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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.