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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DARLENE A. VARGAS, Defendant and Appellant.	) No. _____))) 2 Crim. B231338))) Los Angeles County) Case No. KA085541)

SUPREME COURT
FILED

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PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)	
)	
Plaintiff and Respondent,	) No. S_____
)	
v.	) 2d Crim. B231338
)	
DARLENE A. VARGAS,	) Los Angeles County
	) Case No. KA085541
Defendant and Appellant.	)
_____)	

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 Petitioner, Darlene A. Vargas ("petitioner"), respectfully petitions this Honorable Court for review in the above-entitled matter following the filing of an opinion by the Court of Appeal of the State of California, Second Appellate District, Division Eight, which affirmed the judgment. A copy of the published opinion, filed on June 4, 2012, is attached as Exhibit A.

ISSUES PRESENTED FOR REVIEW

1. Where the alleged prior strike convictions arise from a single act, is it an abuse of discretion for a trial court to refuse to dismiss one of these priors under the Three Strikes Law?

2. Where the alleged prior strike convictions arise from a single act, it is an abuse of discretion for a trial court to refuse to consider this factor when sentencing a defendant pursuant to the Three Strikes Law?

3. Is an indeterminate life sentence imposed under the Three Strikes Law and based on two prior strikes arising from the same conduct, cruel and/or unusual punishment under California and/or federal constitutions?

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 current split of authority concerning a court's duty and/or discretion to dismiss one of the two prior strikes arising from the same conduct, pursuant to Penal Code section 1385,[1] and under state and federal constitutions. (*People v. Benson* (1998) 18 Cal.4th 24; see *People v. Scott* (2009) 179 Cal.App.4th 920, and *People v. Burgos* (2004) 117 Cal.App.4th 1209.)

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

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'S REFUSAL TO STRIKE ONE OF THE TWO 1999 FELONY CONVICTIONS ARISING FROM THE SAME ACT WAS REVERSIBLE ERROR, AND THE COURT OF APPEAL'S DECISION TO THE CONTRARY WARRANTS REVIEW

Petitioner distinguished the circumstances that gave rise to her two prior strikes from those presenting in *Benson*. Accordingly, petitioner argued that, *in her case*, the trial court's failure to dismiss one of her two convictions arising from the same act must be deemed an abuse of discretion under *Benson*. Despite finding that petitioner's prior convictions stemmed from the same act, the Court of Appeal affirmed the trial court's refusal to even consider this as a factor. (Ex. A., pp. 7-16.)

In *Benson*, this Court left open the question of whether it would be an abuse of discretion for a trial court to refuse to dismiss a prior conviction under the Three Strikes Law, where the priors arose from a single act. This Court did not define the circumstances where such an abuse of discretion could be found. The published opinion here reflects the split of authority on

this issue. Granting review in this case would clarify *Benson*'s dicta in this regard. (*People v. Benson, supra*, 18 Cal.4th at p. 36, fn. 8.)

In addition, although the Court of Appeal held that the "single act" should be an "important" consideration, somehow it affirmed the trial court's failure to exercise its discretion to consider this very same "important" factor. (Ex. A, p. 14.) In essence, the published opinion amounts to a general endorsement of trial courts' refusal to consider the "single act" factor when sentencing a defendant under the Three Strikes Law. Review is necessary to remedy this error.

A. Governing Law

1. Three Strikes Law

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531, the court held that a prior conviction may be stricken in the interest of justice after the judge has weighed numerous factors, including the defendant's background, the nature of the present offenses, and other individualized considerations. (See *People v. Dent* (1995) 38 Cal.App.4th 1726, 1731; § 1385.) The decision to dismiss a strike allegation is subject to review for abuse of discretion. (*People v. Superior Court (Romero), supra*, 13 Cal.4th at p. 531; *People v. Carmony* (2004) 33 Cal.4th 367, 374.)

Subsequent decisions have further examined the proper criteria for dismissing a prior conviction as a strike, and have unanimously agreed:

> The touchstone for that determination is whether "in light of the nature and circumstances of [a defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies."

(*People v. Cluff* (2001) 87 Cal.App.4th 991, 997-998, quoting *People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Garcia* (1999) 20 Cal.4th 490, 498-499.) A defendant's "recidivist status," while relevant, should not be "singularly dispositive" when deciding whether a prior conviction should be stricken. (*People v. Alvarez* (1997) 14 Cal.4th 968, 973, 979.)

The purpose of the Three Strikes law; to ensure lengthy prison sentences, should not be the dominant factor, and is likewise not defeated, where the circumstances support a decision to dismiss a strike. (*Id.* at pp. 974-975, 979; *People v. Deloza* (1998) 18 Cal.4th 585, 590-591.) Accordingly, the court retains the power to strike a prior to and reduce the sentence to a level that is consistent with a defendant's individual culpability and society's interests in punishing and deterring criminal behavior. (See *People v. Williams*, *supra*, 17 Cal.4th at pp. 160-161.)

Ultimately, the court's decision must fall within the 'bounds of reason' in light of "applicable law and the relevant facts," free of bias or prejudice. (*People v. Garcia*, *supra*, 20 Cal.4th at p. 503, quoting *People v. Williams*, *supra*, 17 Cal.4th at p. 162; *People v. Cluff*, *supra*, 87 Cal.App.4th

at p. 998.) More importantly, the consideration must be an individualized one. (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 474.) Clearly, there would be an abuse of discretion if the trial court's findings were not supported by evidence. (*People v. Cluff, supra*, 87 Cal.App.4th at p. 998.)

Apart from the state habitual offender provisions and applicable judicial precedent, misapplication of state sentencing laws that are "arbitrary or capricious" may violate federal due process. (See *Richmond v. Lewis* (1992) 506 U.S. 40, 50 [113 S.Ct. 528, 121 L.Ed.2d 411].) Similarly, sentencing errors that result in "fundamental unfairness" constitute a due process violation. (*Christian v. Rhode* (9th Cir. 1994) 41 F.3d 461, 469.)

2. Two Prior Strikes Involving a Single Act

In *People v. Benson, supra*, 18 Cal.4th at p. 26, the two prior strikes involved residential burglary and assault with intent to commit murder, both of which arose from the same case and same set of facts. The trial court in the earlier action had stayed the sentence on one of the convictions. (*Ibid.*) When requesting that the court dismiss one of the prior convictions, the court denied the motion, citing its mistaken belief that it lacked discretion to do so. (*Id.* at p. 28.) The Court of Appeal remanded to the trial court to exercise its discretion to strike one of the prior convictions, and this Court affirmed. (*Ibid.*)

This Court noted that regardless of whether the two convictions involved a single victim and occurred at the same time with a single intent, or whether the sentence on one conviction was stayed pursuant to section 654, each felony conviction qualified as a prior strike under the Three Strikes Law. (*Id.* at pp. 30-33; § 1170.12, subd. (b).) Still, this Court remanded to the trial court for a proper exercise of its discretion to strike one of the priors under section 1385. (*Id.* at pp. 36-37.)

In doing so, this Court refrained from expressing an opinion as to the manner in which the lower court should exercise this discretion. Instead, in a footnote, this Court made the following observation:

> Because the proper exercise of a trial court's discretion under section 1385 necessarily relates to the circumstances of a particular defendant's current and past criminal conduct, we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected - for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct - that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors.

(*Id.* at p. 36, fn. 8.)

Later, in *People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1212, Division Two of the Second District was faced with a similar situation, where the trial court had refused to strike one of the two prior felony convictions for attempted robbery and attempted carjacking stemming from the same case. One issue on appeal was whether the two priors were

brought and tried separately within the meaning of section 667, subdivision (a). (*Ibid.*) As the court held that they were not, it agreed that one of the five-year prior serious felony conviction enhancements under section 667, subdivision (a), had to be stricken. (*Ibid.*)

The defendant also claimed ineffective assistance by his counsel who did not request that the court exercise its discretion to strike of the prior convictions which arose from a single act. (*People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1212.) The Court of Appeal opined that the trial court had considered the issue and decided against it despite the fact that his counsel had not raised it. (*Id.* at pp. 1212-1213.) Nevertheless, since the court remanded for resentencing under section 667, subdivision (a), it also directed the trial court to exercise its discretion to strike one of the prior convictions if deemed appropriate under *People v. Benson*, *supra*, 18 Cal.4th at p. 36, fn.8. (*People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1213.)

On remand, the trial court once again declined to strike one of the priors, claiming it had already exercised its discretion and there was no basis for doing so again. (*Ibid.*) The defendant appealed again, and this time, the court held that while it had previously analyzed and rejected the issue in the context of ineffective assistance of counsel, it would now consider the issue in terms of whether the failure to strike of the priors constituted an abuse of discretion. (*Id.* at p. 1214.)

In a footnote, the court took judicial notice of the complaint, the information, and the transcript of the preliminary hearing in the case that produced the two prior convictions. (*Id.* at p. 1212, fn.3.) As such, the court found, "These documents demonstrate that the attempted carjacking and attempted robbery convictions arose from a single criminal act, where appellant and two companions approached a man at a gas station and appellant demanded the victim's car while one of the companions told the victim that he had a gun. Appellant and his companions were frightened off before they took the victim's car." (*Ibid.*)

Having determined that the two priors had arisen from a single act, the court observed that *People v. Benson*, *supra*, 18 Cal.4th at p. 36, fn.8, contemplated certain circumstances where it would be abuse of discretion not to strike one of the prior convictions which may have been stayed pursuant to section 654, "under either of two different rationales-either because the defendant's multiple convictions resulted from multiple acts arising from an indivisible course of conduct, or because the convictions resulted from the same single act." (*People v. Burgos*, *supra*, 117 Cal.App.4th at pp. 1215-1216; see *People v. Sanchez* (2001) 24 Cal.4th 983, 993.)

The court held that the case before it presented such circumstances justifying the dismissal of one of the priors. (*People v. Burgos*, *supra*, 117

Cal.App.4th at p. 1216.) The court reasoned that the attempted carjacking and attempted robbery, which arose from a single act, were 'so closely connected,' that the failure to strike one of them "must be deemed an abuse of discretion." (*Ibid.*, quoting *People v. Benson*, *supra*, 18 Cal.4th at p. 36, n.8.) It concluded:

> In the case of these particular offenses, not only did the two prior convictions arise from the same act, but, unlike perhaps any other two crimes, there exists an express statutory preclusion on sentencing for both offenses. Section 215, subdivision (c) permits the prosecution to charge a defendant with both carjacking and robbery under section 211, but expressly states that "no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211." While this provision does not refer to the use of the convictions as priors in a later prosecution such as the one before us, it reinforces our belief that infliction of punishment in this case based on both convictions constitutes an abuse of discretion.

(*People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1216.)

The court's analysis, however, did not end there, as the court also noted the defendant's criminal history, which otherwise consisted primarily of misdemeanor and drug offenses. (*Ibid.*) The court also pointed out that one of the priors was sufficient to cause the defendant to receive a lengthy sentence of up to 20 years, including the upper term for the robbery and a consecutive term for assault, both doubled under the Three Strikes Law, with a great bodily injury enhancement and a serious felony enhancement under section 667, subdivision (a). (*Ibid.*)

In view of the nature of the prior offenses and the lengthy sentence, the court held that it was abuse of discretion to fail to strike one of the two convictions in "furtherance of justice." (*Id.* at pp. 1216-1217, citing *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 497.) As such, the court, once again, remanded for resentencing, directing the court to strike one of the priors and to resentence the defendant pursuant to the second strike only. (*People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1217.)

In *People v. Scott*, *supra*, 179 Cal.App.4th at p. 931, the trial court properly noted that the 1998 prior convictions for carjacking and robbery had in fact stemmed from a single act. It also noted that while this did not "*mandate*" that it strike one of these prior convictions, the single act was one such factor it could consider in exercising its discretion to do so. (*Id.* at pp. 930-931, citing *People v. Burgos*, *supra*, 117 Cal.App.4th at pp. 1216-1217, emphasis in original.)

Still, the court declined to strike one of the priors, finding that the defendant fell within the spirit of the three strikes law. (*People v. Scott*, *supra*, 179 Cal.App.4th at pp. 923-925.) The Third District found no error. (*Id.* at p. 931.) The court recognized that the defendant "was entitled to [] consideration by the trial court of the closeness of the two strikes in determining whether, *in the exercise of discretion,* one should be stricken." (*Ibid.*, emphasis in original.) However, the court added, "[t]he trial court

considered that factor, but, in the exercise of its discretion, did not find that his violent record justified treating those two strikes-albeit arising from the same act-as one." (*Ibid.*)

This violent record consisted of the 1998 convictions for carjacking and robbery, a juvenile history for robbery and assault with a deadly weapon, numerous adult convictions, including an in-prison stabbing, many sustained discipline cases in prison involving violence, and the current 2005 offense for assault with a deadly weapon and possession of a sharp instrument for stabbing another inmate. (*Id.* at pp. 923-924.)

B. Analysis

1. Two Strikes

In *People v. Benson, supra*, 18 Cal.4th at p. 34, this Court distinguished the two situations where two crimes were part of a single act for purposes of punishment under section 654, and where they constituted two strikes for purposes of punishment under Three Strikes Law. The Court explained:

> In contrast to section 654, which is concerned with the appropriate punishment for "[a]n act or omission that is punishable in different ways," the Three Strikes law has, as its central focus, the status of the defendant as a repeat felon--i.e., whether the defendant proceeded to commit a subsequent felony after already having been convicted of one or more serious or violent felonies. Thus, there clearly was a rational basis upon which the electorate and the Legislature could direct the courts, in cases involving a defendant with two prior felony convictions who thereafter commits a subsequent

> felony, to count each prior felony conviction as a strike, in effect declining to extend the leniency previously afforded the defendant when sentence on a prior felony conviction was stayed under section 654. In the present case, defendant received the benefit of section 654 when he was sentenced for the felonies he committed in 1979; it was only when defendant reoffended after the enactment of the Three Strikes law that he faced the prolonged incarceration of which he now complains.

(*Id.* at pp. 34-35.)

In her opening brief, petitioner acknowledged the distinction this Court made in *Benson*, when discussing sections 654 and 1385. (AOB, pp. 17-18.) In response, the Court of Appeal held that accepting petitioner's position would rewrite the Three Strikes Law, contradict the legislative intent and strip trial courts of their discretionary powers. (Ex. A, pp. 7-9, 12-14, citing *People v. Benson, supra*, 18 Cal.4th at pp. 30-35.)

Notwithstanding the Court of Appeal's seemingly mischaracterization of petitioner's arguments, its reasoning fails for numerous reasons. First, unlike the defendant in *Benson*, here, petitioner *did not* "receive[] the benefit of section 654 when [s]he was sentenced for the felonies [she] committed" in 1999, as she served concurrent terms in her prior case. (1 C.T. pp. 13-14, quoting *People v. Benson, supra*, 18 Cal.4th at pp. 34-35.) Therefore, the rationale of *Benson*—that a person cannot benefit twice from the leniency that was granted to her in the prior case, by virtue of the application of section 654—does not apply here.

Second, contrary to the Court of Appeal's opinion, a finding of an abuse of discretion where the circumstances of the prior convictions revealed but a single act would not "rewrite the Three Strikes law" or strip trial courts of their discretionary powers. (Ex. A, pp. 7-9, 12-14.) Each prior conviction would still qualify as a strike, and courts would retain the power to consider all the relevant circumstances to determine if the priors stemmed from a single act. Of course, a grant of review would allow this Court to generally define and/or clarify the nature of those circumstances.

In *People v. Benson*, *supra*, 18 Cal.4th at p. 27, the defendant went to his neighbor's apartment to borrow a vacuum cleaner. After returning the vacuum cleaner, he returned again to the apartment, stating he had left his keys there. (*Ibid.*) Once inside, he grabbed his neighbor from behind, struggled with her, forcing her to the floor and displaying a knife. (*Ibid.*) He then stabbed her multiple times. (*Ibid.*) He was convicted of residential burglary and assault with intent to commit murder, and his sentence on the assault count was stayed pursuant to section 654. (*Ibid.*)

In contrast, here, as the trial court found, after conversing with the victim and after her male companion jumped in the back seat with a knife, petitioner took the car keys and pushed the victim out, then, the two drove off in the car. (1 R.T. pp. 6-7.) As respondent conceded and the Court of

Appeal agreed, the carjacking and robbery convictions were based on the same act—taking the victim's car by force. (Ex. A, pp. 4, 6-7.)

This is certainly not the same as the *multiple acts* committed by the defendant in *Benson*, who entered the residence, armed, then struggled with the victim, forced her to the floor and stabbed her numerous times. Rather, the circumstances were identical to those in *Burgos*, where the attempted robbery and carjacking which were also committed with the assistance of a companion, were deemed a single act for purposes of punishment under Three Strikes Law. (*People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1212, fn. 3.)

The Court of Appeal did not address, and in fact, authorized the trial court's failure to exercise its discretion to consider the "single act," in accordance with *Benson*. A failure to exercise discretion, however, has been deemed "an abuse of discretion," warranting automatic reversal and remand. (See, e.g., *People v. Crandell* (1988) 46 Cal.3d 833, 861; see also *People v. Benn* (1972) 7 Cal.3d 530, 535.)

It should be noted that to the extent that the Court of Appeal relied on *Scott*, said reliance was misplaced. (Ex. A, pp. 11-12, 15.) There, the carjacking and robbery involved more than the act of taking the car, since, inside the vehicle, there were 'numerous items belonging to the victim, including clothing.' (*Id.* at p. 924.) That was not the case here, as the

victim's testimony in the prior case clearly established that the only property stolen was his car. (1 C.T. p. 18.)

In sum, the foregoing presents numerous issues that should be resolved by way of review. Was the trial court within its rights to refuse to even consider the single act of taking the victim's car? Did this inaction itself amount to an abuse of discretion? Was the court required to strike one of the priors, since there was no dispute that the convictions arose from the same act? If these questions are not answered by this Court, the inconsistently in the law will persist.

2. Individualized Consideration under *Romero*

The Court of Appeal agreed with the trial court that petitioner had been "very active" during the carjacking. (Ex. A, pp. 16-17.) Past offenses, alone, however, do not just justify imposing an enhanced sentence for the current offense, because this amounts to punishment for prior, rather than current offenses. (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1080; see *Duran v. Castro* (2002) 277 F.Supp.2d 1121, 1130.) Here, petitioner's current offenses did not involve any acts of violence.

With respect to petitioner's criminal record, petitioner's prison records reflected a parole revocation on February 28, 2002, and another one

on October 23, 2003. (Case No. B215690, 1 C.T. pp. 186, 188.)[2] Although the prosecution also mentioned a juvenile robbery, the probation report did not show any such arrest or adjudication. (1 R.T. p. 3; Case No. B215690, 1 C.T. p. 205.)

The Court of Appeal also found that any error in the trial court considering the unproven juvenile robbery to be harmless. (Ex. A, p. 17, fn. 6.) However, an abuse of discretion occurs where the sentencing court considered impermissible factors. (*People v. Scott*, *supra*, 179 Cal.App.4th at p. 926.) The error, therefore, was not harmless.

In addition, while there is no clear indication that the court also relied on the 2003 conviction noted in the probation report, to the extent it did, this was error as well. As petitioner pointed out at resentencing, that case was ultimately dismissed, because the San Bernardino County district attorney had learned that the accused there had been someone other than petitioner. (1 R.T. p. 5.)

In fact, this was the same conviction the prosecution alleged in the information in this case as a prior prison term enhancement, but later expressly *conceded* that belonged to a different person, therefore, did not proceed on. (Case No. B215690, 1 C.T. p. 78; 4 R.T. p. 1810.) Yet the

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[2] At the request of petitioner, the Court of Appeal took judicial notice of the record in her original appeal in Case No. B215690. All citations referencing Case No. B215690 relate to the record from the first appeal.

same prosecuting attorney was now retracting its earlier concession, without submitting additional evidence to support his new contention.

The Court of Appeal simply concluded that the trial court did not consider this alleged prior. (Ex. A, p. 17, fn. 6.) However, while the court did not mention the prior, it also did not expressly state that it was not considering it, and if did, again, this would make the court's decision improper and arbitrary. (*People v. Scott, supra*, 179 Cal.App.4th at p. 926.)

A defendant has the Fifth, Sixth and Fourteenth Amendment right to a jury determination of every fact supporting an enhanced sentence. (U.S. Const., amends. V, VI, IVX; *Cunningham v. California* (2007) 549 U.S. 270, 288-289 [127 S.Ct. 856, 166 L.Ed.2d 856]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) Therefore, to the extent the court relied on the juvenile robbery not listed in the probation report and a conviction that was erroneously included in her adult criminal history, the court also violated petitioner's federal due process rights. (*Ibid.*)

Regardless, even if the information was correct, based on an individualized consideration of all the factors, including petitioner's current offenses and criminal past, petitioner fell outside the spirit of the Three Strikes Law. Petitioner was born on October 18, 1979. (Case No. B215690,

1 C.T. p. 201.) At the time of the prior convictions in April of 1999, she was 19 years old. (1 C.T. p. 190.) She is now in her early 30's.

Apart from her 1999 convictions which involved a single act of carjacking and where she herself was not armed, petitioner's criminal history included a 2007 misdemeanor conviction for trespass, and there is no indication that her parole violations in 2002 and 2003 were for violent offenses. (Case No. B215690, 1 C.T. pp. 183-189, 205, 210.) Even the probation officer noted a serious, but "limited" criminal history. (Case No. B215690, 1 C.T. p. 210.)

The purpose of the Three Strikes Law is to "... to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." (*Rummel v. Estelle* (1980) 445 U.S. 263, 284-285 [100 S.Ct. 1133, 63 L.Ed.2d 382].) This objective can be accomplished here without subjecting petitioner to a sentence of 30 years to life.

Even with one prior, petitioner's maximum exposure would involve a lengthy sentence of 13 to 17 years, including the mid-term of 4 years or high term of 6 years on the burglary count, doubled pursuant to the Three Strikes Law, plus the already-imposed 5-year enhancement. In light of all the aforementioned factors, the interests of justice required that one of the

prior convictions be dismissed. (§ 1385; *Christian v. Rhode*, *supra*, 41 F.3d at p. 469.) The Court of Appeal's decision to the contrary, therefore, requires review. (*People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1217; *People v. Romero*, *supra*, 13 Cal.4th at p. 497.)

II.

PETITIONER'S SENTENCE OF 30 YEARS TO LIFE WAS CRUEL AND/OR UNUSUAL PUNISHMENT UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS, AND THE COURT OF APPEAL'S FINDINGS TO THE CONTRARY REQUIRE REVIEW

The court's refusal to dismiss one of the prior convictions resulted in a sentence of 25 years to life as to count 1 alone. Petitioner's current convictions were for nonviolent offenses, and her past did not reflect violent conduct. Comparing her sentence to that which a person would typically receive for violent crimes in California and for identical offenses and under habitual offender laws in other states, it is clear that petitioner's sentence constituted cruel and/or unusual punishment and did not pass constitutional muster.

The Court of Appeal rejected petitioner's arguments, despite acknowledging petitioner's minimal criminal history, compared to those defendants whose indeterminate sentences had been upheld based on their extensive criminal background. (Ex. A, pp. 18-19; AOB, pp. 32-34.) Moreover, although the Court of Appeal seemingly agreed that the punishment petitioner had received pursuant to the Three Strikes Law was

"the nation's most severe," it still found no constitutional violation. (*Id.* at p. 20.)

The Court of Appeal noted, "In response to defendant's claim that applying Three Strikes to convictions where the sentence had been stayed under section 654 would lead to dramatic and harsh results, the *Benson* court said that absent a constitutional violation, it was not free to alter the statute's intended effect." (Ex. A, p. 9.) Accordingly, review is necessary to decide whether the indeterminate sentence imposed for a single act that occurred ten years prior to the current offenses, in fact, amounted to the constitutional violation noted in *Benson*.

A. Governing Law

A punishment is excessive under the Eighth Amendment if it involves the "unnecessary and wanton infliction of pain" or if it is "grossly out of proportion to the severity of the crime." (U.S. Const., amends. VIII, XIV; *Gregg v. Georgia* (1976) 428 U.S. 153, 173 [96 S.Ct. 2909, 49 L.Ed.2d 859].) A punishment may violate article I, section 17 of the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (Cal. Const., art I, § 17; *In re Lynch* (1972) 8 Cal.3d 410, 424.)

The federal constitution prohibits cruel and unusual punishment, whereas the state provision "forbids cruel *or* unusual punishment." (*People v. Carmony, supra,* 127 Cal.App.4th at p. 1085, emphasis in original.) In determining a constitutional violation under both state and federal standards, courts generally apply a three-part test by examining the nature of the particular offense and offender, the penalty imposed in the same jurisdiction for other offenses, and the punishment imposed in other jurisdictions for the same offense. (*Solem v. Helm* (1983) 463 U.S. 277, 290-291 [103 S.Ct. 3001, 77 L.Ed.2d 637]; *In re Lynch, supra,* 8 Cal.3d at pp. 425-427.) Any one of these three factors can be sufficient to demonstrate that a particular punishment is cruel and unusual. (*People v. Dillon* (1983) 34 Cal.3d 441, 487, fn. 38.)

In *Solem v. Helm, supra,* 463 U.S. at p. 303, the High Court held that a sentence of life without the possibility of parole ("LWOP") was unconstitutionally disproportionate as applied to defendant on his seventh conviction of a nonviolent felony. In doing so, the court observed:

> [A]s a matter of principle ... a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is per se constitutional. As the Court noted in *Robinson v. California* [(1962)] 370 U.S. [660], 667 [8

> L.Ed.2d 758, 82 S.Ct. 1417], a single day in prison may be unconstitutional in some circumstances.

(*Solem v. Helm*, *supra*, 463 U.S. at p. 290.)

Later, in *Harmelin v. Michigan* (1991) 501 U.S. 957, 1005 [111 S.Ct. 2680, 115 L.Ed.2d 836], in his concurring opinion, Justice Kennedy, joined by three other members of the court, interpreted *Solem*'s "intrajurisdictional and interjurisdictional" analyses as appropriate "only in the rare case in which a threshold comparison of the crime committed and the sentence imposed [led] to an inference of gross disproportionality." (See *People v. Cooper* (1996) 43 Cal.App.4th 815, 820-823.) The court ultimately held that an LWOP sentence for possessing a large quantity of cocaine pursuant to a Michigan statute was not unconstitutional. (*Harmelin v. Michigan*, *supra*, 501 U.S. at pp. 961, 996.)

In *Ewing v. California* (2003) 538 U.S. 11, 20 [123 S.Ct. 1179, 155 L.Ed.2d 108], the court upheld a sentence of 25 years to life for the theft of a few golf clubs pursuant to California's Three Strikes Law. The four prior convictions consisted of three burglaries and a robbery committed in October and November of 1993. (*Id.* at pp. 18-19.) The felony grand theft that subjected the defendant to the Three Strikes Law occurred several months after he was paroled in his prior case. (*Id.* at p. 19.)

In addition to his prior strikes, the defendant was shown to have suffered a multitude of convictions, including a 1984 theft conviction at the

age of 22, a 1988 felony grand theft auto conviction, a 1990 conviction of petty theft, 1992 battery and theft convictions, 1993 burglary, appropriating lost property and drug convictions, and 1993 trespass and unlawful firearm possession convictions. (*Id.* at p. 18.)

Similarly, in *Lockyer v. Andrade* (2003) 538 U.S. 63, 66-68, 77 [123 S.Ct. 1166, 155 L.Ed.2d 144], the court upheld the two consecutive 25-years to life sentences of a defendant convicted of two counts of felony petty theft with a prior, with three first-degree residential burglary prior strikes. The court observed that the defendant had "been in and out of state and federal prison since 1982," for a 1982 misdemeanor theft, three 1982 first-degree residential burglaries, a 1988 and a 1990 federal transportation of marijuana offense, a 1990 petty theft, and a 1991 parole violation. (*Id.* at pp. 66-67.)

In *People v. Carmony, supra,* 127 Cal.App.4th at pp. 1070-1072, 1084, 1089, the court held that the sentence of 25 years to life for failing to register as a sex offender, imposed under the Three Strikes Law, violated both state and federal constitution. When analyzing the issue under the Eighth Amendment, the court focused on the gravity of the offense, as well as the fact that the defendant was a repeat offender. (*Id.* at pp. 1077-1079.)

With respect to recidivism, the court observed as follows:

> Past offenses do not themselves justify imposition of an enhanced sentence for the current offense. (*Ewing* [*v.*

> *California*], *supra*, 538 U.S. at p. 26 [] (lead opn. of O'Connor, J.).) The double jeopardy clause prohibits successive punishment for the same offense. [Citation omitted.] The policy of the clause therefore circumscribes the relevance of recidivism. [Citation omitted.] 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." [Citation omitted.]

(*People v. Carmony*, *supra*, 127 Cal.App.4th at p. 1080.) When examining the nature of the offense and/or offender for a violation of the state constitution, the court considered several factors, including the nonviolent nature of the current offense. (*Id.* at p. 1085, citing *In re Lynch*, *supra*, 8 Cal.3d at pp. 425-426.)

In *People v. Cooper*, *supra*, 43 Cal.App.4th at pp. 819, 825, 828, the court found that the sentence of 25 years to life for possession of a firearm by an ex-felon with two prior robbery convictions was not cruel and/or unusual punishment. When discussing recidivism, the court noted that, in addition to his 1977 and 1982 prior strikes, the defendant had a "lengthy record," which included grand theft in 1980, petty theft with a prior in 1981, grand theft from a person in 1982 and transporting narcotics for sale in 1988, as well as two parole violations in 1988 and 1991. (*Id.* at pp. 825-826.)

Finally, in *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1086-1087, 1093, the defendant received a sentence of 25 years to life for

commercial burglary, with two prior residential burglaries that occurred on the same date when he was 19 years old. In finding no cruel and/or unusual punishment, the court observed:

> Appellant was sentenced in 1984 to concurrent four-year prison terms for the two burglaries, violated parole, was sentenced in 1986 to sixteen months in prison for possession of drugs in prison, was convicted in 1987 of a misdemeanor battery, was sentenced in 1988 to sixteen months in prison for possession of a controlled substance, was sentenced in 1990 to a suspended four-year prison term for sale of a controlled substance and placed in a narcotic addict commitment program (but after release as an outpatient was sent to prison). In 1991 appellant was again sentenced to a four-year prison term for a narcotics offense, and in 1996 was convicted of the misdemeanor of being under the influence of a controlled substance. At the time of the present offense, appellant had a spousal abuse charge pending, as well as a warrant and a pending pretrial hearing on an alleged torture offense. ¶ Appellant's recidivism is thus highlighted by several prior prison terms and parole violations, and an unsuccessful narcotics rehabilitation commitment. His record reveals an almost unrelenting pattern of criminal conduct.

(*Id.* at pp. 1093-1094.)

B. Analysis

1. Offender & Current Offenses

Petitioner's past and present offenses do not reveal any acts of violence, and even in the prior strike case, petitioner was not armed. With respect to the current case, petitioner and her companion entered the first residence and attempted to enter the second one at a time when the homes were unoccupied. (1 C.T. pp. 4-5.) Based on the record, there was every

indication that the sole intent was to take the property, without causing harm to any person.

Petitioner acknowledges her two parole violations and the misdemeanor trespass conviction. However, similar to her current convictions, none of these demonstrated any propensity toward violence or a person who was dangerous, thus, deserving of isolation from society for 30 years to life. (*Rummel v. Estelle*, *supra*, 445 U.S. at pp. 284-285.)

Unlike the defendants in many federal and California decisions, here, petitioner's criminal record did not rise to the level of recidivism noted in those cases. (See *Ewing v. California*, *supra*, 538 U.S. at p. 18 [at least 10 convictions for theft-related offenses, including burglary, and unlawful firearm possession]; see also *Lockyer v. Andrade*, *supra*, 538 U.S. at pp. 66-67 [7 state and federal convictions for theft and drug-related offenses, and a parole violation]; see also *People v. Cooper*, *supra*, 43 Cal.App.4th at pp. 825-826 [4 prior convictions for theft and narcotics-related crimes, and 2 parole violations]; see also *People v. Goodwin*, *supra*, 59 Cal.App.4th at pp. 1093-1094 [at least 6 convictions for theft, drugs and battery, and parole violations and pending charges for torture].)

Petitioner's sentence included the determinate term of 30 years, which must be served first, without any credit to be applied toward eligibility for parole. (§§ 669, 3046.) Petitioner's post-sentence worktime

custody credits are also limited to 20 percent. (§ 1170.12, subd. (a)(5).) As such, petitioner will not become eligible for parole for at least 24 years since she was sentenced.

In contrast, petitioner's co-defendant, Velazquez, who had suffered a multitude of state and federal convictions for possession and importation of drugs, firearms, as well as disturbing the peace, false representation to a police officer, and most recently, second degree burglary in 2005, received a sentence of 6 years. (Case No. B215690, 1 S.C.T. pp. 33-34, 49.) It should be pointed out that, at the time of the arrest, Velazquez was in possession of methamphetamine and a glass smoking pipe. (1 C.T. p. 5.)

Based on all of these factors, petitioner's 30-years to life sentence was grossly disproportionate to her crime and constituted cruel and/or unusual punishment under both the state and federal constitution. (U.S. Const., amends. VIII, XIV; Cal. Const., art I, §17; *Solem v. Helm*, *supra*, 463 U.S. at p. 303; *In re Lynch*, *supra*, 8 Cal.3d at pp. 424-426.) In fact, the absence of violence from both current and past offenses, presents the "rare case" of "grossly disproportionality" that triggers further "intrajurisdictional and interjurisdictional" analyses, as relevant under both the state and federal constitution. (*Harmelin v. Michigan*, *supra*, 501 U.S. at 1005; *People v. Cooper*, *supra*, 43 Cal.App.4th at pp. 820-823.)

2. Interjurisdictional and Intrajurisdictional Comparison

Petitioner's 30 years to life sentence is indisputably severe when compared to punishment imposed for other violent offenses in California. Her penalty is exceeded only by a sentence of life without the possibility of parole or death imposed for first degree murder (§ 190, subd. (a)), while it is substantially greater than the penalties for far more serious or violent felonies, such as second degree murder, rape, kidnapping and certain sexual offenses (§ 667.5, subd. (c)).) (See AOB, p. 35, fn. 35.)

A comparison of her sentence for residential burglary and pursuant to the Three Strikes Law, with punishment imposed in other states for the identical offense and under pertinent habitual offender laws, yields the same results. This is because petitioner's burglary offense is not subject to recidivist laws in 26 states (Colorado, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Washington, Wisconsin, Wyoming), either because the two prior strikes occurred on the same occasion, the current offense is not listed as a violent crime, or there was a 5-year "wash-out" period. (See AOB, pp. 35-47.)

Where such habitual offender laws are applicable or where punishment for the offense alone so requires, only 6 states call for an

indeterminate life sentence for such qualifying habitual offenders, such as petitioner (Alabama, Idaho, Oklahoma, Rhode Island, Texas, West Virginia). Even so, the minimum term in those states is set at 5 years in Idaho, Rhode Island and Texas; 6 years in Oklahoma; and 15 years in Alabama. Therefore, the minimum eligibility parole date is mostly set at 5 to 6 years, rather than the 25 or 30 years imposed here.

Otherwise, the maximum punishment varies and includes a fixed term of 25 months (North Carolina), 34 months (Kansas), 3 years (Delaware), 4 years (New Mexico), 5 years (Florida, Iowa, Maine, New Jersey, Ohio, Oregon), 7 years (Illinois, Missouri, New York, North Dakota), 8 years (Indiana), 10 years (Alaska, Connecticut, Hawaii, Kentucky, Massachusetts, Minnesota, Washington, Wyoming), 12 years (Colorado, Tennessee, Wisconsin), 15 years (District of Columbia, Maryland, South Carolina, Utah), 15.25 years (Vermont), 16.25 years (Arizona), 20 years (Georgia, Montana, Nevada, Pennsylvania, Virginia), 22.5 years (Michigan), 24 years (Louisiana), 25years (Mississippi, South Dakota), 30 years (Arkansas, New Hampshire), 60 years (Nebraska).

Clearly, only 11 states require a sentence of 20 to 30 years, with only Nebraska prescribing a 60-year term. Also, Virginia classifies the offense as a wobbler, and additionally, 3 states allow the court to exercise its discretion to impose a fine in lieu of a prison sentence (Montana,

Wisconsin, Wyoming). This reaffirms the observation that California's Three Strikes law is "the most stringent in the nation." (See e.g., *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, 772.)

Given that petitioner's crime and her prior strikes would subject her to punishment of a substantially lesser degree in other states, and since her sentence far exceeds that which a defendant convicted of violent crimes would receive in California, there can be no question that petitioner's sentence was excessive under both the state and federal constitution. Petitioner is not requesting that both of her prior strikes be dismissed, but only one, in which case, it would still subject her to a lengthy sentence.

The Court of Appeal's cruel and unusual punishment analysis read more like a *Romero* discussion, as it focused solely on the circumstances of the current and prior offenses, without any regard to the comparisons that should be made to determine whether the 30-year to life sentence is cruel and unusual punishment under the federal constitution. (Ex. A, pp. 19-20.) Also, while California may enact repeat offender laws that are harsher than those in other states, as applied *here*, petitioner's enhanced sentence based on a single act and in light of her minimal record, did, in fact, offend the state constitution. (Ex. A, p. 20, citing *People v. Romero* (2002) 99 Cal.App.4th 1418, 1433.)

For these reasons, review should be granted to address the impact of the Three Strikes Law on the state and federal constitutions where the prior convictions involved a single act, and to determine whether there are any circumstances where such harsh penalty should be avoided. (*Solem v. Helm*, *supra*, 463 U.S. at pp. 290-291; *In re Lynch*, *supra*, 8 Cal.3d at pp. 425-427; *In re Benson*, *supra*, 18 Cal.4th at p. 35.)

As a final note, petitioner submits that this Court should review her case, not only because of all the open questions under *Benson* that need to be resolved, but because the notion that petitioner may not be punished twice for stealing a car by force under section 654, but may later be punished twice for the same single act as a *repeat offender*, should be reevaluated.

The rule of *stare decisis* dictates precedent must be followed, so as to maintain certainty, predictability, and stability within the law. (See generally, *People v. Mendoza* (2000) 23 Cal.4th 896, 924; *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 503, 504; *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 296.) However, the rule is flexible, and courts are permitted to revisit issues where the prior opinion relates to a matter of continuing concern in the community, or where "subsequent developments indicate an earlier

decision was unsound, or has become ripe for reconsideration." (*Id.* at p. 297; see also *People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1141.)

This Court recently decided that a single act could not be punished twice under section 654, thereby doing away with precedent that had held or suggested otherwise. (*People v. Jones* (June 21, 2012, S179552), -- Cal.4th --, 2012 Cal. LEXIS 5797, overruling *In re Hayes* (1969) 70 Cal.2d 604, and *People v. Harrison* (1969) 1 Cal.App.3d 115.) Thus, there is no bar to revisiting and reconsidering the issue at hand, as framed by Justice Chin in his dissenting opinion in *Benson*, including the interrelationship between section 654 and the Three Strikes Law:

> The majority also states, "The Three Strikes law provided [defendant] with notice that he would be treated as a recidivist if he reoffended." (Maj. opn., *ante*, at p. 35.) Again, I fully agree. Defendant is obviously a recidivist; he had full notice he would be treated as one if he reoffended; he is being treated as one. The issue is not whether defendant is a recidivist but whether he should be punished twice for the same act. Defendant clearly had a strike against him when he stole the cigarettes. The sole question is whether he had two strikes. He did not. ¶ [] Mine is but a modest proposal: A single act that may be punished only once may generate one strike, not two. Defendant was punished for his serious criminal behavior in 1979. He is properly being punished today as a recidivist. However, he has one strike against him, not two. Accordingly, I dissent.

(*People v. Benson*, *supra*, 18 Cal.4th at p. 46.)

CONCLUSION

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

Dated: June 30, 2012

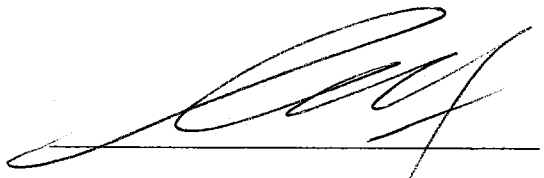
Respectfully submitted,

Melanie K. Dorian
Attorney for Petitioner
DARLENE A. VARGAS

CERTIFICATE OF WORD COUNT

People v. Darlene A. Vargas
No. S_____
2 Crim. B231338
Los Angeles County No. KA085541

Pursuant to rule 8.504(d) of the California Rules of Court, I, Melanie K. Dorian, appointed counsel for DARLENE A. VARGAS, hereby certify that I prepared the foregoing Petition for Review on behalf of my client, and that the word count for this brief is 7,774, 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
DARLENE A. VARGAS

EXHIBIT A

Filed 6/4/12

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DARLENE A. VARGAS, Defendant and Appellant.	B231338 (Los Angeles County Super. Ct. No. KA085541)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Melanie K. Dorian, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Taylor Nguyen and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for partial publication. This opinion is ordered published in its entirety except for part 5 of Discussion.

Darlene A. Vargas appeals from the judgment entered after she was again given a Three Strikes sentence for burglary after we reversed the judgment and remanded so the trial court could reconsider whether to dismiss one Three Strikes allegation because her two prior strike convictions arose from a single act. We reject her contention that it was an abuse of discretion to not dismiss one of the strike allegations solely because of that fact, and we also conclude that the trial court did not abuse its discretion when considering all the circumstances of Vargas's criminal history. Finally, we conclude that her prison sentence was not unconstitutionally cruel or unusual.

FACTS AND PROCEDURAL HISTORY[1]

Around 2:00 p.m. on December 29, 2008, Lynn Burrows returned home to the house in Claremont that she shared with William Alves and their two sons to find it had been ransacked. Numerous items were missing, including computer equipment, cameras, a jewelry bag, cash, checks, a suitcase, a trashcan, and a backpack belonging to her son, Spencer. When Claremont police came to investigate, neighbor Gabriela Jimenez told them she saw a man and woman walking nearby sometime between 10:00 a.m. and 11:00 a.m. that day. The woman was rolling a suitcase. Sometime between noon and 1:00 p.m., Jimenez saw the same couple walking down the street. The woman was dragging a large gray trashcan filled with "bags [] of stuff," and the man was carrying a large box.

Around noon the next day, Claremont Police Officer James Hughes was on patrol in the same neighborhood when he saw Oscar Velasquez and appellant Darlene Vargas near the front door of the Chavez house. Because they matched the description of the couple Jimenez saw the day before, Hughes called for back-up as he drove past, then made a U-turn and detained the pair. Another officer soon joined Hughes. Hughes

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1 Our statement of facts is drawn largely from our earlier decision in a nonpublished opinion. (*People v. Velasquez* (Oct. 21, 2010, B215690) (*Vargas I*).)

knocked on the front door of the Chavez house to speak with the owner. Hughes then noticed a backpack on the ground nearby. When owner John Chavez came to the door, he told Hughes that he did not know Vargas or Velasquez and did not know who owned the backpack by his door. Chavez said he had not seen the backpack there when he went to get his morning newspaper at 6:00 a.m. The other police officer opened the backpack, where he found a blue IKEA bag, a green duffel bag, a knife, a hammer, several gloves, and $31 in change. A search of Velasquez turned up methamphetamine and a glass smoking pipe.

Later that day, Jimenez went to the police station, where she identified Vargas and Velasquez from photographic "six-pack" lineups. A police officer took the backpack found at the Chavez house and showed it to Spencer Burrows, who identified it as his.

Vargas and Velasquez were charged with burglary, grand theft, and receiving stolen property (the backpack) in connection with the break-in at the Alves/Burrows house, and with conspiracy to commit theft based on their presence in front of the Chavez house.[2] The information also alleged that Vargas had convictions for carjacking and robbery from a 1999 case that qualified as "strikes" under the Three Strikes law.

At trial, the members of the Alves-Burrows household identified as theirs various objects found in the possession of Vargas and Velasquez, while Jimenez identified Vargas and Velasquez at trial and reconfirmed her earlier photo identification of them.

The jury convicted Vargas and Velasquez of burglary, grand theft, and conspiracy to commit grand theft, but acquitted them of receiving stolen property. Vargas moved to dismiss one of the two Three Strikes allegations on the ground that both convictions arose from a single act. The trial court denied the motion because Vargas received concurrent sentences for the carjack and robbery convictions, which indicated that separate acts had been involved. However, because it found that Vargas was not entirely within the Three

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[2] Velasquez was also charged with and convicted of possession of methamphetamine and a smoking device, while Vargas was also charged with and convicted of making false statements to the police based on comments she made when stopped by the Chavez house.

Strikes scheme, the trial court applied both Three Strikes allegations as to only the burglary conviction and dismissed the strike allegations as to the remaining counts. Because the burglary conviction in this case was Vargas's third strike, the court imposed a sentence of 25 years to life on that count. She received a combined state prison sentence of 30 years to life.

In *Vargas I,* we considered and rejected Vargas's contentions that the evidence was insufficient to support the convictions and that the photo line-up shown to eyewitness Jimenez was unduly suggestive. We agreed that the concurrent sentence imposed for the grand theft conviction should have been stayed. We rejected Vargas's contention that one of the Three Strikes allegations should have been dismissed in its entirety, concluding that the record before the trial court showed no abuse of discretion because the concurrent sentences imposed for her robbery and carjacking convictions suggested that separate acts had been involved. However, we granted Vargas's companion habeas corpus petition for ineffective assistance of counsel because her original trial lawyer did not provide the court with the preliminary hearing transcript from the proceeding where she eventually pleaded out to charges of carjacking and robbery. Because that transcript made it appear that both convictions arose from a single act, and because the trial court found that Vargas did not fall entirely within spirit of the Three Strikes scheme when it dismissed those allegations as to two of the three new convictions, we reversed and remanded for a new sentencing hearing so that new evidence could be presented on that issue for the trial court to reconsider.[3]

On remand, no new evidence other than the preliminary hearing transcript from Vargas's 1999 carjack/robbery conviction was presented. The trial court found that despite what the transcript showed, Vargas still fell enough within the Three Strikes

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[3] In *Vargas I,* Velasquez appealed on the grounds that there was insufficient evidence to support the robbery-related convictions and that the grand theft sentence should have been stayed. As with Vargas, we affirmed as to the first ground and reversed as to the second. Velasquez, who received a combined state prison sentence of 6 years, is not a party to this appeal.

scheme to warrant imposing a full Three Strikes sentence on the one burglary count. According to the court, the transcript from the preliminary hearing showed that Vargas took the lead role in a crime that involved the use of a weapon. She twice violated parole while serving her sentence for that crime, committed another crime in 2007 – misdemeanor trespassing – and then committed her current offenses, which showed she would have continued to burgle people's homes if she had not been stopped.

Vargas contends the trial court erred because: (1) case law requires automatic dismissal of a Three Strikes allegation when it is one of multiple convictions incurred for only a single act, particularly in regard to carjacking and robbery; (2) even if that rule does not apply, the trial court abused its discretion under the analysis ordinarily used when considering the dismissal of Three Strikes allegations; and (3) her sentence of 30 years to life violates the protections against cruel and/or unusual punishment found in the United States and California Constitutions.

DISCUSSION

1. *The Three Strikes Law*

Under the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), prior convictions for certain serious or violent felonies qualify as "strikes" that increase the prison sentence of a defendant who has been convicted of another felony. One "strike" will double the ordinary prison term, while two or more strikes will lead to an indeterminate sentence of at least 25 years to life. (§§ 667, subd. (e)(1), (2); 1170.12, subd. (c)(1), (2).)[4] Carjacking and robbery are both designated as strike offenses. (§§ 667.5, subd. (c)(9) & (17), 1192.7, subd. (c)(19) & (27).)

The determination of whether a prior felony conviction qualifies as a strike is not affected by the sentence imposed unless the sentence automatically converts to a misdemeanor at the initial sentencing. (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1).)

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4 All further section references are to the Penal Code.

Various other sentencing dispositions also have no effect on the determination of what prior convictions qualify as strikes, including the stay of execution of sentence. (§§ 667, subd. (d)(1)(B), 1170.12, subd. (b)(1)(B).)

Trial courts have discretion under section 1385 to dismiss Three Strikes allegations in the furtherance of justice. In deciding whether to exercise this discretion, the trial court must take into consideration the defendant's background, the nature of the current offense and other individualized considerations. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531 (*Romero*).) "Preponderant weight" must be given to factors intrinsic to the Three Strikes scheme, including the nature and circumstances of the defendant's present felonies and prior serious or violent felony convictions, and the particulars of her background, character, and prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review the trial court's decision under the abuse of discretion standard. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 992-993.) A trial court abuses its discretion when it refuses to dismiss because of personal antipathy for the defendant while ignoring her background, the nature of her present offenses, and other individualized considerations. When determining whether to dismiss a Three Strikes allegation, the trial court must consider whether, in light of the nature and circumstances of her present felonies and prior serious or violent felony convictions, along with the particulars of her character, background, and prospects, the defendant may be deemed to be outside the Three Strikes scheme in whole or in part. (*Id.* at p. 993.)

2. Vargas's Contentions

Carjacking occurs when a car is taken by force or fear, regardless of whether the perpetrator had the intent to permanently or temporarily deprive the victim of the car. (§ 215, subd. (a).) When the thief had the intent to permanently deprive the victim of his car, the crime is also a robbery. (*People v. Scott* (2009) 179 Cal.App.4th 920, 928-929 (*Scott*).) The carjacking statute allows convictions for both offenses, but does not allow

punishment for both when they were each based on the same act. (§ 215, subd. (c).) This provision incorporates the principles of section 654, which prohibits multiple punishments when multiple convictions arise from an indivisible course of conduct involving different acts or when multiple convictions arise from a single act. (*People v. Thurman* (2007) 157 Cal.App.4th 36, 43; *People v. Burgos* (2004) 117 Cal.App.4th 1209, 1215 (*Burgos*).)

The preliminary hearing transcript from Vargas's 1999 carjacking and robbery convictions includes the testimony of her victim. According to the victim, a man got into his parked car and forced him out at knifepoint, while Vargas stood outside and claimed to have a gun. The pair then drove off. Respondent does not dispute that these convictions arose from the same act. Vargas contends that as a result the trial court was automatically required to dismiss one of the Three Strikes allegations. To support this contention she relies on *People v. Sanchez* (2001) 24 Cal.4th 983 (*Sanchez*) overruled on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1229, *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*), and *Burgos, supra,* 117 Cal.App.4th 1209. Respondent concedes that Vargas's carjacking and robbery convictions arose from a single act. However, respondent disputes Vargas's interpretation of those decisions, and also relies on *Scott, supra,* 179 Cal.App.4th 920, which rejected the *Burgos* decision. We discuss these decisions below.

3. *Decisions Concerning Effect of Stayed Sentences on Motions to Dismiss Three Strikes Allegations*

A. *People v. Benson*

The court in *Benson, supra,* 18 Cal.4th 24 held that strike convictions still counted even if they had been stayed under section 654. The defendant in that case fell within the multiple-acts, single-course-of-conduct rule because he allegedly incurred two strikes for burglary and assault with intent to commit murder arising out of the same incident. The sentence on one of those counts was stayed under section 654, and the defendant claimed

that as a result one of the two strike allegations in his current case had to be dismissed. The *Benson* court rejected that contention based on both the plain language of the Three Strikes statute and its legislative history.

The court's plain language analysis was based on two portions of the Three Strikes law: (1) the statute's directive that "Notwithstanding any other provision of law," prior convictions of any violent or serious felony offense set forth in section 667.5 subdivision (c) or section 1192.7 subdivision (c) were prior strike convictions under the Three Strikes law (§ 1170.12, subd. (b)(1)); and (2) the directive that a stay of sentence did not affect the determination that a prior conviction qualified as a strike (§ 1170.12, subd. (b)(1)(B)). (*Benson, supra,* 18 Cal.4th at pp. 30-32.) Accepting defendant's contention would effectively and impermissibly rewrite the Three Strikes law to state that a stay of sentence does not affect the determination of what counts as a strike except for stays imposed under section 654. (*Id.* at p. 31.)

The *Benson* court's legislative history analysis looked at both versions of the Three Strikes law: section 1170.12, which was enacted by the voters as a ballot measure (Proposition 184) in 1994; and section 667, subdivisions (b) through (i), which the Legislature enacted that same year. According to the *Benson* court, nothing in the ballot arguments for Proposition 184 indicated an intent to exclude convictions that otherwise qualified as strikes because sentence on that charge had been stayed under section 654. (*Benson, supra,* 18 Cal.4th at p. 33.) So too with the pre-enactment history of the legislative version of Three Strikes, with one legislative analysis stating that nothing in the statute " 'require[s] that the prior convictions be separate in any way.' " (*Id.* at pp. 33-34, quoting Sen. Com. on Judiciary, Analysis of Assem. Bill No. 971 (1993-1994 Reg. Sess.) as amended Jan. 26, 1994, p. 10.)

Based on this, the *Benson* court rejected the defendant's contention that there was no rational basis to consider as a two-strike offender someone who committed two crimes as part of a single act committed against a single victim at the same time with a single intent. Whether he formed the intent to assault his victim before or after he entered her

house "is less significant for purposes of the Three Strikes law than the fact that his prior criminal conduct yielded *two convictions*." (*Benson, supra,* 18 Cal.4th at pp. 34-35, original italics.) Instead, the central focus of the Three Strikes law is the defendant's status as a repeat felon – someone who committed a felony after being convicted of one or more strike offenses. (*Ibid.*)

In response to defendant's claim that applying Three Strikes to convictions where the sentence had been stayed under section 654 would lead to dramatic and harsh results, the *Benson* court said that absent a constitutional violation, it was not free to alter the statute's intended effect. It added: "It is worth noting, however, that our decision in *Romero, supra,* 13 Cal.4th 497, affirms that a trial court retains discretion in such cases to strike one or more prior felony convictions under section 1385 if the trial court properly concludes that the interests of justice support such action. [Citation].)" (*Benson, supra,* 18 Cal.4th at pp. 35-36.) In a footnote to this sentence, the court said: "Because the proper exercise of a trial court's discretion under section 1385 necessarily relates to the circumstances of a particular defendant's current and past criminal conduct, we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected – for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct – that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors." (*Id.* at p. 36, fn. 8.)

B. *People v. Sanchez*

The defendant in *Sanchez, supra,* 24 Cal.4th 983, was convicted of both second degree murder and gross vehicular manslaughter. The Supreme Court rejected his contention that he could not be convicted of both because the vehicular manslaughter charge was a lesser included offense of the murder charge. However, sentence on the manslaughter count was properly stayed under section 654, the court held. (*Id.* at p. 992.)

Pointing to footnote 8 in *Benson, supra,* 18 Cal.4th at page 36, Sanchez complained that should he ever reoffend, he could be wrongly deemed to have two strikes from his current convictions. Noting that it was not faced with that question, the *Sanchez* court said it was "appropriate and prudent to note that in . . . *Benson*, we observed that a trial court may strike a prior felony conviction under section 1385, and that we left open the possibility that 'there are some circumstances in which two prior felony convictions are so closely connected . . . that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors.' [Citation.]" (*Sanchez, supra,* 24 Cal.4th at p. 993, quoting *Benson, supra,* at p. 36, & fn. 8.)

C. *People v. Burgos*

The court in *Burgos, supra,* 117 Cal.App.4th 1209 relied on *Benson's* footnote 8 when concluding that the trial court erred by failing to dismiss a Three Strikes allegation because both of the defendant's strike priors involved one act – a failed attempt to steal someone's car at gunpoint – resulting in twin convictions for attempted carjacking and attempted robbery. According to the *Burgos* court, footnote 8 of *Benson* "strongly indicates that where the two priors were so closely connected as to have arisen from a single act, it would necessarily constitute an abuse of discretion to refuse to strike one of the priors." (*Burgos,* at p. 1215.) Quoting the reminder in *Sanchez, supra,* 24 Cal.4th at page 993 that *Benson* left open the possibility that there might be circumstances where it would be an abuse of discretion to deny a motion to dismiss a strike allegation if the prior convictions were sufficiently closely connected, the *Burgos* court concluded that "[t]hose circumstances are present in this case." (*Burgos,* at pp. 1215-1216.)

Because Burgos's convictions for attempted carjacking and attempted robbery arose from "the same single act," the trial court's failure to dismiss one of them "must be deemed an abuse of discretion." (*Burgos, supra,* 117 Cal.App.4th at p. 1216.) This conclusion was bolstered, the court said, by the fact that section 215, subdivision (c)

precludes multiple punishments for carjacking and robbery when based on the same act. (*Ibid.*)

Despite the use of language that sounds like a hard and fast rule requiring dismissal of strike allegations in cases such as this, the *Burgos* court still went on to conduct a traditional section 1385 analysis that included the relatively minor nature of the defendant's past and current offenses and the length of the sentence he would serve if the strike allegation were dismissed. (*Burgos, supra,* 117 Cal.App.4th at p. 1216.)

D. *People v. Scott*

The court in *Scott, supra,* 179 Cal.App.4th 920 considered the appeal of a defendant whose two prior strike convictions were for robbery and carjacking arising from the same act, and concluded that *Benson* did not stand for the proposition that the trial court's failure to dismiss one of those convictions based on that fact alone was an abuse of discretion.

The *Scott* court began by pointing out that even though portions of *Burgos* seemed to state an automatic rule of dismissal in such circumstances, the *Burgos* court's use of a standard section 1385 analysis made the true nature of the decision doubtful. (*Scott, supra,* 179 Cal.App.4th at p. 930.) It then noted the *Burgos* court's failure to discuss the statutory definition of a strike as something unaffected by the sentence imposed unless the felony was converted to a misdemeanor at that time. The failure to do so "negates a broad reading of *Burgos*," the *Scott* court held. (*Scott,* at p. 931.) Finally, the *Scott* court faulted *Burgos* for its reliance on section 215, subdivision (c), which bars multiple punishments for carjacking and robbery when they arise from the same act. Doing so was contrary to *Benson,* the *Scott* court said, because *Benson* said the defendant was on notice that both convictions would be treated as strikes should he reoffend. (*Scott,* at p. 931.)

Therefore, *Scott* held, the "same act" circumstance arising from convictions for robbery and carjacking was just another factor for the trial court to consider when

determining whether to dismiss a Three Strikes allegation. (*Scott, supra,* 179 Cal.App.4th at p. 930.)

4. *The Trial Court Did Not Err By Refusing to Dismiss One of the Three Strikes Allegations*

A. No Rule of Automatic Dismissal for Strikes Arising from Same Act

Vargas's contention that a three strikes allegation must be dismissed if it was based on the same act as another three strikes conviction is based on her interpretation of *Benson's* footnote 8. According to Vargas, the *Burgos* court properly read the footnote that way, and she asks that we follow both decisions.

Footnote 8 must be examined in two ways: First, in the context of the entire *Benson* decision; and second, by the language of that footnote and the context of the sentence in the text to which it was appended. We address them in that order.

Benson held that a strike is a strike is a strike, regardless of whether the sentence on that strike conviction was stayed under section 654. Its rationale was simple – both the plain language of the Three Strikes law and its pre-enactment history showed that the law was concerned with a defendant's status as a repeat offender, not the timing of his criminal intent. When the law said that the stay of execution of sentence had no effect on determining whether a prior conviction was a strike, its language was unambiguous and extended to sentencing stays of all kinds. (*Benson, supra,* 18 Cal.4th at pp. 30-32.) Thus, the overall context of *Benson* was to clarify that a prior conviction that qualified as a strike remained a strike even if sentence on that charge had been stayed for any reason.

As for the specific context of footnote 8 itself, it came toward the end of the *Benson* majority's response to the defendant's contention that harsh results would follow should convictions where sentence had been stayed under section 654 continue to qualify as strikes. After pointing out that it could not alter the law on that ground absent some constitutional infirmity, the court said: "It is worth noting, however, that our decision in *Romero, supra,* 13 Cal.4th 497, affirms that a trial court retains discretion in such cases to

strike one or more prior felony convictions under section 1385 if the trial court properly concludes that the interests of justice support such action. [Citation.]" (*Benson, supra,* 18 Cal.4th at p. 36.) Footnote 8 followed immediately: "Because the proper exercise of a trial court's discretion under section 1385 necessarily relates to the circumstances of a particular defendant's current and past criminal conduct, we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected – for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct – that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors." (*Id.* at p. 36, fn. 8.)

In short, *Benson* answered the harshness argument by pointing out that trial courts still had discretion under *Romero* to dismiss strike allegations where the sentence had been stayed. Because such discretion necessarily takes into account a defendant's past and current criminal conduct, the court said it *did not have to determine* whether a trial court would abuse its discretion by failing to dismiss a strike allegation arising from single act, multiple convictions.

We do not read this as stating, much less signaling, that a trial court automatically abuses its discretion by failing to dismiss a Three Strikes allegation that was part of a single act that yielded another Three Strikes conviction. Such a rule does not involve discretion at all. Instead, it strips the trial court of discretion. But the exercise of discretion under *Romero* is the whole point of footnote 8 and the text it follows. This is especially so given *Benson's* conclusion, which rejected defendant's proposed rule as untenable because it would prevent certain convictions on which sentence had been stayed from ever being treated as a strike, a result that violated both the language and intent of the Three Strikes law. (*Benson, supra,* 18 Cal.4th at p. 36.) Instead, the stay of sentence was a factor for the trial court to consider when determining whether to dismiss a strike allegation. (*Ibid.*)

Given *Benson's* interpretation of the Three Strikes law and the statutory non-effect of stayed sentences when determining whether a prior conviction is a strike, combined with the language and context of footnote 8, we conclude that the footnote does no more than offer guidance, and perhaps a warning, that trial courts should *consider* whether one act produced multiple strike convictions as a factor when deciding whether to dismiss a strike allegation.

When distilled, *Benson* holds that a stay of sentence under section 654 does not affect the determination of whether a prior conviction qualifies as a strike. However, the fact that a sentence was stayed on a conviction that is alleged as a strike is a factor the trial court may consider when ruling on a motion to dismiss that allegation. This rule applies whether multiple acts in a single course of conduct or single acts by themselves produced multiple strike convictions. Although *Benson* was specifically focused on section 654 stays, it noted that the Three Strikes provision that a stay of sentence did not affect whether a prior conviction counts as a strike applied to any type of stay.

We see no reason why *Benson's* rationale does not apply here. Under section 215, subdivision (c), when robbery and carjacking convictions are based on the same act, only one may be punished, a provision that effectively incorporated the sentencing stay principles of section 654. (*People v. Thurman, supra,* 157 Cal.App.4th at p. 43.) Given *Benson's* holding, combined with the plain language of the Three Strikes law concerning the non-effect of stayed sentences on determining whether a prior conviction is a strike, we conclude that whether a single act yielded multiple convictions is just one more factor, albeit an important one, for a trial court's *Romero* analysis.

Our interpretation of *Benson* means that we part ways with our colleagues in *Burgos*, who read footnote 8 as a strong indication "that where the two priors were so closely connected as to have arisen from a single act, it would necessarily constitute an abuse of discretion to refuse to strike one of the priors." (*Burgos, supra,* 117 Cal.App.4th at p. 1215.) To the extent that *Burgos* can be read to endorse such a rule, we decline to follow it.

However, we agree with the *Scott* court that the precise nature of the *Burgos* holding is not entirely clear. As the *Scott* court noted, after making what looked like a blanket pronouncement about the necessity of dismissing strike priors that arose from a single act, *Burgos* went on to conduct a typical *Romero* analysis based on the defendant's past and current criminal offenses. (*Scott, supra,* 179 Cal.App.4th at p. 930.)

A stronger indication that *Burgos* did not hold that dismissal was automatically required under these circumstances comes from that decision's statement of facts. *Burgos* arose from that court's earlier, unpublished decision in the same case (*People v. Burgos* (Oct. 31, 2002, B153653) [nonpub. opn.] (*Burgos I*)) where the defendant, pointing to footnote 8 of *Benson*, contended that he received ineffective assistance of counsel because his trial lawyer had not asked the trial court to dismiss one of the strike allegations because it arose from the same act as the other.

The *Burgos I* court remanded for resentencing because the trial court erroneously imposed two five-year sentence enhancements under section 667, subdivision (a). It declined to reach the *Benson* issue because the defendant failed to establish prejudice from his lawyer's failure to raise it in the trial court. Recounting its decision in *Burgos I*, the *Burgos* court said that based on *Benson's* footnote 8 and the sentence that preceded that footnote, it had "pointed out that *the Supreme Court in Benson had not stated that the refusal to strike a prior conviction on which the sentence had been stayed would necessarily constitute an abuse of discretion* . . . ." (Italics added.) Accordingly it remanded " 'the matter for resentencing, at which time the trial court may consider whether, under the language in *Benson* cited above . . . it deems it appropriate to exercise its discretion under *Romero* . . . and section 1385 to strike one of the prior strikes.' " (*Burgos, supra,* 117 Cal.App.4th at p. 1213, quoting *Burgos I, supra,* B153653, slip opn. at p. 14.)

Based on this, it sounds to us like the *Burgos* court read *Benson* the same as we do – as holding that the circumstances of multiple convictions arising from the same act or

course of conduct is a factor to consider when determining, and not dispositive of, motions to dismiss a strike allegation.[5]

B. The Trial Court Did Not Abuse Its Discretion

Vargas contends that even if the trial court was not required by *Benson* and *Burgos* to dismiss one of the Three Strikes allegations, the trial court abused its discretion when it failed to do so. She bases this on her limited criminal history – the 1999 carjacking and robbery convictions that sprang from a single act where she did not perform an act of violence, her 2007 misdemeanor trespass conviction, and two parole violations.

As the trial court pointed out, Vargas was very active during the 1999 carjacking, making the initial contact with the victim, yelling at him to get out of his car, and threatening that she had a gun, although she never displayed one. Her companion did have a knife and pressed it to the victim's neck. Vargas was granted parole while serving her sentence for this crime, but violated parole twice. She was released from prison supervision in September 2006 and committed her trespass one year later. Sixteen months after that, she committed the current offenses.

As we pointed out in *Vargas I* when discussing Vargas's current offenses, she broke into one house and stole numerous items, including cash, jewelry, and personal electronics. She returned to the same neighborhood the next day prepared to burgle another house, thereby giving every indication that she was on her way to becoming a frequent residential burglar. Thus, she fell within the Three Strikes scheme, warranting a Three Strikes sentence. Although both strike convictions could have been imposed on all three of her current offenses for a sentence of 75 years to life, the trial court mitigated the

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[5] As for *Sanchez's* reminder in dicta that *Benson* warned of circumstances where it would be an abuse of discretion not to dismiss a strike allegation arising from a single act (*Sanchez, supra,* 24 Cal.4th at p. 993, that statement must be read in light of what we believe is the correct interpretation of *Benson*: advising trial courts to consider that factor when exercising their discretion under *Romero*.

effects of the Three Strikes law by dismissing both allegations as to two of the counts. We therefore hold that the failure to dismiss one of those allegations entirely was not an abuse of discretion.[6]

5. Vargas's Sentence Was Not Unconstitutionally Cruel

Vargas contends that the Three Strikes sentence of 25 years to life she received on the burglary conviction was unconstitutional because it was cruel and unusual under the Eighth Amendment to the United States Constitution and cruel or unusual under Article I, section 17 of the California Constitution.[7]

Under the Eighth Amendment, the courts examine whether a punishment is grossly disproportionate to the crime. We consider all the circumstances of the case, beginning with the gravity of the offense and the severity of the sentence. (*Graham v. Florida* (2010) ___ U.S. ___, 130 S.Ct. 2011, 2021, 2022.) In the rare case where this threshold comparison raises an inference of gross disproportionality, the court then compares the defendant's sentence with those received by others in both the same state

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6 Vargas contends that the trial court relied on the prosecutor's assertion that she had a juvenile robbery conviction, when her probation report states that she had no juvenile record. Although the trial court did include the supposed juvenile conviction in its analysis, we conclude under the circumstances that any error in doing so was harmless, given her past and current criminal record and the trial court's initial grant of leniency.

She also suggests the trial court might have included in its analysis a 2003 narcotics conviction, but her lawyer pointed out at the resentencing hearing that the prosecutor had already conceded that the drug conviction was not hers, the court answered, "All right. Thank you." The trial court did not mention the 2003 conviction when describing her criminal record later during the hearing. Based on that, we conclude the trial court did not rely on the 2003 conviction.

7 Respondent contends this issue was waived because Vargas did not raise it below. We will reach the issue on its merits in order to forestall a habeas corpus petition based on a claim of ineffective assistance of counsel. (*People v. Norman* (2003) 109 Cal.App.4th 221, 230.)

and other states. If this comparative analysis confirms the initial belief that the sentence is grossly disproportionate, then it is cruel and unusual. (*Id.* at p. 2022.)

Under the California Constitution, a sentence is cruel or unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity. Our review under this test includes an examination of the nature of the crime and the character of the defendant, and the penalties in this state for more serious crimes and those imposed in other states for the same crime. (*In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Haller* (2009) 174 Cal.App.4th 1080, 1092.)

Vargas contends her Three Strikes sentence violated both the federal and California constitutions because: (1) she claims her previous criminal history was minimal and non-violent and her current offenses were also non-violent and showed no intent to harm; (2) the sentence is extremely severe when compared to the sentence imposed for other more serious crimes in California and for burglary when committed in other states; and (3) it is grossly disproportionate when compared to the sentences imposed by habitual offender statutes in other states. We disagree.

In *Ewing v. California* (2003) 538 U.S. 11, 20 (*Ewing*), the United States Supreme Court held that a Three Strikes sentence of 25 years to life was not grossly disproportionate for a defendant convicted of grand theft. The defendant's strike convictions were for three residential burglaries and a robbery. He was on parole at the time of the current offense, and had several other felony and misdemeanor convictions for theft, petty theft, unlawful firearm possession, and possession of drug paraphernalia. In the companion case of *Lockyer v. Andrade* (2003) 538 U.S. 63, 77, the court held that a Three Strikes sentence of 50 years to life for a defendant convicted of two counts of petty theft with a prior was not grossly disproportionate. Three convictions for residential burglary were charged as strikes. The defendant also had two misdemeanor theft convictions and a felony conviction for transporting marijuana.

The defendant in *People v. Romero* (2002) 99 Cal.App.4th 1418 was given a Three Strikes sentence after being convicted of felony petty theft with prior petty theft convictions for stealing a $3 magazine. In addition to the petty thefts, he had prior convictions for burglary, hit and run battery on, and obstruction of, a peace officer, and lewd conduct with a child under 14. He violated both probation and parole on the burglary conviction. Given that, the court held that no inference of gross disproportionality had been raised. (*Id.* at p. 1428.)

Although every case is obviously different, we conclude Vargas falls within the parameters established by these decisions. If Three Strikes sentences of 25 years to life for grand theft and 50 years to life for stealing a magazine are not grossly disproportionate under the Eighth Amendment, then neither is Vargas's sentence for residential burglary. The only distinguishing factor might be her criminal history, but it is sufficiently extensive to warrant the sentence imposed.

As noted above when discussing whether the trial court abused its discretion when declining to dismiss one of the strike allegations for the burglary sentence, Vargas has rarely been free of prison custody or supervision. She was convicted of carjacking and robbery in 1999 at the age of 20. She violated her parole twice, and appears to have been in prison or on parole supervision for those crimes until September 2006. One year later, she committed a misdemeanor trespass and was placed on probation for 36 months. Sixteen months later, while still on probation, she committed her current offenses: burglary, grand theft, conspiracy to commit theft, and giving false information to a police officer.

Although Vargas downplays her role in the 1999 carjack-robbery, she forgets that she was working in tandem with someone who held a knife to the victim's neck while she at least claimed to have a gun. As for her current offenses, residential burglary "is an extremely serious crime presenting a high degree of danger to society," because of the risk of violence it creates should the victims be at home and because it is an invasion of our most private space. (*People v. Weaver* (1984) 161 Cal.App.3d 119, 127.) Not only

did Vargas commit one burglary and conspire to commit another, as we have pointed out before, it is reasonable to infer she was on a new criminal pathway and would commit even more burglaries in the future if unchecked. At the very least, it suggests that the present crimes were not an aberration for someone of otherwise good behavior. Based on all this, we hold that her sentence did not violate the Eighth Amendment.

The same analysis applies under the California Constitution. What we have just said above applies to an examination of the nature of the offense and the offender. As for a comparison with Vargas's punishment and that for more serious crimes in the same jurisdiction, that step is inapplicable to recidivist sentencing schemes like Three Strikes. (*People v. Romero, supra,* 99 Cal.App.4th at p. 1433.) As for the final prong, a comparison with recidivist sentencing provisions in other states, Vargas is correct that Three Strikes is one of the nation's most severe. However, the state constitution "does not require California to march in lockstep with other states in fashioning a penal code," and we are not required to adhere to some majority rule. Otherwise, California could not take the toughest stance against repeat offenders. (*Ibid.*)

DISPOSITION

The judgment is affirmed.[8]

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.

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[8] We received a copy of an April 5, 2012 letter that Vargas's appellate counsel sent to the trial court asking it to amend the abstract of judgment to correct purported errors in the amount of her custody credits. That letter did not ask us to take any action in regard to that issue. We have ordered that a copy of the letter be sent to respondent.

PROOF OF SERVICE

Re: People v. Darlene A. Vargas, No. S____

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 July 2, 2012, I served a true copy of APPELLANT'S PETITION FOR REVIEW, by first class mail, on the following parties:

California Court of Appeal
Second District, Division Eight
300 S. Spring Street, Room 2217
Los Angeles, California 90013

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FOR DELIVERY TO:
Hon. Bruce F. Marrs, Judge

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

Executed on July 2, 2012, at Glendale, California.

MELANIE K. DORIAN