S201186

LIU, J.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DEWONE T. SMITH, Defendant and Appellant.	) No. S_____)) 2 Crim. B223181))) Los Angeles County) Case No. BA337647)

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (Cont'd)

Constitution

Statutes

Court Rules

Secondary Sources

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant and Appellant, Dewone T. Smith ("petitioner"), respectfully petitions this Honorable Court for review in the above-entitled matter following the filing of a published opinion by the Court of Appeal of the State of California, Second Appellate District, Division One, which, in part, affirmed the judgment. A copy of the Court of Appeal's opinion, filed on February 24, 2012, is attached as Exhibit A.

ISSUE PRESENTED FOR REVIEW

Is Penal Code section 148[1], a lesser included offense of resisting by force under Penal Code section 69?

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

NECESSITY FOR REVIEW

Petitioner respectfully requests that review be granted under California Rules of Court, rule 8.500 (b)(1), as it appears necessary to settle important questions of law and resolve the split of authority as to whether section 148, subdivision (a)(1) is a lesser included offense of section 69 under the theory of forcible resistance.

STATEMENT OF CASE AND FACTS

Petitioner incorporates the facts as presented by the Court of Appeal in its opinion, and has added additional facts as needed in the Argument section.

ARGUMENT

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO INSTRUCT ON SECTION 148, SUBDIVISION (A)(1), AS A LESSER INCLUDED OFFENSE OF SECTION 69, IN COUNT 2, AND THE COURT OF APPEAL'S DECISION TO THE CONTRARY REQUIRES REVIEW

The trial court refused to instruct on section 148, as the lesser included offense of resisting with force, in violation of section 69, as charged in count 2. This was reversible error, because there was substantial evidence from which the jury could have inferred that petitioner had resisted the deputies, albeit with lawful force and in response to excessive force utilized by the deputies.

The Court of Appeal disagreed that section 148 was a necessarily included offense of section 69, and even so, it concluded there was not substantial evidence to have warranted the instruction. (Ex. A, pp. 6-9.) For the reasons discussed below, petitioner submits that the Court of Appeal's decision was error and requires review.

A. Background

During trial, the court recognized its potential sua sponte duty to instruct on the lesser included offense of section 148, subdivision (a)(1), with respect to both counts 2 and 5. (3 R.T. pp. 1299-1300, 1507, 1511-1513, 1636-1641.) The prosecution took the position that section 148 was not a lesser included offense of section 69, while petitioner requested that the instruction be given. (1 C.T. pp. 137-149; 3 R.T. p. 1300; 4 R.T. pp. 1801-1802.)

Ultimately, the court refused to include the instruction, in either count 2 or 5, finding that there was not "substantial evidence" to warrant this. (1 C.T. pp. 170-172; 4 R.T. pp. 1808, 1874-1877.) At sentencing, the court acknowledged that, in appropriate cases, section 148, subdivision (a)(1), could be a lesser included offense of section 69. (4 R.T. p. 3003.)

Still, the court opined that, based on the facts of the case, it had properly refused to give the instruction in both counts. (4 R.T. pp. 3003-3004.) The court cited *People v. Breverman* (1998) 19 Cal.4th 142, and later, *People v. Carrasco* (2008) 163 Cal.App.4th 978, in support of its conclusion. (4 R.T. pp. 1808, 3003-3004.)

B. General Principles

Courts have recognized a general obligation on the part of trial courts, even in the absence of a request, to instruct the jury on "general

principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case." (*People v. Carter* (2003) 30 Cal.4th 1166, 1219; citing *People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) Trial courts must instruct the jury on defense theories that are "supported by substantial evidence." (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386.)

A defendant is not entitled to an instruction on a lesser related offense where the prosecution objects. (*People v. Birks* (1998) 19 Cal.4th 108, 136.) However, a sua sponte duty to instruct, even absent a request and over the objections of the parties, arises with respect to lesser offenses necessarily included in the charged crime, where there is "substantial evidence" that the defendant is guilty of the lesser. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826; *People v. Kraft* (2000) 23 Cal.4th 978, 1063.)

A refusal or failure to give such instruction violates the Sixth and Fourteenth Amendment rights to adequate instructions on the theory of the defense, the Sixth Amendment right to a jury trial, and the Due Process Clause. (U.S. Const., amends. V, VI, XIV; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740; *United States v. Unruh* (9th Cir. 1988) 855 F.2d 1363, 1372; *People v. Birks*, *supra*, 19 Cal.4th at 119; *People v. Sedeno* (1974) 10 Cal.3d 703, 720.)

Substantial evidence has been defined as evidence from which a reasonable jury could conclude that the lesser offense, but not the greater, was committed. (*People v. Hughes* (2002) 27 Cal.4th 287, 365-367; *People v. Mendoza* (2000) 24 Cal.4th 130, 174.) A lesser necessarily included offense, in turn, has been characterized as follows:

> [In] California, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations omitted.]

(*People v. Birks, supra*, 19 Cal.4th at 117; see also *People v. Sanchez* (2001) 24 Cal.4th 983, 988.)

The erroneous failure to instruct on a lesser included offense generally is subject to the harmless error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836-837. (*People v. Breverman, supra*, 19 Cal.4th at 177-178.) Reversal is required "only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of." (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868; *People v. Ledesma* (2006) 39 Cal.4th 641, 716.)

C. Section 148, subdivision (a)(1) as the Lesser Included Offense of Section 69

Section 69 provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing

any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment."

This statute may be violated in two ways—first, "by threats or violence to deter or prevent an officer from performing a duty imposed by law;" and second, by "resisting by force or violence an officer in the performance of his or her duty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814.) The former is called "attempting to deter," and the latter or second type is known as "actually resisting an officer." (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1530; see *People v. Lacefield* (2007) 157 Cal.App.4th 249, 255.)

These two types of offenses under section 69 each have different elements. (*In re Manuel G., supra,* 16 Cal.4th at 814.) The first one includes "a threat, unaccompanied by any physical force," and an attempt to deter an immediate or future performance of a duty. (*Id.* at 817.) The second type involves the use of "force or violence" against an officer who is lawfully engaged in the performance of his or her duty at the time of the resistance. (*Id.* at 815-816.)

Section 148(a)(1) states, in pertinent part: "(a)(1) Every person who willfully resists, delays, or obstructs any ... peace officer ... in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment."

Much like the *second type* of offense in section 69, section 148, subdivision (a)(1), includes the elements of an officer's present performance of duty, as well as resistance. (*People v. Lacefield*, *supra*, 157 Cal.App.4th at 256-257.) Where the two differ is the requirement in section 69 that the resistance be carried out by "force or violence," whereas section 148, subdivision (a)(1), can be violated without force. (*Id.* at 257.)

Several appellate courts have considered whether section 148, subdivision (a)(1), is the lesser included offense of section 69 and reached varying conclusions. (See *People v. Lacefield*, *supra*, 157 Cal.App.4th at 257, 258, fn. 4, 259, fn. 5 [declaring section 148, subdivision (a)(1), the lesser included of the second type of offense in section 69, based on the statutory elements test]; but see *People v. Lopez*, *supra*, 129 Cal.App.4th at 1532-1533 [finding that section 148, subdivision (a)(1), was not a lesser included, but a lesser related offense of section 69]; see also *People v. Belmares* (2003) 106 Cal.App.4th 19, 24, disapproved on another ground in

People v. *Reed* (2006) 38 Cal.4th 1224, 1228 [holding that section 148, subdivision (a)(1), was not the lesser included offense of section 69 under either the statutory elements or accusatory pleading tests].)

In *People v. Lacefield, supra*, 157 Cal.App.4th at 257-259, Division Eight of the Second district criticized the holding in *Belmares* and *Lopez*, pointing out that the Fifth and Sixth Districts had failed to take into account the second type of offense in section 69 in deciding the issue. Division Eight explained that in both cases, the courts had erroneously focused on the element of attempting to deter the officer's immediate performance of a duty or a future one, without discussing the second type of offense involving actual resistance with force. (*People v. Lacefield, supra*, 157 Cal.App.4th at 257-259, citing *People v. Belmares, supra*, 106 Cal.App.4th at 24, and *People* v. *Lopez, supra*, 129 Cal.App.4th at 1532-1533.)

Having determined that section 148, subdivision (a)(1), was a lesser included of the second type offense in section 69, the court then decided whether there was substantial evidence to have warranted the lesser included offense instruction. (*People v. Lacefield, supra*, 157 Cal.App.4th at 259-261.) In doing so, the court summarized the testimony of the various officers and percipient witnesses offered by both sides. (*Id.* at 260-261.)

Several officers had responded to a disturbance call outside a bar and decided to close down the bar due to overcrowding. (*Id.* at 252.) According

to one sergeant, the defendant ignored commands to stop and kept walking toward him, at which time, he placed his hands on the defendant's chest, who then slapped his arm away and continued to move toward the sergeant. (*Id.* at 260.) The sergeant testified that this led to a physical altercation, and eventually, he took the defendant down. (*Ibid.*)

Two officers corroborated the sergeant's testimony, while another officer did not observe any aggressive behavior by the defendant. (*Ibid.*) The defense witnesses, on the other hand, contradicted the sergeant's version of the incident, testifying that the defendant did not exhibit any assaultive behavior and merely casually approached the sergeant, who pushed him to the ground. (*Id.* at 261.)

In concluding that there was substantial evidence to support a violation of section 148, subdivision (a)(1), thus, warranting the instruction, the court held:

> The jurors were entitled to accept or reject all of the testimony, or a portion of the testimony, of any of the above witnesses. (See *People v. Wickersham* (1982) 32 Cal.3d 307, 328 [], disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201 []. They might have believed part of what the officers said and part of what the defense witnesses said. They therefore might have found that appellant acted unlawfully, by arguing with Sargent and refusing to disburse, but he did not use force unlawfully because his use of force was a response to Sargent's unlawful use of force.

(*People v. Lacefield, supra*, 157 Cal.App.4th at 261.) The court also specifically noted that the jury might have found that the defendant's words "went beyond verbal criticism, into the realm of interference with duty." (*Ibid.*, citing e.g., *People v. Robles* (1996) 48 Cal.App.4th Supp. 1, 6.)

Finally, given the varying testimony and versions of the encounter, the court found that the evidence of guilt was not overwhelming, and that the prejudice resulting from the failure to instruct on section 148, subdivision (a)(1), was not harmless. (*People v. Lacefield, supra*, 157 Cal.App.4th at 262, citing *People* v. *Watson, supra*, 46 Cal.3d at 836.) As such, the court ruled that the defendant would have obtained a more favorable outcome had the jury received the instruction. (*People v. Lacefield, supra*, 157 Cal.App.4th at 262.)

To that end, the People argued that since the court instructed on the meaning of unlawful force with CALCRIM No. 2670, "it necessarily found that [the defendant] unlawfully used force or violence." (*People v. Lacefield, supra*, 157 Cal.App.4th at 262.) The court disagreed and observed as follows:

> In our view, the error was prejudicial because the jury was given no alternative other than a not guilty verdict if it believed that appellant's initial resistance was unlawful, but there was no unlawful use of force. The absence of an instruction on section 148(a)(1) forced "an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other." [Citation omitted.] "[N]either party has a greater interest than the other in

> gambling on an inaccurate all-or-nothing verdict when the pleadings and evidence suggest a middle ground ...." [Citation omitted.] The pleadings and evidence here suggested a middle ground, a conviction for section 148(a)(1), but the jury was not given that option.

(*Id.*, quoting *People v. Birks*, *supra*, 19 Cal.4th at 119, 127.)

Subsequently, in *People v. Carrasco*, *supra*, 163 Cal.App.4th at 984, Division Eight of the Second District reaffirmed its prior ruling that section 148, subdivision (a)(1), was a lesser included of the second type offense in section 69. However, the court found no error in not including the instruction, because there was not substantial evidence that the statute had been violated. (*Id.* at 984-986.)

The court explained:

> The People's witnesses testified appellant was knowingly and unlawfully resisting both Deputy Macias and Detective McGuffin through the use of force or violence. Appellant had to be physically taken to the ground by Detective McGuffin because he refused to comply with Deputy Macias's repeated orders to remove his hand from his duffle bag. Appellant failed to comply with several officers' repeated orders to relax and Macias's orders to "stop resisting." He continued to struggle with Macias and McGuffin, as well as several other officers. Macias attempted to control appellant's torso, while three other detectives attempted to control appellant's arms. Appellant placed his hands and arms underneath his body, was "yelling, kicking, [and] cussing," and said he would "kick [the officers'] ass[es]." Appellant continued to squirm and refused to give his right hand to Macias. Appellant did not comply until after Lieutenant Rothans administered the use of pepper spray. There was no contrary evidence disputing the officer's description of the struggle on the floor. Hence, the jury would have had no rational basis to conclude appellant wrestled with the officers, for which they convicted

> him of resisting or delaying an officer, but the struggle did not involve force or violence; accordingly, the trial court properly instructed the jury by not instructing it with section 148, subdivision (a) as a lesser included offense.

(*Id.* at 985-986.)

D. Analysis

The trial court properly noted that section 148, subdivision (a)(1), was a lesser included offense of section 69. (1 C.T. pp. 170-172; 4 R.T. pp. 1808, 1874-1877, 3003-3004.) This was consistent with the holding in *People v. Lacefield, supra*, 157 Cal.App.4th at 259-261. Under the statutory elements test, the Court of Appeal rejected the analysis in *Lacefield*, and instead, relying on *Belmares* and *Lopez*, it opined that "[l]ooking at the statute as a whole," section 148 was not a lesser included offense of section 69, under the second theory of resisting with force. (Ex. A, p. 7.)

The Court of Appeal opined that *Lacefield* had not cited any authority for applying the statutory elements test "to just half of the statute." (*Ibid.*) First, the absence of any such authority did not invalidate the conclusion reached in *Lacefield*. That is how precedents are set. Second, *Lacefield* did not simply apply the test to "half of the statute." Since section 69 criminalizes conduct under two separate theories, *Lacefield* properly focused its analysis on the second type offense of forcible resistance.

In re Manuel G., supra, 16 Cal.4th 805, is instructive. There, when explaining the two separate ways which section 69 could be violated, this

Court noted, "Because the minor is accused only of attempting by threats to deter or prevent an officer from performing a duty imposed by law, we are concerned here only with the first type of *offense* under section 69." (*Id.* at 814; emphasis added.) It appears that this Court viewed each of the two separate theories of culpability under the statute, as a separate "offense." (*Ibid.*)

As relevant here, this Court has also defined a lesser necessarily included offense as follows:

> [A] lesser offense is necessarily included in a greater *offense* if either the statutory elements of the greater *offense*, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations omitted.]

(*People v. Birks*, *supra*, 19 Cal.4th at 117; emphasis added.)

Reading *Manuel G.* and *Birks* together, whether section 148, subdivision (a)(1) is a lesser included offense of section 69, depends on which "type of offense" is alleged and presented to the jury under section 69. The Court of Appeal's analysis contradicts and/or ignores the distinction this Court has drawn between the two offenses under section 69, with each offense deserving a distinct analysis in terms of what constitutes a lesser included offense.

More importantly, *Lopez* and *Belmares* were wrongly decided. First, the court in *People v. Lopez*, *supra*, 129 Cal.App.4th at 1532, did not offer

an original discussion on the issue, but simply reiterated the holding in *Belmares*. As the court in *Lacefiled* noted, *Belmares* did not observe the distinction drawn between the two types of offenses under section 69, and mainly focused on the deterrence element of the first type offense. (*People v. Blemares*, *supra*, 106 Cal.App.4th at 24-26; *In re Manuel G.*, *supra*, 16 Cal.4th at 814.) The Court of Appeal here did not address this shortcoming. (Ex. A, p. 7.)

In addition, the Court of Appeal reached the same conclusion under the accusatory pleading test. (*Id.* at 7-8.) However, the accusatory pleading test was not relevant here. As the Court of Appeal recognized, while the information alleged both types of offenses under section 69 in count 2, the prosecution ultimately elected to proceed on the second type offense. (*Ibid.*) As such, the Court of Appeal itself agreed that the issue should be evaluated under the statutory elements test. (*Id.* at 7.)

Finally, the Court of Appeal opined that even if section 148, subdivision (a)(1) was a lesser included offense, there was not substantial evidence to have justified giving the instruction. (*Id.* at 7-8.) This was, in fact, the trial court's reasoning. (1 C.T. pp. 170-172; 4 R.T. pp. 1808, 1874-1877, 3003-3004.) Petitioner submits this was error.

The information alleged a violation of section 69 in count 2, based on both theories of attempted delaying of the deputies in the lawful

performance of their duties, as well as actually resisting with force. (1 C.T. p. 72.) In the end, the prosecution proceeded under the second prong of actual use of force. (1 C.T. pp. 170-171; 4 R.T. pp. 1802-1808, 1874-1875.) In its closing, the prosecution argued that petitioner used this force by hitting Deputy Baker after he took him to the ground. (4 R.T. pp. 1838-1839.)

The defense pointed out that petitioner was merely concerned about his legal paperwork and was not making "any aggressive moves" toward the deputy, but for simply refusing to follow commands, Baker "grabbed him" and "slammed him down to the ground." (4 R.T. pp. 1859-1860.) This, petitioner argued, was excessive and unreasonable force by the deputy, who was considerably larger in size than petitioner was. (4 R.T. pp. 1860-1862.)

Pursuant to CALCRIM No. 2671, the court also instructed the jury that an officer using "unreasonable or excessive force" was not lawfully performing his duties, in which case, the defendant could "lawfully use reasonable force" in self-defense. (1 C.T. p. 171; 4 R.T. pp. 1817-1820, 1876-1877.) Clearly, the court opined there was substantial evidence from which the jury could infer that Baker had used excessive force, as, in fact, he had.

Baker testified that after having ordered petitioner to face the wall, he eventually moved toward petitioner, placed his hand on petitioner, grabbed his left wrists with his left hand, placed his right hand on the center of his back and told him to face the wall. (3 R.T. pp. 1210-1212, 1240-1241, 1271-1272.) Baker was taller and heavier than petitioner was. (3 R.T. pp. 1242-1243.)

Baker then handcuffed him, and as he felt that petitioner was becoming "tense," he swung around and took him to the ground. (2 R.T. pp. 1212, 1241-1242, 1272-1273, 1283.) Once on the ground, petitioner hit Baker, but shortly after, he was subdued by Baker and Esquedo who wrestled and repeatedly struck him in the midsection and by Lim who applied pepper spray into his eyes. (3 R.T. pp. 1214-1217, 1239, 1241, 1243, 1256, 1259, 1272-1276, 1278-1279, 1283-1286, 1289.)

As it follows, there was substantial evidence from which the jury could have found that given Baker's size, he could have simply handcuffed petitioner. The jury could have, therefore, concluded that swinging around and slamming petitioner to the ground was excessive and unreasonable force, and that in hitting Baker, petitioner was responding to the deputy's use of unlawful force. (*People v. Lacefield, supra*, 157 Cal.App.4th at 261.)

The jury could have also found that petitioner's kicking and screaming while on the ground was the result of the pepper spray, not an

attempt to resist. (3 R.T. pp. 1216-1217, 1243, 1244-1257, 1260, 1263-1264, 1278-1279, 1285.) Finally, the jury could have found that petitioner's repeated refusal to face the wall constituted a verbal interference with the deputies' performance of lawful duties, but nothing more. (*Ibid.*)

If so, the jury could have, at most, convicted petitioner of a violation of section 148, subdivision (a)(1), whereas, the absence of the instruction forced 'an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other.' (*People v. Lacefield, supra*, 157 Cal.App.4th at 262, quoting *People v. Birks, supra*, 19 Cal.4th at 119, 127.) Therefore, the error was not harmless and requires reversal. (*People v. Lacefield, supra*, 157 Cal.App.4th at 262.)

To further illustrate this point, the prosecution alleged and presented both theories of attempted delaying and resisting with force in count 5. (1 C.T. pp. 73, 170-172, 179; 4 R.T. pp. 1802-1808, 1874-1877, 1885-1886.) The first theory was put forth based on petitioner's comments that if the deputies attempted to approach him, he would get "physical." (2 R.T. p. 630; 4 R.T. pp. 1836-1837.) According to the prosecution, petitioner was also guilty under the second prong, by throwing the bowl containing excrement, at the deputies. (2 R.T. pp. 638-639, 656, 658, 660-661, 664; 4 R.T. pp. 1837-1838.)

Based on the testimony and the videotape of the incident, arguably, there was not substantial evidence that petitioner was using lawful force when throwing the bowl. (1 C.T. pp. 150-157; 2 R.T. pp. 633-636; 3 R.T. pp. 1567-1572, 1634.) As such, the court did not necessarily err in refusing to give the lesser included instruction in count 5. (1 C.T. pp. 170-172; 4 R.T. pp. 1808, 1874-1877, 3003-3004.) The same cannot be said of count 2.

Unlike the defendant in *People v. Carrasco*, *supra*, 163 Cal.App.4th at 984, here, petitioner did not hit Baker when he attempted to handcuff him, but did so after Baker slammed him to the ground. (3 R.T. pp. 1215-1216.) Of course, the context of petitioner's refusal to face the wall is also very important, as petitioner was merely concerned about his legal documents. (3 R.T. pp. 1208, 1210, 1236, 1238, 1277.)

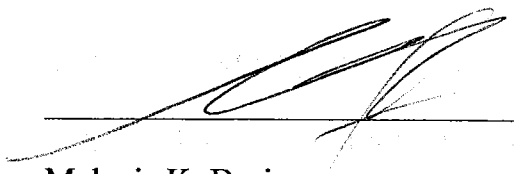
Thereafter, petitioner was repeatedly struck and eventually pepper sprayed. (3 R.T. pp. 1216-1217, 1239, 1241, 1243, 1256, 1259, 1272-1276, 1278-1279, 1283-1286, 1289.) Therefore, the jury could have found that any resistance he displayed was in direct response to Baker's initial use of excessive force. For these reasons, the Court of Appeal erred in finding that the failure to give the instruction was not error. (*People v. Breverman*, *supra*, 19 Cal.4th at 177-178; *Conde v. Henry*, *supra*, 198 F.3d at 739-740.) Therefore, the petition for review should be granted.

CONCLUSION

For the foregoing reasons, petitioner submits this Court should review his case.

Dated: March 26, 2012

Respectfully submitted,



Melanie K. Dorian
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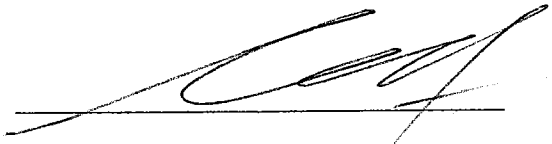
DEWONE T. SMITH

CERTIFICATE OF WORD COUNT

People v. Dewone T. Smith
No. _____
2 Crim. B223181
Los Angeles County No. BA337647

Pursuant to rule 8.504(d) of the California Rules of Court, I, Melanie K. Dorian, appointed counsel for Dewone T. Smith, hereby certify that I prepared the foregoing Petition for Review on behalf of my client, and that the word count for this brief is 4,236, excluding tables and the Court of Appeal opinion.

This brief therefore complies with the rule which limits a computer-generated brief to 8,400 words. I certify that I prepared this document in Word, and that this is the word count Word generated for this document.



Melanie K. Dorian
Attorney for Petitioner
DEWONE T. SMITH

EXHIBIT A

Filed 2/24/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DEWONE T. SMITH, Defendant and Appellant.	B223181 (Los Angeles County Super. Ct. No. BA337647)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jose I. Sandoval, Judge. Affirmed with directions.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Ryan M. Smith, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Dewone T. Smith appeals from the judgment entered following a jury trial in which he was convicted of custodial possession of a weapon (Pen. Code, § 4502, subd. (a); undesignated statutory references are to the Penal Code), two counts of resisting an executive officer (§ 69), and three counts of battery by gassing (§ 243.9, subd. (a)), crimes committed in the county jail. Defendant had previously been treated for mental illness while incarcerated in state prison and, upon parole, treated by the State Department of Mental Health as a "prisoner [having] a severe mental disorder."

Defendant contends the trial court erred by refusing to instruct on misdemeanor resisting a peace officer (§ 148, subd. (a)(1)) as a lesser included offense and that it abused its discretion by denying his motion to vacate three or more "strike" findings under section 1385 and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*). We affirm defendant's conviction but vacate his 150-years-to-life sentence and remand for the trial court to reconsider defendant's *Romero* motion and its exercise of sentencing discretion because the trial court abused its discretion by failing to consider several very significant factors: defendant's mental illness, the impropriety of defendant's incarceration in the county jail at the time of the commitment offenses, the combined effect of defendant's improper incarceration in county jail and mental illness, and the relatively minor nature of the commitment offenses. In addition, the court's comments indicate it may have been unaware of the variety of ways in which it could exercise its discretion to impose something less than the sentence it admittedly found "excessive."

BACKGROUND

Defendant had several prior convictions, including an April 2000 conviction for involuntary manslaughter. Defendant was paroled on that case in February 2003, but his parole was revoked after he was convicted in September 2004 of driving under the influence in violation of Vehicle Code section 23152, subdivision (b). While he was back in prison, six new charges were filed against defendant and ultimately consolidated under Los Angeles County Superior Court case No. MA032128: five counts of battery by

gassing on a correctional officer (§ 4501.1, subd. (a)) and one count of making a criminal threat (§ 422). Defendant was "paroled" to the custody of the Los Angeles County Sheriff's Department on October 27, 2006, apparently for trial of these charges. On April 30, 2007, defendant pleaded no contest to two violations of section 4501.1, subdivision (a) and the criminal threat charge. On May 25, 2007, the court granted defendant probation, but on June 20, 2007, the court resentenced him to four years eight months in prison and awarded him 864 days of presentence credit. The court's minute order stated, "The defendant is ordered to be transported to state prison forthwith." Yet for causes not explained in the record before us, the Los Angeles County Sheriff never transported defendant to a state prison to serve the remainder of his sentence in case MA032128, but instead left him in the county jail, where he engaged in misconduct giving rise to the convictions in the present case.

The first incident involved in the present case occurred on February 7, 2008, following several days of insults exchanged between defendant and a Hispanic inmate in the same "security level nine" module. (Undesignated date references are to 2008.) Sergeant Mark Renfrow, who was in charge of discipline in the men's central jail, believed there would be a race riot when the inmates in the module were let out for their weekly "roof time" recreation on February 7, so he brought in extra deputies to respond. When the cell doors were opened, two inmates charged toward defendant, who raised one hand above his head. Renfrow saw that defendant was holding a shank. Deputies fired rubber-pellet shotguns and all inmates dropped to the floor. Renfrow recovered defendant's shank, which was made of a short pencil tied to two spoons. Defendant explained that he had the shank for protection because "when you go up against more than two, you need a little help." Defendant was placed in disciplinary housing for 30 days, which Renfrow felt was an appropriate discipline. Generally, possession of a weapon in jail resulted in 15 to 30 days in disciplinary housing. Although Renfrow testified that "more often than not" a jail inmate's violation of rules—even fighting with a deputy—results in only internal administrative discipline, not criminal charges, the

district attorney charged defendant with custodial possession of a weapon based upon this incident.

The next incident occurred on April 21 when defendant and six to eight other inmates were being moved out of a cellblock that housed potential "K10" high security inmates and into the general population. The inmates were supposed to face a wall while a single deputy searched every inmate's plastic bag of personal property for contraband. Several other deputies watched the inmates. Defendant repeatedly looked back toward the deputies and asked them not to lose his paperwork and important legal documents. Deputy Deloy Baker told defendant three times to face the wall and be quiet. When defendant again looked back, Baker moved toward defendant, placed one hand on defendant's back, pulled defendant's left wrist up behind defendant's back, and, in Baker's words, "assisted [defendant] to face the wall." Baker was going to handcuff defendant, but after a few seconds, defendant became tense, clenching his hands and breathing heavily. Baker ordered defendant to place both hands behind his back, but defendant "spun to his left," and Baker "swung around and took [defendant] down." Baker lost his footing and fell down next to defendant. While both were on their knees, defendant punched Baker twice in the face. Baker stood, then he and other deputies began fighting with defendant. Baker repeatedly punched defendant in the head and face and Deputy Adolph Esqueda repeatedly punched defendant in the midsection. Deputy Lim sprayed defendant in the face with pepper spray several times. According to Esqueda, defendant quickly stopped fighting, but according to Baker, the pepper spray seemingly did not affect defendant, who continued to fight. At some point, the deputies subdued and handcuffed defendant. Defendant was charged with resisting an executive officer. About 18 months after the incident, after speaking with the prosecutor, Esqueda wrote a supplemental report reflecting that after defendant was handcuffed he said, "Fuck you Baker, I knocked your ass out, I got you."

An incident on September 11 gave rise to three charges: resisting an executive officer and two counts of battery by gassing. Defendant had been let out of his cell to

retrieve his breakfast from the dayroom and was refusing to go back into his cell and to attend court. After a sergeant attempted to negotiate defendant's return to his cell, Mark Tadrous, Monty Gudino, and other deputies were summoned to form an emergency response team to handcuff defendant. Another deputy videotaped the events and the video was shown at trial. (We have also watched the video.) As the team of deputies entered the day room, defendant repeatedly yelled at the deputies, urging them to "shoot." When the deputies got near him, he threw the contents of a bowl at them. Tadrous and Gudino were struck on their arms and uniforms with a mixture of urine and feces. Deputies repeatedly fired plastic and foam bullets and a Taser at defendant, who eventually fell to the ground. Deputies handcuffed defendant and took him to the clinic, where a physician removed a Taser dart from defendant's arm. Throughout his time in the clinic, defendant made statements such as, "I needed that man," "I love it. I love it," "No pain, no gain. I love pain. In fact, it didn't even hurt," "I'm fine, I'm excellent. Yea, I feel like a giant man. Uh, yea, ya know, some would say that's a love tap. Yea. Love it," "Don't trip, I need that ah, that ah, you know, like Batman, he got that energy flow," "That shit felt good though. That shit felt good. I'm gonna have to try that some more," and, "Hit me one more time, don't trip. Hit me again, I like it man, it was fun. Shit felt good man."

The third battery by gassing occurred on September 13, when defendant somehow sprayed a mixture of urine and feces onto Deputy Bensobhi Ben-Sahile's face and neck as the deputy checked on defendant through the solid door of a disciplinary cell. As a result, Ben-Sahile suffered an eye infection and missed work for three days.

The jury convicted defendant of custodial possession of a weapon, two counts of resisting an executive officer, and three counts of battery by gassing. Defendant admitted that four prior convictions alleged as strikes were his, but argued that three of them were not strikes within the scope of the "Three Strikes" law. The trial court found that all four were strikes. Defendant moved to dismiss the strike findings. The court denied the

motion and sentenced defendant to six consecutive third-strike terms of 25 years to life, for a total of 150 years to life in prison.

DISCUSSION

1. Refusal to instruct on section 148 as lesser included offense

Section 69, under which defendant was charged and convicted, states, "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment." "The statute sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814.) The first form of a violation of section 69 "encompasses attempts to deter *either* an officer's *immediate* performance of a duty imposed by law *or* the officer's performance of such a duty at some time *in the future*." (*Manuel G.*, at p. 817.) The second form of violating section 69 "assumes that the officer is engaged in such duty when resistance is offered," and "the officers must have been acting lawfully when the defendant resisted arrest." (*Manuel G.*, at p. 816.)

The trial court considered instructing upon a violation of section 148 as a lesser included offense of section 69, but ultimately decided not to do so because it concluded the evidence did not support a conviction of only the lesser offense. Defendant contends that for count 2 (pertaining to Baker), section 148, subdivision (a)(1) was a lesser included offense of section 69 and the trial court was required to instruct upon it. Section 148, subdivision (a)(1) states, "Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a

fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment."

An offense is necessarily included in another if either the statutory elements of the greater offense or the facts alleged in the accusatory pleading include all of the elements of the lesser offense, so that the greater offense cannot be committed without also committing the lesser. (*People v. Birks* (1998) 19 Cal.4th 108, 117.)

With respect to the statutory elements test, there is a split of authority as to whether a violation of section 148, subdivision (a)(1) is necessarily included within a violation of section 69. (*People v. Belmares* (2003) 106 Cal.App.4th 19, 24 [not included]; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532 (*Lopez*) [not included]; *People v. Lacefield* (2007) 157 Cal.App.4th 249, 259 (*Lacefield*) [included within actual resisting form of section 69 under statutory elements test].) We agree with *Lopez* and *Belmares* because an attempt to deter or prevent an officer from performing a duty at some time in the future violates section 69, but not section 148, subdivision (a)(1). *Lacefield* cited no authority for applying the statutory elements test to just half of the statute. Looking at the statute as a whole, it cannot be said that when a person violates section 69, he or she necessarily violates section 148, subdivision (a)(1). Accordingly, we follow *Belmares* and *Lopez*.

As for the accusatory pleading test, the information alleged count 2 as follows: "On or about April 21, 2008, in the County of Los Angeles, the crime of RESISTING EXECUTIVE OFFICER, in violation of PENAL CODE SECTION 69, a Felony, was committed by DEWONE T. SMITH, who did unlawfully attempt by means of threats and violence to deter and prevent ROWLAND, ESQUEDA, LIM, BAKER, MORENO, FARINO, who was [*sic*] then and there an [*sic*] executive officer [*sic*], from performing a duty imposed upon such officer [*sic*] by law, and did knowingly resist by the use of force and violence said executive officer [*sic*] in the performance of his/her duty." The information thus alleged defendant committed both forms of violating section 69 (*Lacefield, supra*, 157 Cal.App.4th at p. 255), and the statutory elements test governs (*Lopez, supra*, 129 Cal.App.4th at p. 1533).

As defendant correctly notes, during trial the prosecutor elected to proceed on only the second form of violating section 69 (actual resisting) as to count 2, and argued defendant committed the offense by punching Baker in the face. At the prosecutor's request, the trial court instructed the jury that in order to convict defendant of a violation of section 69 in count 2, the prosecutor must prove that "defendant used force or violence to resist an executive officer" when "the officer was performing his lawful duty." But established law requires that the determination of whether a lesser offense is necessarily included must be based on the statutory elements or accusatory pleading, not on events occurring during the trial. For example, "[t]he evidence adduced at trial is not to be considered in determining whether one offense necessarily is included within another." (*People v. Cheaves* (2003) 113 Cal.App.4th 445, 454.)

Even if section 148, subdivision (a)(1) were for some reason necessarily included within the violation of section 69 alleged in count 2, instruction would be required only if the trial court found substantial evidence that, if accepted by the trier of fact, would have absolved the defendant of guilt of the greater offense, but not of the lesser. (*People v. Blair* (2005) 36 Cal.4th 686, 745.) Defendant argues that the jury could have convicted him of a violation of section 148, subdivision (a)(1) if it concluded that Baker used excessive force against defendant, and defendant was merely responding to the unlawful use of force when he punched Baker. But an officer must be engaged in the lawful performance of his or her duty for conviction under either section 148, subdivision (a)(1) or the actual resistance form of violating section 69. (*People v. Simons* (1996) 42 Cal.App.4th 1100, 1108–1109; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409.) Thus, as the trial court instructed with respect to section 69, if the jury found that Baker were using unreasonable or excessive force, it was required to acquit defendant, not convict him of a different offense that also required the lawful performance of duty by a peace officer. In other words, there was no substantial evidence here that, if accepted by the trier of fact, would have absolved defendant of guilt of the greater offense (§ 69)

but not of the lesser (§ 148, subd. (a)(1)). Accordingly, the trial court did not err by refusing to instruct on section 148, subdivision (a)(1).

2. Denial of *Romero* motion

Defendant's four strikes were a 1989 juvenile adjudication of robbery, for which he was sent to the California Youth Authority (CYA), apparently for a "90-[day] diagnostic"; a 1995 federal conviction for armed bank robbery, for which he was sentenced to 51 months in prison; a 2000 involuntary manslaughter conviction, for which he received a four-year prison sentence; and the 2007 criminal threat conviction in case No. MA032128, for which he received an eight-month subordinate term.

Citing *Romero*, *supra*, 13 Cal.4th 497, defense counsel asked the trial court to vacate the strike finding with respect to the juvenile robbery adjudication because it was remote and no one could anticipate in 1989 that it would become a strike. He argued that the strike finding pertaining to the involuntary manslaughter conviction should be vacated because there was no finding he inflicted great bodily injury and he simply swung at a man who fell, hit his head, and died. He further asked the court to vacate the finding based on the federal bank robbery because it was in 1995 and "just saying bank robbery is not good enough for a strike." And he asked the court to vacate the strike finding based upon the criminal threat conviction because the eight-month sentence indicated it was "not that serious or not that violent."

In denying the motion, the trial court stated, "This is something I had frankly looked at from various angles and various sides as to whether or not given the current case law cited both by the People and by the defense whether or not this court can under its exercise of its discretion strike some of these strikes. And it—I take great pains to place on the record the fact that I fine-tooth combed this and, quite frankly, despite the fact that I may be motivated by some desire to decrease what the court must do in this case. Looking at the case law, looking at his record, looking at the probation department report, I genuinely do believe that it would be an abuse of discretion subject to reversal

should I strike the strikes. So I'm going to decline the request for the strikes to be stricken."

With respect to sentencing, defense counsel asked the court to consider defendant's mental illness as a mitigating factor and "pick[] the low term." He also argued that the current offenses "stem[med] from mental illness, isolation, many, many months in county jail. I think he's been there two and a half years. And all of these taken together just took him to the edge and caused his conduct." In response, the prosecutor noted that with the strike findings, there was no triad of terms: "It's all 25 to life."

Defense counsel then informed the court that defendant had just handed him a document reflecting his treatment by the Department of Mental Health, "Atascadero State Prison [*sic*]," pursuant to section 2962[1] as a prisoner who "has a severe mental disorder

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[1] Section 2962 provides, in pertinent part, as follows:

"As a condition of parole, a prisoner who meets the following criteria shall be required to be treated by the State Department of Mental Health, and the State Department of Mental Health shall provide the necessary treatment:

"(a)(1) The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment.

"(2) The term 'severe mental disorder' means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. The term 'severe mental disorder' as used in this section does not include a personality or adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances.

"(3) The term 'remission' means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person 'cannot be kept in remission without treatment' if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan. In determining if a person has voluntarily

that is not in remission or cannot be kept in remission without treatment." The court noted that defendant had been found to be competent at the start of proceedings in this case and the court had not been told of any "current mental condition that would have given me pause about whether or not he was competent to stand trial." Counsel agreed defendant was competent, but said he was trying to "inform the court maybe the reason behind his conduct."

As it imposed the sentence of 150 years to life, the court stated, "Let me just say that I do this with no pleasure. Quite frankly, and I'm admitting my large view here that this appears to be excessive. I'm not underplaying the suffering that would have been sustained by the deputies, I'm not underplaying the importance of maintaining a nonviolent environment in lockup, but I take no pleasure in enforcing this sentence. I do

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followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.

"(b) The severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison.

"(c) The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release.

"(d)(1) Prior to release on parole, the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health have evaluated the prisoner at a facility of the Department of Corrections and Rehabilitation, and a chief psychiatrist of the Department of Corrections and Rehabilitation has certified to the Board of Parole Hearings that the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior, that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, and that by reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others. For prisoners being treated by the State Department of Mental Health pursuant to Section 2684 [state prison inmates transferred to state hospital], the certification shall be by a chief psychiatrist of the Department of Corrections and Rehabilitation, and the evaluation shall be done at a state hospital by the person at the state hospital in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Corrections and Rehabilitation."

this because I'm properly looking at my authority and what my—what I'm required to do under appellate authority."

Defendant contends that the trial court abused its discretion by denying his *Romero* motion. He argues that his 1989 juvenile adjudication was remote, and nothing indicated the offense involved violence. But he primarily argues that the record demonstrates that he suffers from mental illness, the commitment offenses resulted from his poor reaction to years of isolation in the county jail when he should have been receiving treatment for his mental illness, and "[j]ustice would not be served by incarcerating a person who has been declared a mentally disorder[ed] offender for offenses that are mostly wobblers and for a period of 150 years to life . . . ."

A trial court has discretion under the Three Strikes law to dismiss or vacate prior conviction allegations or findings in the furtherance of justice. (§ 1385, subd. (a); *Romero, supra,* 13 Cal.4th at pp. 529–530.) In exercising this power, the trial court must consider the particulars of the defendant's background, character, and prospects; his constitutional rights; the nature and circumstances of the current and prior offenses; and the interests of society to decide whether the defendant may be deemed to be outside the anti-recidivist "spirit" of the Three Strikes law, in whole or in part. (*Romero*, at pp. 530–531; *People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).) The sentence a defendant receives on one of the current counts is also a relevant consideration with respect to the remaining counts. (*People v. Garcia* (1999) 20 Cal.4th 490, 500 (*Garcia*).) Thus, a trial court may vacate a strike finding with respect to some of the current offenses, while leaving the finding in effect with respect to others. (*Id.* at pp. 503–504.)

The trial court may also exercise its discretion pursuant to section 17, subdivision (b), to treat as a misdemeanor a "wobbler" offense charged as a felony. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 972–973, 979 (*Alvarez*).) Relevant factors include the nature and circumstances of the offense; the defendant's appreciation of and attitude toward the offense; his character, as evidenced by his behavior and demeanor at the trial; and the defendant's criminal history. (*Id.* at pp. 978–979.) All of

defendant's current commitment offenses except custodial possession of a weapon were wobblers.

The trial court's decision is reviewed deferentially. (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).) The "trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) The Three Strikes law "not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances," such as where the court was unaware of its discretion or considered impermissible factors. (*Id.* at p. 378.) "Moreover, 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce[] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case." (*Ibid.*) "Where the record is silent . . . or '[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]. Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Ibid.*)

Based upon our review of the record, we find the trial court abused its discretion by failing to consider several very significant factors: defendant's mental illness, the impropriety of defendant's incarceration in the county jail at the time of the commitment offenses, the combined effect of defendant's improper incarceration in county jail and

mental illness, and the relatively minor nature of the commitment offenses. In addition, the court's comments indicate it may have been unaware of the variety of ways in which it could exercise its discretion to impose something less than the sentence it admittedly found "excessive."

a. Mental illness

As far as the record reveals, the trial court did not consider defendant's mental illness as a factor in ruling upon defendant's *Romero* motion. Although defense counsel mentioned defendant's mental illness in passing in his written motion, and in his sentencing memorandum, he did not argue it at the hearing on the *Romero* motion as a reason the court should vacate the strike findings, and the court did not refer to it. After the court denied the motion, counsel argued that because of defendant's mental illness the court should select the low term on the current offenses. Of course, after the denial of the *Romero* motion, the only term available was 25 years to life, unless the court decided to treat the five counts that were wobblers as misdemeanors.

The record provides ample evidence of defendant's mental illness. In sentencing defendant in 1995 for federal bank robbery, United States District Court Judge Gary Taylor ordered, as a term of defendant's ultimate supervised release following incarceration, "The defendant shall participate in a psychological/psychiatric counseling or treatment program, as approved and directed by the Probation Officer." When Los Angeles Superior Court Judge James Brandlin sentenced defendant to prison for involuntary manslaughter in April of 2000, he ordered that "defendant receive psychiatric counseling while in prison." The incident giving rise to the criminal threats conviction in case No. MA032128 occurred when "defendant was participating in the mental health services delivery system at the enhanced outpatient program level of care" in a state prison. And the Department of Corrections and Rehabilitation's chronological history for defendant includes the following entry dated October 19, 2006: "Prisoner meets criteria for treatment by DMH [Department of Mental Health] as a condition of parole, per 2962 P.C. Treatment by DMH is ordered as a special condition of parole." That is to say,

defendant was found to have a "severe mental disorder requiring treatment." (See *ante*, fn. 1.)

In the course of the proceedings in this case, counsel twice declared a doubt as to defendant's competency. Psychiatrist Gordon Plotkin prepared two reports. In the first, he reached no opinion due to insufficient data and defendant's failure to cooperate. In the second, he opined that defendant was competent. He believed that defendant was "embellishing symptoms," but might have bipolar disorder.

In his second report, Plotkin reviewed defendant's medical records from the Department of Corrections and Rehabilitation and reported, "The psychiatric records date back to 2000, when he was first started on Prozac (the antidepressant medication), Trazodone (a sedating antihistamine-like antidepressant which is frequently abused in corrections), and Benadryl (which is also sedating and frequently abused). He was tried on the mood stabilizer, Depakote, and an antipsychotic medication and mood stabilizer, Risperdal. . . . [I]t was noted that he had a long history of anger and impulse control problems, mood swings, poor sleep, history of auditory hallucinations and paranoia, and had made a suicidal gesture in 1-02 while in corrections. They noted cognitive difficulties, grandiose and narcissistic features in his personality. He had several CDC 115's [disciplinary actions] in a three week period. He had been treated in mental health reported in CYA, CDC [California Department of Corrections], and in juvenile hall. Other than the CDC treatment, this has not been validated. Reportedly, he was shot in the head twice and a bullet is still there. His thinking was concrete and he has routinely been given the diagnosis of Schizoaffective Disorder and Antisocial Personality Disorder. When seen in prison, he sometimes will have pressured speech, report auditory hallucinations or paranoia which are almost always reported as minor. . . . He reported auditory hallucinations since age 19, suicide attempts starting at age 16 (taking asthma pills, and attempted hanging in 2002 while he was in corrections). At best, these appear to be just suicidal gestures rather than true suicide attempts. He reported paranoia of the 'justice system,' something which is repeated frequently in the chart. He has been noted

as 'hypomanic' during observation as noted in the corrections chart. He has threatened to hang himself if he was taken to Ad Seg (the administrative segregation unit), and has at other times reported that he would harm himself in order to manipulate for placements."

Dr. Plotkin noted that sometimes defendant demanded additional medication and other times he refused to take his medication. Plotkin further reported that from mid-2000 through September of 2002, defendant "had reports of auditory hallucinations and was tried on numerous medications." "In early 2005 through 12-05, he had gassing attempts on staff, frequently was pepper sprayed, angry, hostile, was noted as hitting his hand on a door causing superficial wounds, one time punched the door and broke his finger (stating that inmates were trying to hurt him) and he stated at one point, 'I'm going to cut myself if you send me back.' . . . He said he wanted a cut to become infected. He threatened staff and made suicide threats during manipulations. . . . He frequently complained after he was pepper sprayed. He was noted to complain of suicidal ideation after he had reportedly gassed staff, along with reported voices and poor sleep. Throughout 2005, he was tried on numerous medications, many of which are sedating, some mood stabilizing antipsychotics, but eventually on sedating antipsychotics and antihistamines, Prozac, and a mood stabilizing medication, Depakote. He threatened to hang himself if he was placed in Administrative Segregation in 2000. He complained frequently he had paranoia of the 'justice system.' [¶] After the 'gassing' episodes from 12-05 through 10-06, he was again treated with the sedating antihistamine antidepressant, Trazodone, along with Prozac, Haldol, and sometimes Depakote, and other times given Cogentin for the side effects of the Haldol."

In addition, defendant's conduct and statements in the course of the commitment offenses, the offenses in case No. MA032128, and the disciplinary incidents to which Plotkin referred tend to reflect defendant's mental illness. For example, although Plotkin reported defendant "frequently complained after he was pepper sprayed" and wanted to avoid administrative segregation, defendant nonetheless continued to engage in behavior that resulted in him being pepper sprayed "frequently" and placed in administrative

segregation. The recording of the September 11 incident, which gave rise to three of the current commitment offenses, reveals numerous bizarre statements by defendant that may be viewed as reflecting his mental illness. For example, his repeated entreaties to the deputies to "shoot" at him, and his statements in the clinic that he "needed," loved, and was energized by the Taser shocks, which he said were "fun" and "felt good."

A mental condition that significantly reduces culpability for a crime is a mitigating factor (Cal. Rules of Court, rule 4.423(b)), and defendant's apparent mental illness was clearly a material factor pertaining to defendant's background, the nature and circumstances of the current and prior offenses, and society's interests that the trial court should have considered in deciding whether to vacate some or all of the strike findings or treat the wobblers as misdemeanors, or both. Based upon its remarks at the sentencing hearing, the trial court seemingly failed to understand that it could and should consider defendant's mental illness for these purposes, even though defendant was competent to stand trial. As noted in the April 2011 final report of the Task Force for Criminal Justice Collaboration on Mental Health Issues established by former Chief Justice Ronald M. George, "Functional impairments can make it difficult for inmates with mental illness to abide by the myriad jail and prison rules. Not surprisingly, these individuals are often at higher risk for being charged with facility rule violations and prison infractions. . . . [P]risoners with mental illness are more likely to be placed in administrative segregation than the general inmate population. Isolation and segregation can exacerbate symptoms of mental illness, however." (Jud. Council of Cal., Admin. Off. of Cts., Task Force for Criminal Justice Collaboration on Mental Health Issues: Final Rep. (Apr. 2011) p. 31, fn. omitted.) Upon remand, the trial court should consider whether lifetime incarceration for an apparently mentally ill offender who has difficulty abiding by jail rules best serves the interests of society and is otherwise appropriate under *Romero*, *Williams*, and *Carmony*.

b. Impropriety of incarceration in county jail and effect upon defendant's mental illness

The most confounding aspect of this case was why, at the time of the commitment offenses, defendant was not in prison, where he was supposed to be serving his term in case No. MA032128 and could have been receiving treatment for his mental illness, but was instead incarcerated in the Los Angeles County jail. Just before trial began, the court asked, "What was he in custody for?" The prosecutor replied, "That I'm not sure of. Counsel and I have discussed it. It is not clear to me." The court asked, "Is that going to be brought up? Does it matter?" The prosecutor said he did not expect to bring it up, and defense counsel said, "No, it is not an issue." Defense counsel then explained that defendant had been sentenced to prison on a different gassing case, but "came here" instead of going to prison. The court did not allow defendant to explain the situation when he attempted to do so, but after defendant conferred with counsel, counsel told the court that "at one point [defendant] was declared incompetent" and "then he was to go to Atascadero State Prison [*sic*] for further evaluation on a 1368, and he never got there because they didn't have a bed or didn't have room." Defendant attempted to correct these statements, but the court did not permit him to do so. Defense counsel continued, "He is trying to explain to you, he shouldn't have been here. He should have went [*sic*] to Atascadero or Patton, but he didn't go, although he was ordered to go." The court stated, "That is not an issue." Counsel then agreed, "Not an issue here in this case." Defendant protested: "I've been having this case go on for over a year now. I supposed to have been somewhere else. I'm stuck here. They held me in county jail, set me up with these cases, knowing that I take medication and all that. I have to take shots. [¶] And he is talking about, oh, that don't matter. That does matter, man, because I'm supposed to have been somewhere else. I'm not being heard appropriately. . . . [¶] . . . [¶] All in county jail, it's all messed up there. They don't give me no treatment or nothing."

Defendant attempted to raise the impropriety of his incarceration in the county jail again during trial, to no avail. He also argued the point before trial during a hearing on

his motion to replace his appointed attorney and after the court imposed the sentence of 150 years to life.

Sections 1215 and 1216 imposed a duty upon the Los Angeles County Sheriff to "take and deliver the defendant to the warden of the state prison" "forthwith." In addition, on June 20, 2007, the trial court in case No. MA032128 ordered the sheriff to transport defendant to prison "forthwith." With no explanation in the record as to why, the sheriff did not transport defendant to prison to serve his sentence in case No. MA032128. Defendant inappropriately remained in the county jail, and, as far as the record reveals, he was not housed in the jail's psychiatric unit. Because defendant was never transferred to prison, he was improperly incarcerated in jail and deprived of the mental health treatment he could have received in state prison through the Department of Corrections and Rehabilitation Mental Health Services Delivery System, or through a transfer by the Department of Corrections and Rehabilitation to a state mental facility for inpatient care. Simply put, defendant should not have been in county jail to commit the offenses giving rise to the 150-years-to-life term. He should instead have been in state prison, receiving appropriate treatment for his mental illness. The sheriff's not transporting defendant to prison "forthwith," as required by the trial court's order and sections 1215 and 1216, created unusual and inappropriate conditions—for which defendant was blameless—that placed the sheriff's deputies in the difficult position of dealing with defendant and gave rise to the commission of the charged offenses.

As far as the record reveals, when the court ruled upon defendant's *Romero* motion and exercised its sentencing discretion, it did not consider the crucial factor of the impropriety of defendant's custody in the jail at the time of the commitment offenses and the effect this had upon defendant's mental illness. Indeed, it appears the court accepted defense counsel's repeated assurances that the site of defendant's incarceration was "not an issue." While it is, to at least some extent, understandable that the trial court disregarded an issue that defense counsel repeatedly disclaimed, we believe the trial court's failure to consider the inappropriateness of defendant's incarceration in the county

jail at the time of the commitment offenses—and the effect this had upon his mental illness and behavior—was nonetheless an abuse of discretion. (We further note that were we to consider the issue forfeited by trial counsel, the same point would need to be resolved in the context of a habeas corpus petition alleging ineffective assistance of trial counsel. Directing the trial court upon remand to consider the impropriety of defendant's jail incarceration, along with the other factors discussed herein, thus promotes the efficient use of judicial resources.)

c. Relatively minor nature of commitment offenses

Another factor the court could have considered in relation to its discretion to ameliorate its "excessive" sentence is that the current offenses were actually relatively minor in nature. Sergeant Renfrow, who was in charge of inmate discipline for the entire men's central jail, testified that "more often than not" a jail inmate's violation of rules, including fighting with a deputy, results in only internal administrative discipline, not criminal charges. Thus, each of these offenses might have been handled solely through internal jail discipline and never have been the subject of a criminal prosecution, let alone a Three Strikes case. Except for the single charge of custodial possession of a weapon, each offense of which defendant was convicted was a wobbler. The court could have exercised its discretion to sentence five of the six counts as misdemeanors and impose a felony term—whether or not under the Three Strikes Law—only for the weapon conviction. (*Alvarez, supra,* 14 Cal.4th at pp. 972–973, 979.)

We do not intend to diminish the indisputably obnoxious nature of defendant's conduct in gassing the deputies. But, according to Deputy Tadrous, gassing happens "regularly" in the jail system and, as the record reveals, the only person (other than possibly defendant) who was injured in the course of any of the commitment offenses was Deputy Ben-Sahile, who contracted an eye infection. In the grand scheme of things, defendant's commitment offenses were relatively minor. Although that is not a bar to imposition of a third-strike sentence, it is a factor the trial court is required to consider in deciding how to exercise its sentencing discretion.

In addition, the nature and circumstances of the commitment offenses are inextricably linked with defendant's mental illness and the impropriety of his incarceration in the county jail.

d. Conclusion

The trial court expressly recognized that the 150-years-to-life sentence it imposed upon defendant was "excessive." Based upon our review of the record, we conclude that the trial court abused its discretion by failing to consider several very significant factors: defendant's mental illness, the impropriety of defendant's incarceration in the county jail at the time of the commitment offenses, the combined effect of defendant's improper incarceration in county jail and mental illness, and the relatively minor nature of the commitment offenses. In addition, the court's comments indicate it may have been unaware of the variety of ways in which it could exercise its discretion to impose something less than the sentence it admittedly found "excessive." We conclude that this case presents the "even more extraordinary" "circumstances where no reasonable people could disagree that" defendant falls fully or partially outside the spirit of the Three Strikes scheme and that application of the Three Strikes law to its maximum extent to impose a 150-years-to-life sentence produces an "'"arbitrary, capricious or patently absurd" result' under the specific facts of [this] case." (*Carmony*, *supra*, 33 Cal.4th at p. 378.) Accordingly, we remand for the trial court to reconsider defendant's motion and the court's sentencing decision in light of the factors and sentencing options discussed herein. (*Romero*, *supra*, 13 Cal.4th at pp. 529–530; *Garcia*, *supra*, 20 Cal.4th at pp. 503–504; *Alvarez*, *supra*, 14 Cal.4th at pp. 972–973, 979.)

DISPOSITION

The judgment is affirmed. The sentence is vacated and the cause remanded to the trial court for reconsideration of defendant's motion to vacate the strike findings under Penal Code section 1385, *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, and *People v. Garcia* (1999) 20 Cal.4th 490, and consideration of treatment of wobbler offenses as misdemeanors under Penal Code section 17, subdivision (b) and *People v.*

Superior Court (*Alvarez*) (1997) 14 Cal.4th 968. In exercising its sentencing discretion, the trial court shall consider defendant's mental illness, the impropriety of defendant's incarceration in the county jail at the time of the commitment offenses, the combined effect of defendant's improper incarceration in county jail and mental illness, and the relatively minor nature of the commitment offenses. In addition, the court should consider the variety of ways in which it can exercise its discretion to impose something less than the sentence it admittedly found "excessive."

CERTIFIED FOR PUBLICATION.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.

PROOF OF SERVICE

Re: People v. Dewone T. Smith

I, Melanie K. Dorian, declare that I am over 18 years old; my business address is P.O. Box 5006, Glendale, California 91221-5006.

On March 26, 2012, I served a true copy of APPELLANT'S PETITION FOR REVIEW, by first class mail, on the following parties:

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FOR DELIVERY TO:
Hon. Jose I. Sandoval, Judge

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 26, 2012, at Glendale, California.

MELANIE K. DORIAN