The Revised Guerilla (and Ground) War Against the Three Strikes Law: Prop. 36 [the Second] and What's Still Left to Do to Fight This Unjust Law (Since Prop. 36 is No Help for Many of Our Clients)

by William M. Robinson, Assistant Director

Prologue and Introduction

Eight years ago, I wrote an article and gave a seminar presentation entitled "Guerilla War Against the Three Strikes Law." Having come of age in the Vietnam war era, when the concept of guerilla war had a kind of romantic glow to many of us antiwar activists, I chose the title quite deliberately to describe what I thought should be an altered approach to attacking California's Three Strikes law – that unjust, inaptly named, vindictive punishment scheme separately enacted by the Legislature and the Electorate in 1994.[1]

My strategy of recommending a more indirect, clandestine attack on the injustices of the Strikes law followed three rounds of horrible defeats in the war against this law. The first debacle was the U.S. Supreme Court's rejection, by a 5-4 vote, of an Eighth Amendment challenge to a 50 to life sentence under the Strikes law for two current crimes of petty theft with a prior (*Ewing v. California* (2003) 538 U.S. 11). The second terrible blow came the following year, with the Electorate's narrow rejection of Proposition 66, a fair and balanced measure that would have reformed the law. And the triple whammy came in the form of two particularly disturbing California Supreme Court decisions – the first well before *Ewing*, and the second after – which put extreme limits

[1]Inaptly named in two senses: first, as an unfair and semi-comic invocation of the-glorious game of baseball; and second, because California's Three Strikes Law is false to the spirit of the National Pastime since, in baseball, it's *harder* to get that third strike than the previous two (foul balls don't count), whereas under the Strikes Law, at least in its original incarnation, the Third Strike is the *easy* one, requiring *any* felony conviction, even ones that aren't strikes. If baseball was like the Three Strikes law, you would have to swing at *everything* with two strikes, even if the pitch is way out of the strike zone, and then just pray that if you miss, the umpire will give you a break and grant your *Romero* appeal to the first base umpire – a bit like a Pablo Sandoval at-bat.

on judicial power to modify Three Strike sentences. (*People v. Williams* (1998) 17 Cal.4th 148 and *People v. Carmony* (2004) 33 Cal.4th 367 ("*Carmony I*").)

My thesis in the "Guerilla War" article and presentation was that having failed to attack this unjust law by means of frontal assault, our job as rearguard soldiers in the war against the Strikes law was to take to the virtual Sierra and fight against the impact of this law "by any means necessary." No, I was not advocating massive prison breaks led by fatigue-clad middle aged appellate lawyers (more romantic imagery from the 60's); rather, I recommended fierce engagement within the parameters of appellate and habeas advocacy with the goal of subverting the evil of the Strikes law through creative and sometimes indirect means.

The first line of attack involved the *Romero* process. *Carmony I* left us with very little wiggle room to argue that a trial judge's decision not to grant relief under Penal Code section 1385 was an abuse of discretion, having rather grimly concluded 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.)[2] So, I argued, don't go that route; instead, focus on *the manner* in which the trial court exercised, or failed to exercise discretion. I will resummarize and update these points below. Suffice to say here that the emphasis is on a court's consideration of *improper* factors in its *Romero* decision, the refusal to consider or acknowledge *proper* factors, and, in a quite conscious subversion of the bad holding in *Williams*, attacking a court's arguably erroneous conclusion that any exercise of *Romero* authority would be an abuse of discretion under *Williams* as undermining the proper exercise of discretion. A related line of attack focused not on the court, but on trial counsel, with ineffective assistance of counsel claims, on direct appeal and/or habeas, based on a trial lawyer's failure to investigate and present mitigating factors militating toward a grant of *Romero*

[2] Statutory references are to the Penal Code if not otherwise specified.

relief, including mental health and other pertinent expert evidence.

My second recommendation was to continue, in the most egregious cases, to raise cruel and/or unusual punishment arguments under the State and Federal Constitutions. This suggested strategy was based not on some dim hope of obtaining a fifth vote on the U.S. Supreme Court to overturn an unjust Third Strike sentence – after all, it was 2005 and Bush II had just been reelected – but rather because of some favorable news from lower state and federal courts, with one state court, in *Carmony II* (*People v. Carmony* (2005) 127 Cal.App.4th 1066), showing the courage to find a Third Strike sentence for a very minor sex registration violation to be cruel or unusual under the state charter; and continued rearguard action by the Ninth Circuit and some California district courts which, even after *Ewing* and *Andrade*, were able to find that the circumstances of a particular case were such that a Third Strike sentence could be declared cruel and unusual under the Eighth Amendment. (See *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, *Reyes v. Brown* (9th Cir. 2005) 399 F.3d 964, and *Banyard v. Duncan* (C.D. Cal. 2004) 342 F.Supp.2d 865.) In both sets of examples, the less friendly-to-our-cause highest state and federal courts did not reverse these favorable outcomes. Reasoning that there was a chance for relief at the intermediate appellate level in both systems, I advised going forward with such challenges in the hopes of being the rare, seemingly random winner on this issue, and based on the somewhat safe bet that even a hostile higher court is likely to pass on a case most of the time.

The next set of appellate tools I recommended using to undermine Strikes sentences was the familiar one of attacking the validity of prior strike convictions. In my article, I only said a little on this subject, since Michael Kresser, our Gone but not Forgotten Executive Director, was addressing that very subject in his seminar presentation. I will say more this time, as this has been, and continues to be, a highly favorable strategy for attacking Three Strike sentences, mostly by direct review of trials of prior convictions, but sometimes by means of IAC habeas claims involving trial counsel's failure to litigate the validity of a strike prior that was ripe for challenge.

Finally, I made the rather bold claim that there were appellate justices out there who, like us, believed in their hearts that the Strikes law was unjust, and who thus might be more receptive to more garden-variety claims of appellate error which would result in the reversal of a Third Strike case, providing some examples of cases where it looked like this may have happened.

So went my article and effort eight years ago. Hopefully, some of you took this to heart and fought the good fight against the wicked and wrong Three Strikes law. For my part, I continued to battle it out in all the areas I just described, coming up with some new techniques, winning a few, and losing a lot, but keeping the "balls in the air" by preserving issues for federal habeas review and even following several cases up into federal court, albeit with meager rewards.

Meanwhile, as we continued to battle this unjust law, something new and good seemed to be rising out of the mists to head off the injustice of this law. We began to see fewer low-level current felony offenses going forward as Third Strike cases, and many more in which *Romero* relief was granted, ofttimes with the proverbial nod and a wink. And there seemed to be a growing awareness in the public of the manifest unfairness of Three Strike life sentences which, when combined with the state's dire fiscal problems and the growing recognition of the burdensome cost of housing aging prisoners, looked like fuel for a new frontal onslaught on the Strikes law by means of the initiative process.

I lack the time, knowledge, or authority to say much about how the Proposition 36 miracle came about. For present purposes, I will only tip my proverbial hat to the scores of folks, well placed and otherwise, who contributed their minds, hearts, dollars, and knowhow to drafting, promulgating, and enacting, by a surprising landslide vote, a *darned* good reform of the Three Strikes law. The pundit in me cannot resist the opportunity to wish, in light of the huge margin by which Prop. 36 passed, that the drafters would have retained a few more of the just reforms from Prop. 66 – e.g., eliminating non-violent residential burglaries from the category of serious felonies, not singling out persons with remote sex-crime serious felony priors for exclusion. But it's

easy to be a Monday morning initiative quarterback. We can only hope – and more on this later – that the process of reforming the Three Strikes law is not finished.

In the discussion that follows, I want to summarize a few of the important issues which can and will arise under Proposition 36. In doing this, I will defer to Brad O'Connell's excellent article in terms of his summary of the law, and focus primarily on some "hot button" issues which have either arisen or which I, and others, foresee as likely to arise in the context of appeals involving Prop. 36, both for new prosecutions under the amended law and for appeals of denials of resentencings under section 1170.126.

The balance of the article, as suggested above, will recapitulate and further develop the strategies for continuing the fight against this still-unjust law, providing some examples of new arguments and strategies, successful and otherwise, that have been employed since the first version of this article was written.

I. Proposition 36, Selected Potential Issues for Appellate Counsel

The enactment of Proposition 36, the "Three Strikes Reform Act of 2012," has dramatically softened the impact and injustice of California's Three Strikes law. For most persons with current convictions for non-serious felonies, a Third Strike, 25 to life sentence can no longer be imposed, and eligible persons already sentenced to such a term who would not be subject to it under the new law are presumptively eligible to be resentenced. However, as with most reforms, particularly by means of the initiative process, the devil will be in the details. We are already seeing this in practice during the roughly five month period between enactment and the preparation of this article.

I will not endeavor here to lay out a detailed summary of the new law, nor will I try to address all of the conceivable issues which have arisen or could arise in the context of carrying out of the changes enacted by Prop. 36. As to the first task, I believe my worthy colleague and co-Assistant Director from FDAP, Brad O'Connell, has adequately summarized the new law and many of the issues which will arise out of it for appellate

counsel in his January article for the FDAP 2013 seminar, to which I refer the reader.[3]

Brad's article very effectively summarizes the new law, to whom it applies, and the exceptions where it does not apply, and highlights many of the potential areas of contestation as to these categories of persons. He also summarizes what the law provides in terms of the new recall procedure under section 1170.126.

I will briefly comment and update two of the subjects of Brad's article, the retroactivity issue, and the right to appeal Prop. 36 denials, where the results so far are decidedly split. Brad's discussion of the retroactivity issue under *In re Estrada* (1965) 63 Cal.2d 740 (1965) 63 Cal.2d 740 includes a convincing argument as to why full retroactivity as to persons whose convictions are not yet final makes a difference – because such persons would much rather have the retroactive benefit of the new law applied to them, rather than fall back on the recall provisions of section 1170.126, which, as discussed below, permit a judge to block resentencing if he concludes that the person is presently a danger to the public. Brad also persuasively argues why, even after the semi-demise of *Estrada* under the recent holding in *People v. Brown* (2012) 54 Cal.4th 314, 325, the *Estrada* retroactivity principle should be applied. Unfortunately, the retroactivity issue has not played well in the appellate courts thus far. (See, e.g., *People v. Yearwood* (5th Dist. 1-29-13) 213 Cal.App.4th 161 [*Estrada* not applicable because statutory scheme includes retroactivity provisions under section 1170.126, and thus evinces intent that the substantive changes to the sentence law itself be applied only prospectively].) Thus far, four unpublished appellate cases, including one from the Sixth District, have followed and agreed with *Yearwood*. As a review petition in *Yearwood*, filed on March 6, 2013, is still pending, we should continue to raise this issue where applicable.

I concur in Brad's assessment that there is a right to appeal Prop 36 denials, both summary denials based on non-eligibility for resentencing, and "on merits" denials based

[3] http://www.fdap.org/downloads/articles_and_outlines/Prop36FDAP.pdf

on a "dangerousness" determination. Thus far, I am unaware of any controversy on this subject, as all the memoranda and guides for the judiciary prepared for the implementation of Prop. 36 concur that there is an appeal right from an "order after judgment" under section 1237, subdivision (b). Indeed, as discussed below, SDAP has already begun receiving appeals of summary denials of ineligible persons who sought resentencing under section 1170.126.

That said, I hasten to add that since most of my focus in this article will be on the more sobering task of what to do to combat the injustice of the Three Strikes law with respect to the poor souls left out of the benefits of Proposition 36, I will only address here a few selected issues related to our work as appellate counsel which have, hitherto, not received much or any attention. These potential issues are somewhat randomly chosen, based in part on my own interest in the sub-issue, and the (typical for Yours Truly) limited time frame in which I am completing my draft of this article.

A. Finding and Helping Clients Get Prop. 36 Petitions Filed.

1. Looking for the Left-Out Ones.

A major concern after Prop. 36 passed was the challenge of identifying and locating all sentenced prisoners who were arguably entitled to resentencing under section 1170.126. A statewide effort spearheaded by the Stanford Three Strikes Clinic, public defender's offices from the relatively small number of counties from which the lion's share of applicable 3rd Strike sentences were imposed, with considerable help from prison authorities (CDCR), made this task easier, as did the very efficient, though often off-the-mark, Prisoners' Informal News Network (PINN).

Appellate projects, including SDAP, did our part, advising our panel lawyers to comb through their old case records and identify any former or current clients eligible for resentencing. For the most part, this aspect of the process has gone pretty well.[4]

---

[4]There has been much more of a problem with the enormous backlog of cases created by the rush of resentence petitions in the past five months, particularly in those counties (e.g., Kern), where there were literally hundreds of potentially eligible prisoners

But there is still concern that there are inmates who have not been identified, including persons with mental health issues, and others who have missed the boat so far because of erroneous conclusions by CDCR that they are ineligible. I therefore strongly encourage all of our panel attorneys who have ever handled cases on appeal with Three Strike sentences to go back through your files – if you have not done so already – and identify each and every case where a Third Strike sentence was imposed, then carefully sift through them to see if the client is eligible, or even arguably eligible. I did this myself, both as to staff cases of my own and cases where I assisted or was otherwise involved with an appeal, and found a healthy handful of cases – three or four – which had essentially "slipped through the cracks" based on an erroneous determination by CDCR that the inmate was non-qualifying. In those instances, even the well-meaning, effective, and dedicated Santa Clara County PD's office did not have these inmates on their radar screens. However, when I provided them with the appropriate information, and contacted the client, their cases were added to the mix.

2. **A Category of Arguably Eligible Persons Who May Be Slipping Through the Cracks: Persons with *One* Current Serious Felony Conviction, with other Non-Serious Current Convictions, and Multiple Consecutive Life Terms Under the Strikes Law.**

I don't think much, if any, attention has been paid to this subject, which concerns a category of persons who are arguably eligible for *partial* resentencing under Prop. 36 and 1170.126. I am still looking for a good test case for this – so if you find one, please let me know. But here is the scenario, explained by way of a plausible hypothetical.

---

and a prosecutor's office unwilling to concede resentencing on any cases. Fortunately, things have fared better in Santa Clara County, which, of all the Sixth District counties, has by far the most Third Strikers eligible for resentencing. The District Attorney, Jeff Rosen, was an active supporter of Proposition 36, and in a significant (but not considerable) number of cases, his office has essentially not opposed resentencing. I can personally report, with much joy, that two of my own clients – both of whom I had litigated Strikes-related issues all the way through federal court, and one of whom still had claims pending in the Ninth Circuit – are now both resentenced and out of custody.

Mr. Defendant has two prior "strikes" for residential burglaries (serious felonies which don't disqualify him for Prop 36 relief). His "current" convictions, incurred during the bad-old-days 12 years ago, are for one count of residential burglary, but also two charges of receiving stolen property which was found when he was caught on the burglary, but which were taken in two entirely unrelated thefts. The wicked trial judge granted no *Romero* relief, and sentenced Mr. D to 75 years to life: 25 to life for each of the three new charges [the DA beneficently did not charge the 667(a) priors]. Is Mr. D eligible for sentencing relief under Prop. 36?[5]

The first blush answer is, of course, no, he is not, because he has a current conviction for a serious felony, burglary. This is true enough as to *that* charge; he is stuck with 25 to life. But what about the other two mandatory consecutive 25 to life terms imposed for the non-serious stolen property felonies for which, absent the burglary, he would definitely be eligible for resentencing? Is Mr. D eligible for resentencing as to those counts, even if he is not as to the burglary? I think the answer really is, yes, he is eligible for resentencing as to those counts. Here's why.

Were he sentenced *today* for the same three crimes, with no *Romero* relief granted, he could only receive a 25 to life sentence for the burglary, and second strike sentences of no more than 7 years, 4 months for the stolen property charges (doubled 3 year upper term, plus doubled one-third middle term, 16 months). This must be so because as to these counts, he is subject to the *exception* to the third strike, 25 to life term pursuant to section 1170.12(c)(2)(C), which refers only to "*the current offense*," in the *singular*, and thus must be presumed to apply count-by-count when there are multiple offenses.

But does this same rule apply to the *resentencing* provisions of 1170.126? I believe it does, and that the statutory language supports such a conclusion, though not without some ambiguity that must be worked through. The very first sentence of section

---

[5]Here and throughout I will use masculine pronouns. I do so only because it is simpler, but also because, as far as I know, there are close to zero female prisoners serving life sentences under the Three Strikes law for non-serious felony offenses.

1170.126(a) states that its resentencing provisions "are intended to apply exclusively to persons serving an indeterminate term of imprisonment [under the Three Strikes law] whose sentence under this act [i.e., the Prop. 36 change of law] would not have been an indeterminate sentence." Arguably, our hypothetical Mr. D is not such a person, since he would still get *one* indeterminate sentence under the amended Strikes law.

However, our analysis should not stop there. The next subdivision, (b), specifically deals with the concept of *multiple counts of conviction*, and appears to do so in a manner favorable to our argument. "Any person serving an indeterminate term of life imprisonment imposed pursuant to [the Strikes Law] upon conviction, whether by trial or plea, *of a felony or felonies* that are not defined as serious and/or violent felonies . . ., may file a petition for recall of sentence. . . ." (Emphasis added.) Under this language, Mr. D qualifies, since he is, in fact, serving two indeterminate sentences for non-serious current felonies. This language is, in effect, repeated again in subdivision (e)(1), which states that an inmate is eligible for resentencing if he is "is serving an indeterminate term of life imprisonment imposed [pursuant to the Strikes law] for a conviction of a felony or felonies that are not defined as serious and/or violent. . . ." In my view, the use of the singular and/or plural formula in the statute signifies that resentencing is required where *any* of the counts of current conviction are for qualifying non-serious felonies.

So, in my view, Mr. D *is* eligible for resentencing. Mind you, for the guy with a 85 to life sentence for serious/violent current offenses, and another 75 for non-serious current crimes, resentencing under Prop. 36 will probably be meaningless. But in our hypothetical, assuming Mr. D was about 30 when he committed his current crimes, resentencing could be the difference between a meaningful chance for parole as a middle-aged man, on the one hand, and a virtual LWOP on the other -- in other words, all the difference in the world. So, the issue is a good one. It is also one which, I have to believe, may be evading review, as both CDCR and inmates may believe they are ineligible by virtue of the fact that they are disqualified for having a current serious felony conviction.

So, please comb through those old files and see if you can find Mr. D for me. If you don't do it yourself, I will be happy to advocate for his sentence relief under section 1170.126.

B. Litigating Appeals of Non-Eligibility Determinations.

An inmate, either on his own, or with the help of counsel, petitions for resentencing under section 1170.126. The trial court summarily denies the petition, concluding that he is statutorily ineligible for resentencing, typically with a short memorandum accompanying the denial order. A notice of appeal is filed, and counsel is appointed. What can you do?

We are already starting to get some of these appeals. So far, the ones SDAP has received have all turned out to be non-starters, i.e., they all concern inmates found ineligible who truly were ineligible. In those cases, all that can be done is to file a *Wende* brief, and make your best effort to explain to the poor client why he does not qualify for resentencing, but assuring him that, just maybe, the *next* reform of the Three Strikes law will help him.

However, there are some possible issues that could arise in even these cases, including a few hot-button issues discussed in Brad O'Connell's article, and some other issues which will likely arise where the denial of sentence is based on the discretionary determination by the resentencing judge, under 1170.126(f) & (g), that the defendant "would pose an unreasonable risk of danger to public safety." What follows is a short discussion of a couple of potential issues which can and likely will arise.

1. Is the Current Conviction *Really* a Serious Felony?

I have one case, involving Mr. V, where the current offense was a violation of section 245, subdivision (a)(1). At first blush, there was some ambiguity in the record which I received of the Prop. 36 proceeding as to *which* of the alternative versions of aggravated assault in section 245(a)(1) was committed, assault with a deadly weapon (which is a serious felony and a strike), or assault by force likely to inflict GBI (which is

not a serious felony or strike). (See, e.g., *People v. Delgado* (2008) 43 Cal.4th 1059, 1065 and *People v. Rodriguez* (1998) 17 Cal.4th 253.) There were no "Prop 8 priors" (§ 667, subd. (a)) in that case, so I was hoping that maybe there was a way to dispute the contention that the client was ineligible for resentencing based on a lack of proof that the "current offense" was a serious felony.

If you get an appeal like this, do what I did: obtain the record on appeal from the original case. Unfortunately, the record in Mr. V's case established quite conclusively that the crime was ADW, and even included an express admission by Mr. V that his current crime was a serious felony; end of game for Mr. V.

However, there may be other cases where we have an argument, a la *Rodriguez*, that the record in both the Prop. 36 proceedings and from the original conviction (whether appealed or not) fails to prove that the current crime was a serious felony, and should be on the lookout for this as a potential issue as to summary denials of Prop. 36 relief.

2. **Other Disqualifying Facts Concerning the Current Conviction.**

Where the current offense is not a serious or violent felony, certain categories of crimes make a person ineligible for a reduced sentence under Proposition 36, and thus subject to the same-old draconian 25 to life term absent *Romero* relief. There are three subsections, 1170.12(c)(2)(C)(i)-(iii), which set forth disqualifying facts for current offenses. Subsections (i) and (ii) concern specified drug quantity enhancements and sex offenses, respectively, which require careful review of the record of conviction to see if they apply. But these will be black and white determinations – either the offense qualifies, or it does not.

By contrast, subsection (iii) is a big can of worms which appears likely to generate much controversy and litigation. In pertinent part, it provides that a Third Strike term must still be imposed where "the prosecution pleads and proves . . . (iii) [that] [d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§

1170.12, subd. (c)(3)(C)(iii).) Here is a sample of some of the potential issues which are likely to, or have already arisen as to this provision.

a. **Statutory Construction Problems.**

For new, post-Prop. 36 prosecutions, it is obviously the case that the prosecution must plead and prove these exception-triggering facts. If they do so, or if the defendant admits them, the game is over, and a Third Strike sentence must still be imposed.

However, you may have noticed that the exceptions specified in subsection (iii) do not, in most cases, track the elements of presently existing enhancement statutes, and will likely give rise to some controversy based on ambiguities in language. For example, section 12022.5 et. seq. enhances sentences for "personal use of a firearm," but not simply for "use of a firearm," leaving open the question whether the drafters of Proposition 36 intended to include persons who could be said to *vicariously* use a firearm, as when a firearm is used by an accomplice. As a second example, an enhancement exists for being armed with a firearm (§ 12022, subd. (a)) and for personal use of a deadly weapon (§ 12022, subd. (b)), but not for being armed with a deadly weapon; thus, again there is potential ambiguity as to whether these exceptions are intended to apply only where the defendant *personally* is armed, rather than vicariously.

Finally, and perhaps most confusingly, the phrase "intended to cause great bodily injury to another person . . ." employed in subsection (iii) is one which finds no parallel provision in any substantive crime or enhancement. There is a substantive crime of assault *by means of force likely* to inflict great bodily injury (§ 245(a)(1)), and battery causing serious bodily injury (§ 243(d)), and for threatening to inflict such injury (§ 422), but none of these crimes require "intent to cause great bodily injury." Likewise, the enhancement for personal infliction of great bodily injury under section 12022.7 once required that such injury be intentionally inflicted, but that requirement was eliminated nearly two decades ago, not long after the Three Strikes law was enacted. (Stats 1995 ch 341 § 1 (AB 928).)

Thus, for new, post-Prop. 36 Three Strikes prosecutions, it will be incumbent on

the government to plead and prove these missing facts, and there will almost certainly be controversy as to whether any or all of the three provisions are intended to apply *vicariously*, i.e., when the use, arming, or intentional infliction of injury are committed by a coperpetrator, and not the defendant. So, keep your eyes peeled for that in upcoming appeals. But for resentencing hearings, the prosecution will, as explained below, hopefully find rough sledding in trying to prove that the "current" conviction includes, as an element, an intent to inflict great bodily injury on another person.

b. **Applicability of Exceptions to 1170.126 Resentencings.**

Presumably, I have just set the table in your minds for the problems likely to arise – and which are already breeding controversy and turmoil in the lower courts – when the prosecution seeks to establish the excluding facts of subsection (iii) as a basis for disqualifying a defendant from sentencing relief under section 1170.126. In these situations, unlike new charges, Battle Royale will take place over the question whether the record of conviction establishes that the "past tense" current offense for which the life sentence was imposed under the Strikes law, the prosecution pled and proved, or the defendant admitted, the facts required to disqualify a defendant from resentencing.

In some cases, we are bound to lose; but in most of those, the facts at issue will also prove that the current offense was a serious felony – for example, where the nature of the offense and/or enhancement allegations established by plea or proof show that the defendant personally used or was armed with a deadly weapon or firearm. However, in many others, it will be difficult – and hopefully, impossible – for the prosecution to prove that a past-tense "current" conviction includes pleading and proof of the element required for disqualification.[6] Two examples of this in practice will hopefully explain this

[6]I am coining the phrase "past-tense current offense" to refer to the odd situation of section 1170.126 resentencings, where the "current offense" refers to a crime which could have been committed as much as 19 years ago, but which is "current" in the sense that it is the offense which resulted in imposition of a Third Strike sentence, as opposed to the strike priors, committed earlier, which were the basis for elevating the punishment for the "current" offense, to a life term.

problem, and arm you for combat on these grounds should the issues arise.

i. Is Defendant "Armed with a Firearm" When Convicted of Gun Possession Offenses, such as former section 12021?

I don't have to persuade any of my audience for this article or presentation that prosecutors, by and large, have no shame, and will, when needed, shrink at nothing to find a way to maintain an unjust draconian sentence which they labored hardily to obtain. Thus it should be no surprise that prosecutors are coming up with "creative" arguments by which to preclude Prop. 36 resentencing relief. One such practice is to allege ineligibility based on the "armed with a firearm" exception for persons convicted of gun possession charges such as former section 12021 (ex felon with a firearm) or former section 12025 (concealed/ unregistered firearm possession).[7]

Strong opposition has been made to such attempts, on a number of grounds, the most obvious of which is that conviction for weapon possession under section 12021 or 12025 can include *constructive* possession, such that the fact of such conviction does not establish the requirement of "arming," which, under settled law, requires that the weapon be both possessed, actually or constructively, *and* readily available for offensive or defensive use. (See, e.g., *People v. Bland* (1995) 10 Cal.4th 991, 997, 999.) Excellent briefing on this specific issue has been prepared by Michael Romano of the Stanford Three Strikes Clinic for litigation in San Diego County, and shared with the Prop. 36 Group.

Mr. Romano also makes a broader, more compelling argument, that the intent of the drafters was not to include crimes such as firearm possession as the basis for the "armed with a firearm" exclusion, since the statutory language requires arming "[d]uring

---

[7] In order to confuse the hell out of us old timers, the Legislature recently, reenacted and renumbered all the gun possession laws. If you need to know what good-old friends like section 12021 and 12025 have turned into, please contact my colleague Jonathan Grossman, who keeps track of this sort of thing. However, since all the past-tense "current offenses" we will be dealing with in Prop. 36 resentence cases will be older convictions, I will use the old friendly statutory provisions.

the commission of the current offense. . . ." Such language, he persuasive argues, parallels the arming enhancement provisions of section 12022, and should, like that provision, be presumed to include a requirement of a separate, underlying "tethering" felony, apart from weapon possession. (*Bland*, *supra*, at p. 1002.)

Hopefully, armed with these two related contentions, we will be able to shoot down prosecution attempts to bootstrap the "arming" exclusion onto all past-tense current firearm possession offenses.

ii. **"Intended to Cause Great Bodily Injury to Another Person."**

Even stranger is the possibility that the prosecution will seek to exclude defendants whose past-tense current crimes involve a situation in which the defendant "intended to cause great bodily injury to another person." (1170.12(c)(2)(C)(iii).) To say that this provision opens up a big can of worms is an understatement.

What, if any, part can this provision play in resentencing under 1170.126? In no case will a jury have found, or a defendant have admitted, intent to cause great bodily injury to another person.[8] Notably, this wacky phrase does not even include, as an element, any *actual infliction* of great bodily injury. Thus, you could arguably have a case involving assault by force likely to inflict great bodily injury – a non-serious felony – where either no injury, or only minor injury was inflicted, but the defendant could be found, either based on his words or circumstantial evidence, to have intended to inflict great bodily injury.

What hopefully saves us in this situation is the express requirement that "the prosecution plead[] and prove[] . . ." the facts which establish the exception. (§ 1170.12, subd. (c)(2)(C).)[9] Thus, the defense position should be that the prosecution is precluded,

---

[8] Where there was a pre-1995 amendment GBI enhancement under section 12022.7 for intentional infliction of great bodily injury, the issue will not arise, since, by definition, a crime with such an enhancement is both a serious and violent felony.

[9]Known by the liberty-minded pundits at the Three Strikes Clinic as "subdivision (c)(2)-Shining- (C).

at an 1170.126 resentencing hearing, from relitigating in any way the facts of the prior conviction to establish the disqualifying fact of intent to inflict great bodily injury, and is limited to facts actually established by the conviction itself. Thus, even facts which, under the rules followed for "strike" convictions under the *Guerrero* line of cases (*People v. Guerrero* (1988) 44 Cal. 3d 343, 355-356; see also *People v. Rodriguez*, *supra*, 17 Cal.4th at pp. 261-262), would demonstrate intent to inflict great bodily injury – e.g., preliminary hearing testimony that the defendant as he swung his fist at his girlfriend, shouted, "I'm going to beat you to a bloody pulp, darling!" – would be sufficient because the prosecution had never, as required by the statute, pled and proved the fact of intent to inflict great bodily injury.

In fact, the "pleading and proof" requirement built into subdivision (c)(2)(C) nicely sets up an *Apprendi*-type argument (*Apprendi* v. *New Jersey* (2000) 530 U.S. 466) – more on that in a bit – that any fact utilized by the prosecution to increase the maximum punishment at an 1170.126 hearing, must have already been pleaded and either admitted or proven to a jury. Since it is virtually impossible that intent to inflict injury was pled and proven (or admitted), the prosecution is precluded, under due process principles, from prevailing in an argument that this "fact" disqualifies a defendant from a sentence recall under Prop. 36. (See, e.g., *People v. Mancebo* (2002) 27 Cal.4th 735 [defendant may not be punished for an enhancement that was not alleged in the charging document].)

Thus, I am hopeful that our side will be able to "head this one off at the pass" and preclude prosecutors, at 1170.126 hearings, from seeking to prove disqualifying facts under subsection (iii) which were not pled and proven from the original conviction for the past tense current crime.

At least one Santa Clara County trial judge has taken the position that the "pleading" requirement of subdivision (c)(2)(C) of section 1170.12 does not apply to resentencings under section 1170.126, basing this conclusion on the fact that the disqualifying language in subdivision (e)(2) of section 1170.126 refers only to

subparagraphs (i) through (iii), but not to subdivision (c)(2)(C), which contains the pleading requirement, and because much of the language of subparagraphs (i) through (iii) involves matters which would not have been pled and proven. I think this is a weak argument, as (1) statutes have to be read as a whole, and (2) all of (i) and (ii) would have been pled and proven, and the strange language of (iii) is just as likely to be the result of poor draftsmanship rather than an obtuse intent to circumvent the pleading and proof requirement for 1170.126 resentencings.

However, assuming, arguendo, that something more than the facts pled and proven are admissible to show that the past tense current crime includes the disqualifying language from subparagraph (iii), we have a pretty strong fallback position: that any "evidence" to prove these facts about the record of conviction must be limited to the type of facts permitted for proof of missing elements of prior convictions under *People v. Guerrero* (1988) 44 Cal.3d 343, which means that only evidence from the record of conviction is admissible. Under now-settled case law, the "record of conviction" includes admitted pleadings, sworn testimony from trial or a preliminary hearing, but excludes nearly all hearsay statements in probation reports, including "admissions" by a defendant. (See, e.g., *People v. Reed* (1996) 13 Cal.4th 217, 226 and *People v. Trujillo* (2006) 40 Cal.4th 165, 177.

These *Guerrero* principles apply here for the same reasons they apply with respect to prior convictions.

> To allow the trier to look to the record of the conviction – but no further – is . . . fair [because] it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial.

People v. Woodell (1998) 17 Cal.4th 448, 453, quoting *Guerrero, supra,* 44 Cal.3d at p. 355.)

C. **Litigating Appeals of "Dangerousness" Findings after Hearings.**

The most troubling provision in Proposition 36 is the "unsuitability" escape

module which the friendly prosecutors who supported the initiative insisted be included as part of the resentencing provisions of the Three Strikes Reform law. Subdivisions (f) and (g) of section 1170.126 allow a trial court to essentially veto resentencing of eligible defendants where the court, "in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) In making this determination, a court is directed to consider the defendant's criminal history, his record of discipline and rehabilitation while imprisoned, and "any other evidence which the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety. (§ 1170.126, sub. (g).)

Brad O'Connell's article points out a favorable aspect of the way this provision is drafted, noting that the statutory language – that an 1170.126 petitioner "shall be resentenced unless . . ." the court, in the exercise of discretion concludes he is currently dangerous – creates a presumption in favor of resentencing, which narrowly circumscribes the exercise of discretion. (O'Connell, B, "Proposition 36," etc., pp. 9-11, citing *People v. Guinn* 1994) 28 Cal.App.4th 1130, 1142.) Brad also explains why there is a right to counsel with respect to any hearing on "dangerousness" under section 1170.126(g). (*Id*., at p. 11.) Likewise, as noted above, Brad correctly argues that there is an appeal right under section 1237(b) when resentencing is denied on dangerousness grounds. (*Id*., at p. 12.)

However, left unaddressed in his article are several rather dodgy questions about the procedures which should or must be followed at "dangerousness" hearings. Here are the ones I could think of.

1. **Standard of Proof for Facts and Court Determination of Dangerousness.**

We all know that the normal standard for fact-finding by a court in the exercise of sentencing is by preponderance of evidence. (See *McMillan* v. *Pennsylvania* (1986) 477 U.S. 79, 91-92, *People v. Towne* (2008) 44 Cal.4th 63, 85-88.) However, we also know that, in light of *Apprendi* jurisprudence, and the requirement of proof beyond a

reasonable doubt to a jury of all facts which increase the maximum punishment for a crime, where there is a statutory presumption in favor of a particular sentence, facts which would increase sentence beyond the presumed sentence must be proven to a jury beyond a reasonable doubt. (*Cunningham v. California* (2007) 549 U.S. 270, 293.)

How does this apply to Prop. 36 resentencing? As explained above, there is a presumption, under 1170.126, that a person eligible for resentencing *shall* be resentenced *unless* a determination is made by a judge of the "ultimate fact" of present dangerousness, based on certain specified (and unspecified) historical facts about the defendant's background and conduct before and after imprisonment. This means that the finding of these ultimate and underlying facts must be beyond a reasonable doubt, since their determination plainly increases the defendant's maximum punishment. It also means – if we care to push the issue – that such factual findings must be made by a jury.

Mind you, this argument will have to be raised with great care, in that we are not dealing with conviction and sentence, but an initiative-created right to re-open a judgment already imposed and final. But it strikes me that at least as to the standard of proof, the same argument which prevailed in *Cunningham* ought to prevail here. Absent proof of certain facts, the defendant is entitled, by a presumption created by state law, to a particular, lenient sentence. With, and only with, proof of the facts, a greater punishment can be imposed. And here, the difference between the presumed sentence – a doubled determinate term – and the enhanced term – 25 to life – is far more startling than what was at stake in *Cunningham*, i.e., a presumed middle term versus an upper term imposable with proof of aggravating circumstance. Anyway, it sounds like a viable argument to me, and is at least worth a shot.

2. **What Rules of Evidence Apply?**

As with the standard of proof, the admissibility of evidence to prove sentencing facts typically involves a much-relaxed standard, with recognition that hearsay evidence is constitutionally permissible so long as it is reliable. (See, e.g., *People v. Otto* (2001) 26 Cal.4th 200, 207-208, and cases discussed therein.)

But if our *Apprendi-Cunningham* argument holds true, and there is a requirement of proof beyond a reasonable doubt, it should follow that trial rules of evidence should apply, including the right of confrontation, and preclusion against inadmissible hearsay. I have found no authority for this specific point – which makes sense, since, after *Cunningham*, the right to jury trial on facts giving rise to the upper term was promptly torpedoed by Legislature, which eliminated the presumption in favor of the middle term. But it seems to me to flow from the jury trial and requirement of proof beyond a reasonable doubt requirements of *Apprendi* and *Cunningham*.

3. **Defendant's Right to Be Present.**

A defendant normally has a right to be present at all sentencing hearings, including resentencings after reversal. (§ 977, subd. (b)(1).) This right normally applies to resentence hearings, and is of constitutional dimension. (See *People v. Robertson* (1989) 48 Cal.3d 18, 60, citing Cal. Const., art. I, § 15; *Faretta v. California* (1975) 422 U.S. 806, 819, fn. 15 and *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-108.)

Proposition 36 implicitly recognizes this right by providing that, notwithstanding section 977, a defendant may personally, in writing, waive his right to be present. (§ 1170.126, subd. (i).) It appears so far that most of the unopposed resentence hearings are taking place in absentia, presumably with written waivers on file. Where the defendant is resentenced and released, there is not much to complain about. However, in cases where there is a contested hearing on "dangerousness," particularly those where the court rules adversely, any waivers of the right to be present should be scrutinized carefully to make sure that they are not only personally made, and in writing, but, as with all such waivers involving constitutional rights, are knowing and intelligent (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464), which means that waivers must be made with a full awareness of the nature of the right being waived and the consequences of the waiver, and be voluntary in character. (See *People v. Smith* (2003, 110 Cal.App.4th 492, 500, citing *Colorado v. Spring* (1987) 479 U.S. 564, 573.)

4. **Standard of Review on Appeal for "Dangerousness" Determination.**

As appellate lawyers, we always cringe when our task is to argue error by a judge when the determination in question is committed to the "sound discretion" of the court. In those situations, we are stuck with the most unfavorable standard of review, for abuse of discretion, which is typically expressed by the self-defeating truism of *Carmony I* 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." (*Carmony I*, *supra*, 33 Cal.4th 367, 377.)

Is there a way out of this pit for review of a dangerousness determination under Prop. 36? I think there should be. Or at any rate, I have two complementary theories how to get out of the pit.

a. ***Williams* Comes Back to Help Us!**

The late great Justice Stanley Mosk was almost always our friend when it came to criminal case law. But in *People v. Williams*, *supra*, 17 Cal.4th 148, which Justice Mosk authored, he put a real whammy on us. *Williams*, as we all know, delimits the exercise of section 1385 discretion in the context of the Three Strikes law, holding that a trial court's decision whether to exercise its discretion under section 1385 in a Strikes case requires the court to give "preponderant weight . . . to factors intrinsic to the [Three Strikes] scheme, such as the nature and circumstances of the defendant's present felonies and prior serous and/or violent felony convictions, and the particulars of his background, character and prospects . . ." (*Williams*, *supra*, 17 Cal.4th at p. 161), and concluding that an exercise of discretion in this context requires a determination that "the defendant may be deemed outside the [Three Strikes law] scheme's spirit, in whole or in part." (*Ibid*.) Under the rubric of *Williams*, we have on countless occasions seen trial judges conclude that they could not exercise discretion in our client's favor because he was just plain *inside* the spirit of the Three Strikes law.

My thesis is that this case is right on point, with the cart now turned in the other direction, as to the court's exercise of discretion to preclude resentencing under Prop. 36. The purpose of the Three Strikes Reform Act of 2012 is to "[r]estore the Three Strikes

law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime. . . ." (Prop. 36, Section 1, "Findings and Declarations" No. (2).) Since the purpose of the new law is to reduce sentences for such persons, and there is a presumption in favor of resentencing under section 1170.126, a trial court's exercise of discretion to veto resentencing based on the defendant's dangerousness "should give preponderant weight" to the purpose of the Three Strikes Reform Act, i.e., eliminating the injustice of Third Strike sentences of persons who commit minor, nonviolent, non-serious felony offenses. Thus the exercise of such discretion must be narrowly curtailed, a la *Williams*, only to situations where *the defendant can be deemed outside of the scheme of the Three Strikes Reform Act* because he is currently dangerous.

Thus, we can and should take the statutory presumption against a finding of current dangerousness, and carry it over, as Justice Mosk did in his *Williams* opinion, onto the scope of the exercise of discretion, with the concomitant impact on review of such exercises of discretion. What this will precisely look like in practice, I can only guess. But this does seem like a good opportunity for one of those "if it's good for the goose, it's good for the gander" type of arguments.

b. **Substantial Evidence Review of Apprendi Fact Finding.**

You will recall my prior contention that the *Apprendi-Cunningham* line of cases gives rise to a "beyond a reasonable doubt" standard as to factual determinations with respect to both underlying and ultimate facts concerning current dangerousness. If this is correct, it should have a corresponding effect on appellate review of such factual determinations. Rather than the unfavorable abuse of discretion standard (tempered by the *Williams* in reverse approach), we should argue that the somewhat more favorable "substantial evidence" test applies, requiring the appellate court to review the record in the light most favorable to the judgment below to determine whether it discloses evidence which is reasonable, credible, and of solid value, such that a reasonable trier of fact could conclude, beyond a reasonable doubt, that the defendant is *presently* dangerous. (*Jackson*

v. Virginia (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

D. **Collateral Issues re: Prop. 36 Resentencing.**

It wouldn't be a Bill Robinson article without *some* reference to credits and restitution fines. But not much, I promise you.

1. **Post-Resentence Credits.** If your client is resentenced as a second striker, there will be an obvious alteration in his post-conviction credits. Assuming that he does not completely credit out when he is resentenced, he should receive 20 percent, "second striker" credits (§ 1170.12, subd. (a)(5)) for his prison time, rather than the "no soup for you" 25 year term without credits required for Third Strike life terms under *In re Cervera* (2001) 24 Cal.4th 1073.

Where a client has a resentencing hearing under Prop. 36, has resentencing granted, but does not credit out, some attention should be given, if there is an appeal, to the credits award. Where a defendant is resentenced without a reversal of the underlying conviction, case law holds that any time spent in local custody pending resentencing counts as presentence custody time. (See *In re Martinez* (2003) 30 Cal.4th 2934, fn. 4; *People v. Donan* (2004) 117 Cal.App.4th 784.) Mind you, the AG may argue that this rule does not apply because there is no reversal of the sentence, but I think we should prevail on this, as it is local custody time pending resentencing, exactly as in *Martinez* and *Donan*. This matters because presentence time is credited out under section 4019, which is a better rate than second strike prison credits.[10]

Second, the trial court is supposed to calculate *all* of the custody time, including prison custody, and include that in the total "actual" credits. (See, e.g. *Donan*, *supra*, at pp. 792-793.) This is often omitted.

Mind you, much of this is speculation, as, at least at SDAP, we have yet to see any

[10]I will not even touch the dodgy question of which rate of conduct credits under which version of section 4019 would apply other than to say it will depend upon a number of variables.

appeals from "dangerousness" denials. We shall see what turns up in those cases, and what challenges, foreseen and unforeseen, may arise, and what impact they may have on credits and other issues.

2. **Restitution Fines.** Courts commonly utilize the statutory formula for restitution fines under section 1202.4(b)(2). When a third strike sentence is imposed, this typically results in a very high, and often maximum $10,000 restitution fine. When a defendant is resentenced under section 1170.126, the fine should correspondingly be reduced. You should review abstracts to make sure this took place.

Perhaps more importantly, if your client is released, or resentenced but returned to CDCR custody, make sure that the correctional authorities have deleted the fines imposed on the first judgment, or at least credited the defendant for fines already paid out from his prison wages. I have had the experience, after reversals and reduced sentences which included reduced restitution fines, of learning that CDCR has not only not removed the restitution fine imposed after the first conviction, but has simply added the new one on to the old one, as if this were a second conviction. This was relatively easy to fix, but is worth some attention.

// //

II. Continuing the Guerilla War Against the Three Strikes Law.

A major battle has been won with Prop. 36. No longer, in most cases, are inmates facing life terms for minor, non-violent, non-serious felony current crimes. But the war continues. The injustice of Third Strike life sentences continues for persons with disqualifying current and prior convictions, and for persons unfortunate enough to commit current crimes which are classified as "serious felonies," but which involve no acts of violence or the sort of dangerous-to-others acts which might justify what can often amount to a virtual sentence of life without parole. So, as to those persons, the war

against the unjust Three Strikes law continues.

For the most part, I believe the suggestions and strategies of my 2005 article remain valid. Thus, in the remaining portion of the article, I will rehash, revise, and add to much of the original article. After all, there is no sin in plagiarizing oneself, other than perhaps vanity, of which I plead guilty. So, here goes.

A. *Romero*: What Can You Do When It's Denied?

As discussed above, 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.

Preliminarily, though, here is a point to consider, which I will bring up again in the context of my discussion of Eighth Amendment and related challenges. Prop. 36 has fundamentally altered the landscape of the *Romero* process. The "good cases" where *Romero* had the best chance of being granted for Third Strike sentences are mostly the very same cases which are no longer eligible for a Third Strike sentence after Prop. 36. On the one hand, this may reduce the meaningfulness of the *Romero* process. On the other hand, it makes it all the more important for those persons excluded from the benefit of the Prop. 36 reform.

I think it also does something else. It "moves the goalposts" in terms of what is proper, fair, and "in the interest of justice," as well as what type of conduct and/or prior convictions makes a person, to use Justice Mosk's phrase, inside or outside the spirit of the Three Strikes sentence scheme. If your client is an offender who *barely missed* a second strike sentence under Prop. 36 – i.e., his current crime is a minor felony, but he has a prior vehicular manslaughter conviction, or a very remote, relatively minor prior

sex offense – we should actually now be in a much stronger position to make a successful *Romero* argument, since he is closer now to a presumptive second strike sentence than he was before Prop. 36 was enacted. Thus, I suggest, when raising any of the arguments suggested below, that this favorable alteration in the landscape should be emphasized.

1. **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, the 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.[11]

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.[12]

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

---

[11]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 meaningful guide as to whether a subsequent appellate panel will follow the same course as the favorable or unfavorable result in the prior case.

[12]I described this in the original article as my "pet issue," while conceding that it had never gone anywhere. Sad to say, this is still true. But dang it, I'm still right about this one and think I should win, so I'm keeping it first even thought it may not deserve it.

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 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. What the appellate courts have done, in several 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 the courts have not directly addressed it, I would suggest that this avenue of argument be pursued when it arises.[13]

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 *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

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

declining to dismiss." (*People v. Carmony*, 33 Cal.4th at p. 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 unpublished Sixth District cases further illustrate this sub-category of abuse of discretion. In the *O'Brien* case, Alex Green, with help from SDAP's new fearless leader, 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[14] in Santa Clara County; Judge Lisk then included the existence of this "secret strike" as 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

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

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

A similar issue was successfully presented in the *Thimmes* case 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 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 the court agreed in an unpublished opinion that this basis for the trial court's refusal to exercise section 1385 discretion was not supported by substantial evidence, and required a remand.

Please 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.

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.

Three of my own cases since the original article was written involve further glosses on this same theme. In the Broughton case, involving a female client sentenced to 35 to life for aiding and abetting a residential burglary (completely ineligible for Prop. 36 relief, thank you), I cited *Carmony I* and *Gillispie to* argue that the court abused its discretion by dramatically overstating the seriousness of the current crime and appellant's role in the offense, which was decidedly minor. In the Grobman case, where the client's lengthy criminal record never included a single act of actual violence, Mr. Grobman got 190 to life for multiple current residential burglaries and priors only for this same crime. In that case, I challenged the trial court's characterization of Grobman's current and prior burglaries as "violent felonies," pointing out that this was an improper characterization in two senses because (a) none of the crimes fit within the narrow definition of "violent" first degree burglaries, which require a person present in the residence (§ 1192.7, subd.(c)(18)), and (b) because Mr. Grobman's record, in fact, shows a complete lack of "actual violence," a factor which the Supreme Court has recognized as a mitigating factor in its *Romero* jurisprudence. (See *People v. Garcia* (1999) 20 Cal.4th 490 503.)

Finally, a pending case, Miller, involves a fairly novel twist on this theme, where the sentencing court improperly considered the factual circumstances of a new criminal charge which had been filed against the defendant after the court had recalled the sentence under section 1170(d), but which was ultimately dismissed in the interest of justice for lack of evidence. Additional authority in support of the contention in *Miller* comes from a favorable line of cases in the federal courts which found sentencing error when a court relied on unsubstantiated allegations of criminal conduct as a basis for increasing a sentence, holding that this is improper where there is nothing in the record beyond multiple level hearsay and/or mere allegation of wrongdoing. (See *United States v. Weston* (9th Cir. 1971) 448 F.2d 626, *Coleman v. Risley* (9th Cir. 1988) 839 F.2d 434, 459, *United States v. Lalonde* (6th Cir. 2007) 509 F.3d 750, 758, and *United States v. Juwa* (2d Cir. 2007) 508 F.3d 694, 700-701.) Sample briefing on this point is available.

Subcategory 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 afore-mentioned *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. In my own Broughton case, the court's overstatement of the seriousness of the crime and Ms. Broughton's level of culpability resulted in the court's failure to meaningfully take into account indications of some elements of duress from the circumstance of Ms. Broughton's involvement in criminal conduct stemming from an abusive boyfriend who was the perpetrator of the current crime. And in Grobman, the court's mischaracterization of past and current residential burglaries as "violent felonies" precluded it from giving proper weight to a key factor, favorable under *Garcia*, namely that there was a complete absence of "actual violence" in Mr. Grobman's criminal history.

My own Cruz case provides another example of a court's refusal to consider favorable evidence. In an effective *Romero* presentation, trial counsel (she's a judge now) 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 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." Alas for Mr. Cruz: his federal habeas petition, which featured this Due Process argument, went nowhere. But fortunately for Mr. Cruz, he is presumptively eligible to be resentenced under Prop. 36; his strike priors were pretty violent – even if very remote – so I am thinking that this one will end up being contested on the issue of dangerousness.

Subcategory (c): A Creative *Garcia* Spin.

In *People v. Garcia*, *supra*, 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 necessarily all, of the defendant's current charged crimes. (*Id*., at pp. 496-502.) In *England*, another of my own Three Strikes cases from many years back, 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, which 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. I raised a similar argument again in Mr. Grobman's and Ms. Broughton's cases, both of which failed to persuade the appellate

courts; and it is also included as one piece of the argument in the more recent Miller case, which is still pending.

The argument got better as I went along, and seems best suited to cases with defendants – such as Mr. Grobman and Mr. Miller – who have virtual LWOP sentences, but where a partial grant of *Romero* relief, a la *Garcia*, would give the defendant some possible way to be released as an old man. The key to making this argument work is showing that the court's exercise of discretion was never focused on any kind of intermediate grant of partial *Romero* relief when there were favorable facts – lack of actual violence, addiction problems, remoteness of strikes – which made him "at least in part" outside the spirit of the Strikes law. It hasn't worked yet, but hey, the same can be said for many brilliant, correct legal arguments.

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.

Does the quality of the *Romero* motion matter? Where your client is the Third Strike Poster Boy, the lack of an effective written *Romero* motion will make no meaningful difference, as 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 my pre-Prop. 36 Ron Lopez case, which was "in the works" as a habeas when I wrote the original Guerilla War Three Strikes article, and thus appears under a pseudonym in that version. Ron was arrested for simple possession, and had 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 was used in

any of the priors, and no one was injured. Ron's arguably meritorious motion to suppress was denied, and on the advice of his public defender counsel, he entered an "open" guilty plea to the simple possession charges, with the promise of a *Romero* hearing. The written *Romero* motion featured boilerplate legal argument, but did not even contain the typically present "Social History" summarizing Ron's background, social history and prospects. The motion included a two sentence comment about the fact that Ron had been diagnosed with bipolar mania, which was in remission thanks to medication, but no other mental health information or evaluations. After uninspired argument by counsel, the sentencing judge denied *Romero* and sentenced Ron to 25 to life – barely shy of a virtual LWOP term for this forty-five year old defendant. Obviously, I raised the suppression denial on appeal, and an Eighth Amendment claim – see below. But I knew I had to do more to address the injustice from the *Romero* denial.

What I did was to investigate and put together a habeas petition based on the *Romero* motion that counsel failed to make. It turns out that Ron had 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 showed beyond dispute that his bipolar mania diagnosis was quite legitimate. The jail records in particular told an amazing story from his incarceration for the current crime, demonstrating that he behaved in an incredibly bizarre fashion when not properly medicated, but did quite well after his medications were adjusted to properly treat his disorder. A mental health expert who was retained prepared a declaration explaining the links between bipolar mania and both self-medication with illegal drugs and criminal conduct, putting the whole picture of Ron's strikes and current crime in a far different light than the paucity of favorable facts presented at the *Romero* hearing.

I also obtained a declaration from a *Strickland* expert, a local criminal defense trial lawyer who stated that effective counsel would have used the social history, obtained the jail mental health records, and procured an expert for purposes of the *Romero* hearing,

and that trial counsel's supposed tactical reasons for not doing so did not hold up to scrutiny. What I sought to do was to fashion a habeas which included 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.

The story of what happened with Ron Lopez's habeas is rather remarkable, highlighted by a summary denial of the petition by the same superior court judge, ostensibly on prejudice grounds, but in a manner which was quite clearly contrary to the *Strickland* standard for such analysis. Armed with this additional tool, I sojourned on with a federal habeas petition, raising the 8th Amendment and 6th Amendment arguments, only to lose in the district court, which refused even to issue a Certificate of Appealability. Did this deter me? Of course not. I filed a motion for issuance of a certificate of appealability in the Ninth Circuit; and, a mere 18 months later, it was granted. I filed a strong opening brief in the 9th Circuit when – lo and behold! – Prop. 36 was enacted. After obtaining a stay from the Ninth Circuit so that Ron could exhaust his remedies under Prop. 36, the same public defender's office prepared a Prop. 36 recall petition, which was filed and granted in Santa Clara County with the assent of the district attorney's office. Ron Lopez was freed, having served out all of the time for a maximum second strike sentence. And we will never know how my brilliant IAC claim would have fared in the 9th Circuit.

But you get the idea. Where it appears that trial counsel has fallen down on the job in terms of the proper handling of a *Romero*, don't just accept this – take it on, doing your best, by means of an IAC habeas claim, to put together the *Romero* presentation that should have been made.

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 *O'Brien* and *Thimmes*, 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 failed to object.

B. Eighth Amendment Proportionality Analysis: Pre-prop 36 Signs of Life; But Now?

The theme of this portion of my discussion in the first version of this article was essentially, that Eighth Amendment claims against Third Strike sentences were *not completely dead* after *Ewing* and *Andrade*.[15] I noted some "slivers of hope" from those opinions, i.e., that a clear majority of the Court upheld the concept of narrow proportionality review of non-capital sentences (*Ewing*, *supra*, 538 U.S. at p. 20-22, plur. opin. of O'Connor, J. and at pp. 35-37, dis. opin. of Breyer, J.), and that oddly 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, dis. 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.")

From this I opined that the matter was far from settled, and that Eighth Amendment proportionality arguments in noncapital cases, such as those involving the Three Strikes Law, would continue to have vitality, with case-by-case chances for

---

[15] As Miracle Max put it in *Princess Bride*, "There's a big difference between mostly dead and all dead. Mostly dead is slightly alive. With all dead, well, with all dead there's usually only one thing you can do. . . . Go through his clothes and look for loose change." (Found at http://www.imdb.com/character/ch0003789/quotes.)

success. While acknowledging that, after *Ewing*, most Eighth Amendment claims under the Three Strikes Law have been flatly rejected in unpublished opinions in state and federal court, I pointed out two sets of favorable developments: the Ninth Circuit's continued acceptance of such arguments in deserving cases (see *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755 [25 to life for stealing VCR reversed] and *Reyes v. Brown* (9th Cir. 2005) 399 F.3d 964 [8th Amendment violated by 25 to life sentence for current crime of perjury for false statement to DMV], and the remarkable Court of Appeal comeback decision in *Carmony II* (*People v. Carmony* (2005) 127 Cal.App.4th 1066), where 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.

From these cases, I offered several suggestions for continuing to raise Eighth Amendment arguments, recommending that these challenges are best suited for cases where prior offenses, especially strikes, were less serious and not violent, but emphasizing the principle that, in both Eighth Amendment jurisprudence and California Constitutional "cruel or unusual" case law, although recidivism is a factor which can legitimately justify increases in punishment, the emphasis of proportionality analysis must be the current offense. (*Carmony II*, *supra*, 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.)

I suggested that a similar argument can be presented in both section 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 possesses the means of satisfying his addiction. 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.) *Carmony II* concluded with this powerful reminder of the evils of the Three Strikes law:

> 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.)

Ultimately, I suggested that after *Ramirez*, *Reyes*, and *Carmony II*, Eighth Amendment proportionality challenges still had a chance to be successful, and recommended pursuing them in two situations: where the client's current crime is minor and his criminal record, including the strikes, is not terribly violent or prolific, I suggested the *Ramirez* model; where strike priors are more problematical, but the client has an extremely minor, technical type of felony crime, I argued that *Carmony II* provides the best guide. Lastly, I recommended that counsel continue to raise cruel and/or unusual punishment" challenge under the state Constitution as well as under the Eighth Amendment, pointing out that California Supreme Court had 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, and that the somewhat surprising denial of review in *Carmony II* may have signaled a willingness to take on such a claim under the state standard some time in the near future.

Okay, that was a long summary of what I argued eight years ago. What has happened in the intervening years with respect to these types of challenges? Not much that is very encouraging. I am not aware of any published decisions reversing on cruel and/or unusual punishment grounds. In every case which I personally raised in federal court, the result was a rather perfunctory denial, citing *Ewing* and *Andrade*, and essentially applying them as if it were a foregone conclusion that they signaled the death-knell of such claims involving the Three Strikes law. The only bit of recent news is also bad, with the California Supreme Court finally granting review in a case involving a constitutional challenge to a Third Strike sentence for a section 290 registration violation, but affirming the conviction by distinguishing the wrongdoing of the defendant from the defendant in *Carmony*. (*In re Coley* (2012) 55 Cal.4th 524.)

The other point, of course, is that Prop. 36 has fundamentally altered the landscape of challenges under the cruel and/or unusual punishment provisions of the state and federal constitutions. It almost goes without saying that the cases which had the best (slim) chances for successful constitutional challenge are the very ones which are almost certain to lead to resentencing under Prop. 36. This change will, on one level, make it much more unlikely for such claims to succeed.

But here's the parting question I want to leave you with. What is the impact of the change in the law as to determinations of what is "proportionate" in a constitutional sense? Can it be argued, as I did as to *Romero*, that the Electorate's act of, in effect "moving the goalposts," creating a far more lenient second strike punishment for certain classes of offenders, but leaving the harshly punitive and excessive Third Strike life terms for those who do not fit within its sometimes arbitrary distinctions, gives rise to new avenues for constitutional challenges to Third Strike sentences?

Here's one possible example. A defendant with a minor felony current crime, who has one strike for vehicular manslaughter under section 191.5, is excluded from the benefits of Proposition 36; but a similarly situated defendant who has a prior for voluntary manslaughter is eligible. This certainly appears to be an arbitrary

classification. I made a similar argument in one of my Eighth Amendment challenges, pointing out, in Mr. Cruz's case, that for the current crime of simple possession, he missed eligibility for no-jail probation under Proposition 36 (the first one, on drug treatment) by a matter of months, since his most recent misdemeanor conviction occurred about four and a half years prior to the current offense, but not the five years required as a "washout" to strikes under the first Prop. 36. It seems to me that this sort of argument can be raised in cases where a defendant *just misses* eligibility for a second strike sentence under the second Prop. 36. There may also be room for some kind of hybrid arguments, utilizing equal protection principles, where it appears that the distinctions drawn in Prop. 36 are challengeable as arbitrary and unreasonable.

That's as far as I can go now in terms of cruel and/or unusual punishment challenges. Prop. 36 may have undercut the best ones, but it obviously provides a much better remedy and a much fairer sentencing scheme. But I wouldn't give up the ghost just quite yet.

C. **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. Last time, I did not say much about this subject in this article, or in my presentation, because my then-boss, Michael Kresser was addressing the topic directly in his material and presentation. This time, I have basically run out of time. As such, I will rehash the outline of points I made last time, adding some new references from cases which have been decided in the interim.

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 a fair measure of 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 a violation of section 245(a)(1), vehicular manslaughter, an out-of-state conviction, or an old second degree burglary.[16] 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. A few years back, I won reversal of a Third Strike sentence in the Newton case, where the defendant's prior, for drunk driving vehicular manslaughter under section 191.5 involved the death of a person in the car, and thus lacked evidence, in the record of conviction, that the decedent was not an accomplice, as required by section 1192.8. (See *People v. Henley* (1999) 72 Cal.App.4th 555, and *People v. Flores* (2005) 129 Cal.App.4th 174.)[17] Even more recently, panel attorney

---

[16] As to the latter, it bears noting that a 2000 amendment to Penal Code section 1192.7 changed the "serious felony" definition of burglary from "burglary of a residence" to "any burglary of the first degree." At least one court has held that the amendment means that only a first degree burglary qualifies as a serious felony. (*People v. Mestas* (2006) 143 Cal.App.4th 247, 250-254.) However, the Sixth District has held that a second degree burglary can still qualify as a serious felony if the prosecution can prove that the offense involved a residence. (*People v. Garrett* (2001) 92 Cal.App.4th 1417.)

[17] I have sample briefing on this issue both from the Newton case, which involved an IAC habeas claim, and from a pending case, Rivera, where the issue was raised on direct appeal because there was a court trial on the truth of the prior serious felony/strike where the issue was squarely presented to the trial court.

Tom Singman won federal habeas relief on an IAC claim for failure to challenge the sufficiency of a foreign strike prior. 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[18];

Subpoint b: Juvenile strike priors should be challenged as inadequate based on the lack of a jury trial right, and/or due process violations in connection with the adjudication of such juvenile offenses;[19] 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 effectively overrules *Monge v. California* (1998) 524 U.S. 721.

D. **Finding Winnable Issues That Can Get Strikes Convictions Reversed**.

1. **Too Much to Summarize.**

In my prior article, I noted that 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, noting that in these cases, such reversals can and have led to a reduced sentence by plea bargain, dismissal of strikes, or trials which resulted in a reduced sentence. My suggestion was that it was likely, at least with some appellate justices, that the existence of an unjust and arbitrarily lengthy life sentence is a factor

---

[18] Sample briefing is available from this writer. bill@sdap.org We lost this issue in *People v. McGee* (2006) 38 Cal.4th 682, but I believe it is worth raising and preserving for a U.S. Supreme Court challenge.

[19] Again, we lost this issue in *People v. Nguyen* (2009) 46 Cal.4th 1007; although review was denied in *Nguyen*, the U.S. Supreme Court has asked for further briefing on this issue in a couple of cases sent to it for Cert. review, suggesting they are looking for the right case to adjudicate the constitutionality of using juvenile priors as "strikes."

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.

I provided a sampling of such cases, which you can review in the original article. There have been many more such victories in the interim, but I will neither repeat the "wins" listed in the prior article nor try to catalogue the new ones. It suffices to say that we can and will get Third Strike sentences reversed just by doing our job and raising arguable, potentially meritorious issues on appeal and habeas, and that the unjustness of the Third Strike sentence(s) may be a background factor that can work in our favor.

2. **Federalize, Federalize, Federalize.**

Some 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 be 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 appeal 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.

P.S.: Mr. Cousins – like most persons convicted for a current section 290 violation

– had sex crime priors. So, without the miracle just described, Mr. Cousins would have gotten no benefit from Prop. 36, and would still be rotting away in prison.

CONCLUSION

The conclusion to my first version of this article began with the following sentence: "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." At the time, I was less than optimistic that this would come soon enough to matter for most of our clients. I am *thrilled* to have been wrong about this, and, with all of you, dedicate myself to the challenge of carrying out the mandate of Proposition 36.

But even after Proposition 36, the Strikes law remains a bad reality that far too many of our clients, and we, as their advocates, have to deal with. I hope this lengthy pep talk on Prop. 36 and the continued need for "guerilla tactics" against the Strikes law has helped you to think through various strategies for fighting the injustice of this law in practice.