cigarette box next to his girlfriend, who was a meth user. Magnan used the same brand of cigarettes and

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[11] Sample briefing is available from this writer. bill@sdap.org The issue is pending in the California Supreme Court in *People v. McGee*, 115 Cal.App.4th 819, rev. gtd. April 28, 2004.

[12] See *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187; cf. *People v. Lee* (2003) 111 Cal.App.4th 1310; but see pp. 1319-1323, diss. opin. or Rushing, J.

[13] This issue is currently pending in the California Supreme Court in Michael Kresser's case, *People v. Trujillo*, S130080.

possessed $300. According to a police officer testifying as an expert, the amount of meth was just under an ounce and the difference between an ounce and the amount seized could be sold for about $300. Magnan had told trial counsel that the $300 he possessed was recently wired to him by his mother, a fact that was verifiable. Trial counsel, however, made no attempt to investigate the claim or otherwise explain the possession of the money. The superior court granted relief, and Magnan ended up being resentenced on the simple possession charge to a second strike six year determinate term, and winning his immediate release.

2. In the earlier ***Lowery*** case, Dallas Sacher also obtained an OSC and ultimately habeas relief for a third strike sentenced client based on counsel's ineffectiveness in failing to raise a meritorious Fourth Amendment issue.

3. In *People v.* ***Letteer*** (2002) 103 Cal.App.4th 1308, panel attorney Brian Pori won reversal of a three strikes sentence for *Arbuckle* error.[14] When defendant was first sentenced, the original sentencing judge dismissed two of defendant's strikes for prior felony convictions. In a first appeal, the Court of Appeal found this to be an abuse of discretion and remanded. The State then had the trial judge who had granted *Romero* relief disqualified, and a new sentencing judge reinstated the dismissed strikes. The claim in the second appeal was that sentence by a different judge violated his plea bargain, because defendant expected to be sentenced by the original sentencing judge. The Court of Appeal agreed, finding under *Arbuckle* that an implied term of the bargain was that sentencing was to be imposed by the judge who accepted the bargain, that sentencing by a different judge constituted a significant deviation of the bargain, and that the defendant should have been allowed to withdraw his plea.

4. In the ***Price*** case, panel attorney Carol Koenig obtained an unpublished reversal of a Three Strikes sentence imposed after revocation of probation on the grounds that the defendant in this case failed to receive even the modicum of due process rights associated with violations of probation.

5. Panel attorney Courtney Shevelson obtained a full reversal of conviction for instructional error in a third strike case, *People v.* ***Jensen*** (2003) 114 Cal. App. 4th 224.

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[14] *People v. Arbuckle* (1978) 22 Cal.3d 749.

Defendant was charged with an attempted distribution of harmful sexual matter to a minor over the Internet (§§ 664/288.2(b)). He engaged in sexual discussions with and sent explicit photos to two police officers posing as young boys on the Internet. The jury was told that the word "seduce" meant persuading one into sexual activity. "Sexual activity" was not defined, but the jury was given a definition of "sexual conduct" that included "masturbation" that was "performed alone." In reversing the conviction, the Court of Appeal agreed with defendant that the trial court's instruction on the "intent or purpose of seducing" element was erroneous, in that the "seducing" intent element required that the perpetrator intended to entice a minor to engage in a sexual act involving physical contact between the perpetrator and the minor, and that merely intending to entice a male minor to masturbate himself did not satisfy this required element of the offense. The error was prejudicial, as it was hotly contested at trial whether defendant ever intended to meet with the "minors" and have physical contact.

Unfortunately, Mr. Jensen obtained an even greater third strike sentence on remand, when the prosecutor charged, on the same facts, a new crime, attempted lewd acts (§§ 664/288(a)). Ironically, the jury, now properly instructed on the meaning of "seduce," acquitted Jensen on the original felony 288.2(b) charges, but convicted him on the new greater charge. The second appeal has recently commenced. Does anyone spot an obvious issue on appeal?

V STICKING WITH IT.

Just a final point which, though we all know it, bears repeating ad nauseum until it becomes a mantra: don't give up when you lose in the Court of Appeal. Beyond the obvious need to file a review petition in the state Supreme Court, going the extra mile for the client in a Third Strike case can often mean the difference between a lifetime in prison and a determinate sentence or even complete reversal. Here are just a couple of situations in which this can occur.

1. **Habeas Denials**. Don't quit if your state court habeas petition is (a) summarily denied in the Sixth District, or, (b) is denied in superior court after an OSC issues. Keep plugging at next level. We have gotten surprising good results in having OSCs issued by Cal. Supreme Court in first type of case, and having a second OSC or grant of habeas relief in the second instance.

A good example of the first situation involves the habeas petition brought by panel attorney Mark Farbman in the ***Quintero*** case. In that case, the defendant was convicted of

two store robberies based on weak eyewitness evidence. His trial attorney failed to present exculpatory alibi evidence which would have shown that Quintero was in Las Vegas and Pasadena when the crimes were committed, acting as manager to his brother's musical group, with both witness and documentary evidence to support the alibi defense. The Court of Appeal summarily denied the petition without so much as a request for an informal response. On a review petition, the Supreme Court asked for an informal response, then granted review, transferring the case back to the Sixth District with directions to issue an OSC.

A good example of the second type of situation is the ***Ochoa*** case, in which panel attorney Sherry Fleming obtained an OSC in a possession for sale Three Strikes case based on counsel's ineffectiveness in failing to raise a meritorious Fourth Amendment argument. When the petition was denied in the superior court based upon fallacious reasoning, Ms. Fleming prepared a pro bono successor petition in the Court of Appeal. She ended up being reappointed in the case, and winning a grant of habeas relief for her client in an unpublished opinion.

2. **Federalize, Federalize, Federalize.** Many issues that are lost in state court stand a better chance of winning in a subsequent federal habeas petition. When the cases come back to state court after a federal habeas win, it is often many years later, and the chances are sometimes excellent for the prosecutor to make the defendant an offer he can't refuse to a less-than-Three Strikes-sentence.

For example, in my own ***Mack*** case, I raised a *Faretta* issue in state court regarding a request for self-representation made on the day before the jury was empaneled in Mr. Mack's third strike, strong-arm robbery case. We lost in state court under California's timeliness rule, but won the case on federal habeas under the controlling Ninth Circuit cases, which hold that a self-representation request is timely if made before the jury is empaneled and not for the purpose of delay. (*Moore v. Calderon* (9th Cir. 1997) 108 F.3d 261.) When the case went back to the trial court, the prosecutor offered, and Mr. Mack accepted, a doubled middle term second strike sentence, which left him with less than two years to serve on his sentence.

3. **Don't Be Afraid to Raise a Winning Issue Late.** Sometimes we miss issues or decide not to raise them for tactical reasons. Every once in a while, the one we let get away turns out to be the winning lottery ticket.

This turned out to the situation in the ***Cousins*** case. Panel attorney Jill Fordyce, assisted by Yours Truly, represented Cousins, who was sentenced to 25 to life for a 290 violation. The prosecutor had charged two violations, one for fraudulent registration, and the second for failure to register a "change of location." The jury hung on the first count, but convicted on the second. The prosecutor had argued that the "change of location" happened when Mr. Cousins moved his car a block further than the Salvation Army address he had given when he registered. On direct appeal, Ms. Fordyce argued instructional error for a failure to explain to the jury that a "change in location" requiring a homeless person to register with the police must be a substantial change, and not just a trivial one. The unpublished opinion Sixth District opinion rejecting the claim of instructional error did so solely on a conclusion that the error was harmless, based on a hypothesized jury verdict on a theory of the case different than the one argued by the prosecutor to the jury. A petition for review on this issue failed to succeed, and it looked as if a long fight in federal court would ensue as to this meritorious issue.

However, not long after review was denied, the First District decided *People v. North* (2003) 112 Cal.App.4th 621, which held that the "change of location" language in subdivision (a)(1)(A) of section 290 was unconstitutionally vague. Ironically, Ms. Fordyce and I had identified this potential issue, but decided to pass it up as hopeless, resting our argument instead on an argument that assumed that the term "location" could be made clear enough by requiring a *substantial* change in location. After *North* was decided, Ms. Fordyce agreed to prepare a pro per habeas petition for Mr. Cousins raising the "void for vagueness" issue both as based on a change in the law and appellate IAC in failing to raise the issue. To our surprise, the Supreme Court issued an OSC on this ground. To our delight, the prosecution did not oppose the grant of habeas relief, a concession all the more miraculous because the questionable reasoning of the Court of Appeal's opinion would have been a perfectly plausible way of opposing the habeas petition on harmless error grounds. The charges against Mr. Cousins were then dismissed, and he is now a free man, wisely living *outside* Santa Clara County at present.

CONCLUSION

When challenges on appeal or habeas do not succeed, I tell clients and family members in Three Strikes cases that I truly believe that the time will come – either sooner or later – when the People of this State (and I don't mean the prosecution, but the People)

will come to their senses and repeal the most unjust parts of this law. Sadly, this time may not come until many of our clients who should never have gotten life sentences are old, sickly, and expensive for the state to take care of. Hopefully, it won't take so long.

But for now, the Strikes law is a reality that our clients, and we, as their advocates, have to deal with. I hope this lengthy pep talk on paper has helped you to think through various strategies for fighting the injustice of this law in practice.