

FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
RANCHO CUCAMONGA DISTRICT

APR 11 2022

BY 
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7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **COUNTY OF SAN BERNARDINO**

9
10 **THE PEOPLE OF THE STATE OF CALIFORNIA,**

11 Plaintiff,

12 vs.

13 **WILLIAM SHEA McKAY,**

14 Defendant
15
16

Case No.: FWV21002096

**PEOPLE'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS
PRIOR CONVICTIONS PURSUANT TO
PENAL CODE §1385**

DATE: April 20, 2022
TIME: 8:30 A.M.
DEPT: R-5

17
18 **TO THE HONORABLE JUDGE OF THE SUPERIOR COURT, DEFENDANT,**
19 **AND HIS ATTORNEY OF RECORD: THE PEOPLE OF THE STATE OF CALIFORNIA,**
20 through their attorneys, JASON ANDERSON, District Attorney for the County of San
21 Bernardino, and TESS PONCE, Deputy District Attorney, hereby oppose Defendant's motion
22 to dismiss Defendant's prior conviction under Three Strikes Law, pursuant to California Penal
23 Code §1385.

24 This Opposition is based upon the pleadings, files, and records in this action, the
25 attached Memorandum of Points and Authorities, and any such further oral and
documentary evidence set forth at the hearing.

STATEMENT OF FACTS

1 On March 27, 2021, Rancho Cucamonga Sheriff's deputies were dispatched to a
2 residence in Rancho Cucamonga. The reporting party advised that a woman had fled to
3 their residence claiming to have been tied up and held hostage over the course of several
4 days at a nearby house.

5 The victim advised that she had been acquaintances with William Shea McKay
6 (hereinafter "defendant") for some time, and while he was in custody on an unrelated
7 offense, he had asked victim to house-sit and feed his dogs. At some point, victim claims
8 she left defendant's residence for a few hours, during which time it was burglarized.

9 Defendant was soon released from custody, after victim assisted in bailing him
10 out of custody. Having heard about the burglary that took place, defendant asked the
11 victim to come to his home so they could discuss the incident. When victim arrived at
12 the location, defendant confronted her about suspected involvement in the burglary.
13 Defendant punched victim several times in the face, told her he was going to kill her and
14 her mother, took her purse, credit cards, keys, and cell phone, before taking her inside
15 his house from the garage. In his living room, he proceeded to duct tape her at the wrists
16 and ankles. Two other co-defendants were present onlookers at this time.

17 Over the course of the next several days, victim was moved, and sometimes
18 dragged, by either defendant or co-defendants to various parts of the house, such that one
19 of them would be able to keep watch over her while she remained restrained. During this
20 time, they were also making various purchases using the cards she kept in her purse. Each
21 co-defendant assaulted her at least once, however, defendant was responsible for the
22 lion's share of physical cruelty. At one point, the victim had duct tape placed over her
23 mouth, in addition to her wrists and ankles. When she was forced to do manual labor in
24 the backyard, she attempted to speak loudly about being held captive so perhaps a
25 neighbor would hear; when one co-defendant noticed this was likely victim's intent,
victim was roughly brought back inside of the house and back to the garage, where
defendant and one other co-defendant proceeded to hit her as punishment for her
disobedience.

1 The victim was held against her will for several days. On March 27, 2021, she
2 was able to loosen her restraints, and escape through the front door, which she described
3 as being blocked by a large couch. She then ran to several neighbors' houses trying to
4 escape the one co-defendant tasked to watch her at that point. She was ultimately allowed
5 in by a neighbor nearby, and authorities were called.

6 Defendant and one co-defendant were arrested on March 29, 2021, after leading
7 Sheriff's deputies on a lengthy pursuit. Defendant and co-defendant were originally
8 stopped for driving a stolen vehicle, and rather than surrender, they sped off in the
9 vehicle, evading in the desert for over twenty miles, and finally taking off on foot armed
10 with knives after the vehicle was disabled. A K-9 unit was also stabbed during the
11 evading, and required an emergency airlift to receive medical treatment for those
12 wounds.

13 At the time of arrest, Defendant had two prior strikes alleged, pursuant to Penal
14 Code §§1170.12(a)-(d) and 667(a)(1). The first was a violation of Penal Code §245(a)(2),
15 Assault with a Firearm on a Person, of which he was convicted in 1999. He was sentenced
16 to three years in State Prison for this offense, and he subsequently incurred one parole
17 violation in 2004. The second was a violation of Penal Code §211, First Degree Robbery,
18 of which he was convicted in 2006. He was sentenced to thirteen years in State Prison
19 for this conduct.

20 In addition to the two aforementioned convictions, defendant was also convicted
21 of a violation of Penal Code §459 as a misdemeanor in 1998 and sentenced to serve 45
22 days in county jail.

23 In the case at bar, defendant was convicted of the following counts:

- 24 • Count 3: False Imprisonment, in violation of Penal Code §236
- 25 • Count 6: Evading a Peace Officer with Wanton Disregard for Safety, in
violation of Vehicle Code §2800.2(a)
- Count 8: Criminal Threats, in violation of Penal Code §422
- Count 9: Receiving Stolen Property (Over \$950), in violation of Penal
Code §496(a)

- Two Prior Strikes Found True
 - PC §245(a)(2) – Case Number FWV17179
 - PC §211 – Case Number MA03142001
- Penal Code §667(a)(1) “nickel” priors found true

MEMORANDUM OF POINTS AND AUTHORITIES

I.

**FURTHERANCE OF JUSTICE IS NOT SERVED BY DISMISSING THE
DEFENDANT’S PRIOR STRIKE CONVICTION FOR THE PURPOSES OF
SENTENCING PURSUANT TO SUBDIVISION (a) OF PENAL CODE §1385.**

Subdivision (a) of Penal Code §1385 allows the court to dismiss an “action” if doing so if found to be “in the furtherance of justice.” (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530; *People v. Williams* (1998) 17 Cal.4th 148, 165.) This is accomplished by the court determining if the defendant is “within the spirit” of the Three Strikes Law. (*Williams, supra*, 17 Cal.4th at pp. 161-162.) To do this, “[t]he trial court must balance society’s legitimate interest in imposing longer sentences for repeat offenders and the defendant’s constitutional right against disproportionate punishment” in the interests of justice. (*Romero, supra*, 13 Cal.4th at pp. 530-531.) The court shall also consider the nature of the defendant’s present felonies and prior strike convictions, and his background, character, and prospects for change. (*Williams, supra*, 17 Cal.4th at pp. 161-162.) But “[t]he mere presence of some mitigating circumstances cannot insulate a trial court’s decision to strike a prior strike conviction against a charge of abuse of discretion.” (*People v. Mayfield* (2020) 50 Cal.App.5th 1096, 1109; citing *Williams, supra*, 17 Cal.4th at p. 163.)

The Three Strikes sentencing legislation specifically declares that its purpose is to “ensure longer prison sentences and greater punishment for those who commit a

1 [qualifying] felony and have been previously convicted of serious and/or violent felony
2 offenses.” (See Pen. Code § 667, subdivision (b); Ballot Pamphlet, General Election,
3 *supra*, text of Proposition 184, at p. 64; see also *People v. Strong* (2001) 87
4 Cal.App.4th 328, 337.) Furthermore, the law shall be applied to every defendant that
5 fits the statutory scheme for punishment:

6 “[T]he Three Strikes law does not offer a discretionary sentencing choice,
7 as do other sentencing laws, but establishes a sentencing requirement to
8 be applied in every case where the defendant has at least one qualifying
9 strike, unless the sentencing court ‘concludes that an exception to the
10 scheme should be made because, for articulable reasons which can
11 withstand scrutiny for abuse, this defendant should be treated as though
12 he actually fell outside the Three Strikes scheme.’” (*Strong, supra*, 87
13 Cal.App.4th at pp. 337-338.)

14 Career criminals “certainly [go] to the heart of the statute’s purpose—or spirit”
15 and a large body of case law has reversed the dismissal of, or affirmed the refusal to
16 dismiss, a strike offense belonging to those defendants with long or continuous criminal
17 histories. (*Id.* at p. 338; see e.g. *People v. Stone* (1999) 75 Cal.App.4th 707, 717;
18 *People v. Gaston* (1999) 74 Cal.App.4th 310, 320; *People v. Thornton* (1999) 73
19 Cal.App.4th 42, 49; *People v. Barrera* (1999) 70 Cal.App.4th 541, 554-555; *People v.*
20 *Humphrey* (1997) 58 Cal.App.4th 809, 813; *People v. Guzman* (1996) 49 Cal.App.4th
21 1049, 1054.)

22 There is a presumption against striking a prior offense: “If, after having suffered
23 two qualifying felony convictions, an offender commits a third qualifying felony, the
24 Three Strikes law presumes he or she is incorrigible and requires a life sentence.”
25 (*People v. Vargas* (2014) 59 Cal.4th 635, 638.) Of course, courts may deviate from this
presumption, but “that great power should only be used in ‘extraordinary’ circumstances,

1 when the ends of justice demand it.” (*People v. Mayfield* (2020) 50 Cal.App.5th 1096,
2 1105, citing to *People v. Carmony* (2004) 33 Cal.4th 367, 378.)

3 There is no articulable or compelling reason why justice would be furthered by
4 the presumption being cast aside and dismissing the prior strike convictions. The nature
5 of the defendant’s current offense – either the threats of violence, the fear instilled in the
6 victim by zip tying her and duct taping her for days, or the crazed twenty-mile police
7 chase that ensued when the defendant was caught – is in no way mitigating and deserving
8 of the extreme relief offered in *Romero*. While the offenses may not be as severe as other
9 crimes such as murder or rape, they do represent a continuation of the defendant’s life-
10 long dedication to committing serious crimes when released from penal custody.

11 In this case, the defendant lured the female victim to his home, after convincing
12 her to assist in posting his bail on another outstanding criminal matter. He took advantage
13 of the position of trust and confidence to isolate the victim and later terrorize her. When
14 she arrived at his house, he had not only formulated a plan to take her financial
15 belongings and brutally hold her hostage for several days, but he also induced others to
16 participate in the crime by making them watch her such that she could not escape. He
17 assumed a leadership role in spearheading this endeavor of violent confinement.

18 The defendant escalated the situation by endangering other members of society
19 even after the victim managed to escape the fortress he called home. The defendant went
20 on a more than twenty-mile evading in a large dually truck, driving on freeways with
21 other people still on the road. When the truck went off-roading in a remote area, known
22 for narrow dirt roadways, he endangered those deputies following him in their patrol
23 units. When he took off on-foot, he and the co-defendant present armed themselves with
24 large knives, further placing deputies in danger. His refusal to surrender ultimately
25 resulted in a K-9 unit being brutally stabbed several times. Though he was not charged
with animal cruelty, the attack resulted from the defendant’s attempt to flee police.
Defendant brought another co-defendant on-board, was shown to be the main
orchestrator in these crimes, and created situations that put multiple members of society,
and a canine unit as it were, in danger. Public safety has been threatened by the actions

1 of the defendant in this case, as well as the violent behavior he exhibited over the course
2 of the two prior violent strike convictions.

3 The defendant's repeated strike offenses - all involving violence and danger
4 towards others - all put him well within the meaning of the Three Strikes sentencing
5 legislation for recidivist offenders, and warrant the full punishment allowed under the
6 current law.

7 The People will now address the case law surrounding some of the defense's
8 specific requests for leniency.

9 **Time Between Convictions**

10 At no time in the defendant's adult life has he led a sustained crime-free
11 existence.

12 The first strike offense arose from events that occurred on January 9, 1999, after
13 William McKay was pulled over for a traffic stop. After defendant was contacted at his
14 driver side door by an officer, he quickly accelerated in an attempt to get away.
15 Defendant led law enforcement on a high-speed pursuit, in which he drove in excess of
16 100mph on the freeway, and up to 90mph on surface streets. At one point in the pursuit,
17 he drove through a Cal Trans Work Zone. Workers were forced to run out of the path of
18 defendant's vehicle to avoid being struck. Several other vehicles on the road were
19 forced to swerve to avoid being struck. After the lengthy pursuit, the vehicle became
20 disabled, and the driver of the vehicle, William McKay, and two others began to flee on
21 foot. Defendant McKay had a firearm in his hand, and was described as looking
22 threateningly at the officers on scene while raising the weapon, waving it back and
23 forth. When law enforcement officers directed him to drop the weapon, he continued
24 raising it in the air. After disobeying orders to drop the weapon, he finally tossed the
25 gun and surrendered to law enforcement. At the time of the arrest, it was discovered
defendant was driving on a suspended license, and he also had a no bail warrant for his
arrest for violation of Penal Code §459, Burglary.

1 Defendant pled guilty to a violation of Penal Code §245(a)(2), and was
2 sentenced to three years in state prison. He was paroled on March 6, 2001. He suffered
3 two parole violations during this period, one in December of 2001 and the second in
4 February of 2004. He was released on September 2, 2004, and discharged from parole
5 on November 16, 2005.

6 The second strike offense arose from events on February 2, 2005. The male and
7 female victims were asleep in bed together in their apartment, when suddenly their
8 bedroom door was kicked open, the lights turned on, and they were charged at by two
9 men. One of these men was William McKay, who the victims knew to be dating a
10 woman who no longer rented a room in the apartment. The two men punched the male
11 and the female victims several times in the face and body, and beat them with other
12 objects in the room. The men each threw a chair at the victims, hitting one in the head,
13 and the other in the back. The victims were punched multiple times, and the male
14 victim described being choked until he lost consciousness. The victims suffered black
15 eyes, bruising to various parts of their bodies, swelling and bruising to the neck and
16 jaws, and one suffered a scrape-bruise to her back. The male victim's eyes were
17 described as almost completely swollen shut, and the whites of his eyes completely red.
18 During the beating, McKay and his counterpart demanded to be told the location of the
19 male victim's safe, and threatened to "tape up" the victims if they did not comply with
20 their commands. The safe was located, and the men took approximately \$3,700. After
21 taking the money, they continued beating the victims. The female victim identified
22 McKay as the individual who primarily beat her. She told law enforcement he
23 smothered her with a pillow, punched her multiple times, and grabbed her by her hair
24 before slamming her head into a desk. When the beating was finally over, the two men
25 took the victim's two cell phones and a purse before leaving. The victims were both
hospitalized as a result of the assault.

Defendant pled guilty to violations of Penal Code §211, 1st Degree Robbery, and
two counts of Penal Code §245(a)(1), Assault by means Likely to Produce GBI, and

1 was sentenced to 13 years in state prison. He was paroled on April 24, 2016, and
2 discharged from parole on May 31, 2019.

3 The requests for dismissal made by the defense in this matter are similar to the
4 requests made in the recent case of *People v. Mayfield* (2020) 50 Cal.App.5th 1096,
5 where Division Three of the Fourth District Court of Appeal reversed the trial court's
6 decision to dismiss a prior strike allegation pursuant to *Romero*. In that case, the
7 defendant was also convicted of the qualifying third-strike offense of Penal Code §422.
8 (*Id.* at p. 1099.) One justification the trial court issued for its decision was that the
9 defendant's 14-year-old strike prior was simply too remote in time to be used against
10 the defendant at that state in his criminal career, and ordered it dismissed. (*Id.* at p.
11 1107.) The Fourth District overturned that decision, relying on the California Supreme
12 Court's opinion in *Williams*, noting that "older strike convictions do not deserve
13 judicial forgiveness unless the defendant has used them as a pivot point for reforming
14 his ways." (*Ibid.*; *Williams, supra*, 17 Cal.4th at pp. 163-165 [prior offense was 12
15 years old]; see also *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 [reversing
16 order of the trial court to strike a 20-year-old conviction because the defendant
17 continuously committed crimes in the interim]; *People v. Gaston* (1999) 74
18 Cal.App.4th 310, 321 [reversing the dismissal of a 17-year-old conviction based on a
19 continuous life of crime].) The mere fact that the defendant is back in court on a newly
20 convicted offense *would tend to underscore how the defendant rightly fits within the*
21 *statutory scheme of the Three Strikes law*. The defendant must refrain from criminal
22 activity to properly receive relief under *Romero*. It is not mitigating that a prior
23 conviction merely happened a number of years ago. (See *Humphrey, supra*, 58
24 Cal.App.4th at p. 813 ["Where, as here, the defendant has lived a continuous life of
25 crime after the prior, there has been no 'washing out' and there is simply nothing
mitigating about a 20-year-old prior".])

The number and nature of offenses over the defendant's life when he was free
from custody are significant. So too is the defendant's performance on parole or
probation. (*Gaston, supra*, 74 Cal.App.4th at p. 320.) "[T]he court may consider the

1 inmate's criminal conviction history, disciplinary record and rehabilitation records
2 while incarcerated, and '[a]ny other evidence the court, within its discretion, determines
3 to be relevant.'" (*People v. Brown* (2014) 230 Cal.App.4th 1502, 1510; see also Pen.
4 Code, § 1170.126, subd. (g).) The defendant in this matter has previously performed
inadequately on parole.

5 Should the argument be made that there was a significant amount of time
6 between the 2006 robbery conviction and the present offense as an example of the
7 defendant's ability to stay free of new criminal offenses, the People ask the court to
8 consider that as a result of the 2006 conviction, the defendant was sentenced to thirteen
9 years in prison. The defendant's release date from that sentence was April 24, 2016,
10 and the incident in this case took place only a few short years later, in 2021. Where a
11 defendant was incarcerated for prior offenses for a period, and then resumes a life of
12 crime upon release, severely undercuts any justification for granting relief. (See
13 *Mayfield, supra*, 50 Cal.App.5th at p. 1108.) That is precisely what the defendant has
done with his life in the present matter.

14 15 **Overall Length of Sentence**

16 The defense infers that the sentence in this case is inappropriate because it is
17 unnecessarily lengthy, but also fails to cite any facts from the current conviction which
18 would justify such a reduction in otherwise statutorily-mandated sentence.

19 When a trial court is considering granting *Romero* relief, it can consider whether
20 the resulting sentence would be insufficient to address the defendant's likelihood of
21 recidivism if granted relief. (*People v. Burgos* (2004) 117 Cal.App.4th 1209, 1216; see
22 also *People v. Garcia* (1999) 20 Cal.4th 490, 500.) "[A] defendant's sentence is also a
23 relevant consideration when deciding whether to strike a prior conviction allegation; in
24 fact, it is the overarching consideration because the underlying purpose of striking prior
25 conviction allegations is the avoidance of unjust sentences." (*Gaston, supra*, 74
Cal.App.4th at p. 315.)

1 Relevant to this argument is the fact that this case was decided before the
2 imposition of the newly amended subdivisions (b)(1)-(3) of Penal Code §1170 on
3 January 1, 2022, which requires all aggravated terms to be supported by jury or court
4 trial finding. These provisions apply retroactively and affect Defendant McKay’s
5 current sentence. (See *People v. Flores* (2022) __ Cal.App.5th __ [2022 WL 121934].)
6 Unless the court, sitting as the trier of fact in this matter, would be open to hear
7 additional evidence in a bifurcated trial, or make those findings after the trial, the
8 People would be precluded from requesting anything more than the midterm in this
9 case if the third strike penalty was not imposed.

9 Were the court to grant dismissal of one of the strike offenses and “nickel” prior
10 allegations, the People estimate the defendant’s exposure would be approximately eight
11 years in state prison, and the defendant would be subject to good conduct credits under
12 the California Department of Corrections and Rehabilitation’s new custody credit
13 formulation for prior strike offenders (see 15 C.C.R. § 3043.2, subd. (b)(3)(B).),
14 resulting in substantially less actual time, with any credits towards the sentence for time
15 already served. This is far less custody time than the defendant received for his prior
16 2006 robbery conviction (a 13-year sentence), and unlikely to address the public’s
17 interest in keeping recidivist offenders in prison custody for a more substantial period
18 of time. (See generally Cal. Const, art. I, sec. 28; subd. (a)(5).) A criminal defendant
19 who has a long and continual career of violence and lengthy prison sentences is not
20 likely to emerge from prison after a short stay with a reformed outlook on life and
21 commitment to respecting the rights of others.

20 Nor will sentencing the defendant to the life term warranted under Penal Code
21 §667, subdivisions (b)-(i), necessarily ensure that the defendant will serve the entire
22 term in custody considering current parole hearing standards put into place by
23 Proposition 57. (See Cal. Const., Art. I, § 32.) The California Constitution, article I,
24 section 32, subdivision (a), now reads:
25

1 “(1) Parole Consideration: Any person convicted of a nonviolent felony
2 offense and sentenced to state prison shall be eligible for parole
3 consideration after completing the full term for his or her primary
4 offense.

5 (A) For purposes of this section only, the full term for the primary
6 offense means the longest term of imprisonment imposed by the court
7 for any offense, excluding the imposition of an enhancement,
8 consecutive sentence, or alternative sentence.”

9 In fact, because the Penal Code §422 strike conviction which serves as the basis
10 for the life term in this matter is only a “serious” strike offense under Penal Code
11 §1192.7, the defendant will be eligible for parole consideration upon completion of the
12 full term for his primary offense, excluding the imposition of an enhancement,
13 consecutive sentence, or alternative sentence, despite the imposition of the twenty-five-
14 years-to-life term. (See Cal. Const., Art. I, § 32, subd. (a)(1); *In re Gadlin* (2020) 10
15 Cal.5th 915, 924 [non-violent offenders, e.g., “serious” third strike offenders, are
16 entitled to parole consideration at the conclusion of their base term under Proposition
17 57’s language, despite the nature of their prior strike convictions]; see also *In re*
18 *Edwards* (2018) 26 Cal.App.5th 1181, 1189-1190.)

19 He has earned every one of them. He therefore should be sentenced according to
20 the statutory scheme for such recidivist offenders. The actual length of the defendant’s
21 term is, in fact, largely left up to him under current parole configurations. If, after a
22 life-time of committing felony strike offenses, the defendant earnestly wants to make a
23 plan to rehabilitate himself, he may start upon arrival in prison custody and work to
24 gain insight into his criminal history to present at future parole board hearings. But he
25 should not be free to continue to harm members of the public until he makes the
decision to reform his life. He has thus far proven incapable of doing so.

Defendant’s Youth and Drug Use at the Time of the Priors

1 The defense cites the defendant's age and drug use as contributing factors to the
2 two prior strike convictions and urges the court to grant a dismissal based on these
3 assertions.

4 A defendant's youth and inexperience at the time of the prior offense may be a
5 factor for the court to consider in a *Romero* motion, but the "factors of youth" outlined
6 for parole considerations and in *People v. Franklin* (2016) 63 Cal.4th 261 are not a
7 requirement for the court's consideration in exercising its *Romero* discretion. (See
8 *People v. Carter* (2018) 26 Cal.App.5th 985, 988 (such matters are "inapplicable to
9 sentences imposed under the three strikes law"); see also Pen. Code, § 3051, subd. (h)
10 [stating that this section "shall" not apply to cases in which sentencing occurs pursuant
11 to the Three Strikes law].) A prior strike committed while the defendant was young is
12 of little mitigation when followed by a continuous streak of criminal activity upon
13 release from custody throughout the rest of his life.

14 Here, other than note that the defendant was in his twenties at the time he
15 committed the two prior strike convictions, the defense has failed to provide the court
16 with any justification that a *Romero* remedy should be exercised. It has failed to cite
17 what he has done to pivot his life into a more law-abiding existence, and instead finds
18 himself in front of the court again with a felony strike conviction. The defendant was
19 found guilty in each of his offenses *because he had the requisite intent to commit the*
20 *crimes*, and we have no information to suggest otherwise.

21 The relation of the crime to drug addiction for either the current or prior strike
22 offenses is a factor the court may consider in its decision. (See *Garcia, supra*, 20
23 Cal.4th at p. 503.) The court should also consider what attempts the defendant sought
24 to bring that problem under control before granting relief. (See *Williams, supra*, 17
25 Cal.4th at p. 163 ["But neither can we ignore the fact that [the defendant] was
unemployed and did not follow through in efforts to bring his substance abuse problem
under control"].) Mere drug addiction by itself should not be considered a mitigating
factor in this matter; if left untreated and unresolved it simply means one is more likely

1 to commit crime in the future. (See generally *People v. Avila* (2020) 57 Cal.App.5th
2 1134; *People v. Regalado* (1980) 108 Cal.App.3d 531, 539-540).

3 **Aggravating Factors for Consideration**

4 California Rules of Court, rule 4.42,1 specifies aggravating factors for felony
5 sentencing triad purposes. While the standard felony sentencing triad is not at issue
6 when arguing a *Romero* motion, the court may look to the listed factors in aggravation
7 and mitigation in deciding what result would further the interests of justice. (See
8 *People v. Dryden* (2021) 60 Cal.App.5th 1007, 1029; *People v. Cluff* (2001) 87
9 Cal.App.4th 991, 1004.)

10 Aggravating factors relating to a defendant's actions in this case include the
11 following: the crime involved threat of death, acts disclosing a high degree of cruelty,
12 viciousness and callousness; the victim was particularly vulnerable; the defendant
13 induced others to participate in the commission of the crime or occupied a position of
14 leadership or dominance of other participants in its commission; the manner in which
15 the crime was carried out indicates planning, sophistication, or professionalism; the
16 defendant took advantage of a position of trust or confidence to commit the offense; the
17 defendant has engaged in violent conduct that indicates a serious danger to society; and
18 the defendant's prior performance on parole was unsatisfactory. (See Cal. Rules of Ct.,
19 rule 4.421.)

20 The People would ask the court to take the mentioned circumstances into
21 account when considering its decision for this matter.

22 **Sufficiency of the Evidence**

23 Should it become an argument by the defense, the court cannot consider the
24 sufficiency or the state of the evidence in making its decision to dismiss a prior strike
25 offense. (*People v. Wallace* (2004) 33 Cal.4th 738, 748.) “[N]o weight whatsoever
may be given to the factors extrinsic to the [Three Strikes] scheme.” (*Williams, supra*,
17 Cal.4th at p. 161.)

1 Based on the above points and authorities, the People request that the court does
2 not institute its sentencing discretion under subdivision (a) of Penal Code §1385 to
3 dismiss any of the defendant’s prior strike convictions.
4

5 **II.**

6 **NEWLY AMENDED SUBDIVISION (c) OF PENAL CODE §1385 DOES NOT**
7 **GRANT THE ABILITY TO DISMISS PRIOR STRIKE CONVICTIONS**

8 The court’s ability to dismiss a strike prior in furtherance of justice under
9 *Romero* is found only under subdivision (a) of Penal Code §1385. (*Romero, supra*, 13
10 Cal.4th at pp. 529-530.) Senate Bill number 81 recently amended subdivision (c) of
11 Penal Code §1385. (Sen. Bill No. 81 [2021-2022 Reg. Sess.].) Subdivision (c)(1) of
12 §1385 states:

13
14 “Notwithstanding any other law, the court shall dismiss an enhancement
15 if it is in the furtherance of justice to do so, except if dismissal of that
16 enhancement is prohibited by any initiative statute.”

17 As shown, the amendment to subdivision (c) deals exclusively with the dismissal
18 of enhancements. The prior strike convictions alleged pursuant to Penal Code §§667,
19 subdivision (a)(1), and 1170.12, subdivisions (a)-(d) are not considered
20 “enhancements” according to the California Rules of Court and prior case law.

21 California Rules of Court, rule 4.405, subdivision (3), defines an enhancement
22 as “an additional term of imprisonment added to the base term.” This definition has led
23 other courts to rule that a strike prior allegation is not an enhancement. Rather, strike
24 priors constitute “the articulation of a parallel sentencing scheme for specifically
25 described recidivists.” (*People v. Allison* (1995) 41 Cal.App.4th 841, 844, quoting
People v. Anderson (1995) 35 Cal.App.4th 587, 595; see also *People v. Murillo* (1995)

1 39 Cal.App.4th 1298, 1306.) A third strike allegation does not act in the same manner
2 in which an enhancement would; it is not an additional term to be added to the base
3 term - it is the imposition of a 25-years-to-life sentence.¹

4 As such, the provisions under Penal Code §1385, subdivision (c), are not
5 applicable to dismiss the strike priors in this case.

6 III.

7 **NO JUSTIFICATION FOR STRIKING THE “NICKEL” PRIORS PURSUANT** 8 **TO PENAL CODE §667, SUBDIVISION (a)(1) HAS BEEN DEMONSTRATED**

9 Should the defense petition the court to dismiss the defendant’s “nickel” priors
10 alleged under Penal Code §667, subdivision (a)(1), in the furtherance of justice, the
11 People ask the court to consider the scant justification for doing so. The People would
12 agree that the defendant associated with other criminals and made poor choices in
13 committing the crimes of violence, but this sparse reasoning can hardly support a
14 dismissal in the furtherance of justice under subdivision (a) of Penal Code §1385, based
15 on the points and authorities already outlined in this motion.

16 “Nickel” prior would be enhancements eligible for consideration under the new
17 factors in the amended Penal Code §1385, subdivision (c). However, the defense’s
18 general assertion that the defendant “associated with the wrong group of people” -
19 inferring that he has made friends with other criminals in his youth - does not rise to the
20 level of a connection of “childhood trauma” as described in subdivision (3)(c)(E).
21 “Childhood trauma” is defined in the statute as the experience of “physical, emotional,
22 or sexual abuse, physical or emotional neglect.” (Pen. Code, §1385, subd. (6)(A).) The
23 defense has provided no evidence of this.

24
25 ¹ Additionally, legislative analysis from the bill states that it applies only to
enhancements, not alternative penalty schemes. (Assem. Com. on Public Safety, Rep. on Sen.
Bill No. 81 (2021-2022 Reg. Sess.) June 29, 2021, § 4.)

1 Other factors in the amended subdivision (c) may apply to this case based on the
2 language of the statute and the status of the offenses, such as subdivisions (c)(3)(B),
3 (C), (F), and (H). But, importantly, subdivision (c)(2) also instructs:

4 “. . . Proof of the presence of one or more of these circumstances weighs
5 greatly in favor of dismissing the enhancement, unless the court finds that
6 dismissal of the enhancement would endanger public safety. ‘Endanger
7 public safety’ means there is a likelihood that the dismissal of the
8 enhancement would result in physical injury or other serious danger to
9 others.”

10 The defendant is a significant public safety risk. He has now been
11 convicted of three strike convictions involving violence or threats over the
12 course of his life. He has been institutionalized for most of his life. He was
13 responsible for binding the victim and covering her mouth in this case and was
14 convicted of threatening her and her mother with death. He beat the victim
15 when she would not comply with his agenda. When stopped by police, he drove
16 the vehicle in a twenty-mile police chase to evade police, jeopardizing the lives
17 and safety of both the officers and nearby drivers. His numerous courtroom
18 outbursts during the preliminary hearing suggest that he has no respect for
19 authority. Bail was set at a level which considered his on-going threat to the
20 community.

21 The “nickel” prior enhancements in this case add significant time to the
22 defendant’s custody status, a punishment well-justified based on the defendant’s
23 prior criminal history and on-going threat to the safety to members of the public
24 at large.

25 Based on the defendant’s prior criminal history and actions in the present
matter, the People conclude by asking the court to rule that dismissal of these

1 enhancements would result in the likelihood of serious danger or physical injury
2 to others.

3 **CONCLUSION**

4 Based on the People's arguments, and points and authorities, the People request
5 that this court to deny the defendant's motion to dismiss prior conviction allegations.

6
7 Dated this 20th day of April, 2022,

8 JASON ANDERSON
9 DISTRICT ATTORNEY

10 BY:



11 **TESS PONCE**

12 Deputy District Attorney
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SAN BERNARDINO COUNTY

OFFICE OF THE DISTRICT ATTORNEY

STATE OF CALIFORNIA)
COUNTY OF SAN BERNARDINO)

I, TESS PONCE, the undersigned declare:

That I am a citizen of the United States, employed in the County of San Bernardino, State of California, over eighteen years of age, and not a party to the within action.

That I served a true and correct copy of the following named document by the means and on the date indicated below:

PEOPLE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PRIOR CONVICTION ALLEGED UNDER THREE STRIKES LAW PURSUANT TO PENAL CODE §1385

- () depositing a copy thereof, enclosed in a sealed envelope for collection and mailing on that date following ordinary business practice at San Bernardino to:
(X) Emailing a copy thereof to the email listed below:
David Goldstein, Esq.
10737 Laurel Street, Suite 100
Rancho Cucamonga, CA 91730
dave@daveglaw.com
() personally depositing into a receiving box located at:
() Personally delivering said document to:
() personally delivering to Defendant in Court

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed at Rancho Cucamonga, California.

DATED: April 11, 2022

BY:

[Handwritten signature of TESS PONCE]

TESS PONCE
Deputy District Attorney