Three Strikes & *Cunningham* Issues in Guilty Plea Cases

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I. Three Strikes

A. The *Romero* Issue.

A challenge to the trial court's decision declining to set aside a strike under *People v. Superior Court (Romero)* 13 Cal.4th 497, can be raised if raised below, under *People v. Buttram* (2003) 30 Cal.4th 773. The argument is made in cases which may also be considered for raising a Cruel and Unusual sentence challenge, not only where the current violation is relatively minor and the defendant's recent criminal record has been minimal, but also where the two strike priors were closely related. (*People v. Garcia* (1999) 20 Cal.4th 490.)

B. Cruel and Unusual Punishment Challenge

The Third and Fifth Districts usually have required the Cruel and Unusual Punishment argument to have been raised below in order to preserve the issue for appeal. When it was not so raised, the opening brief should contain an allegation that trial counsel was ineffective, with citation to *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27, now seems the most efficient way to raise the issue in both the Third and the Fifth Districts.

A situation that seems particularly appropriate for raising the issue is where a life sentence is imposed but the defendant's current conviction is relatively minimal, such as a "wobbler," and his background shows insignificant violations in recent years. (*Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755; *People v. Carmony* (2003) 127 Cal.App.4th 1066, both acknowledging standards from *Ewing v. California* (2003) 538 U.S. 11; but see *People v. Meeks* (2004) 123 Cal.App.4th 695.) Other factors that seem to play a part are whether the prior convictions were closely related or at least part of the same prior prosecution, and were non-violent or only nominally violent. (See, *Ramirez v. Castro, supra*.)

The Cruel and Unusual Punishment argument may require a certificate if the defendant pled guilty and agreed to the sentence as part of the plea agreement. (*People v. Panizzon* (1996) 13 Cal.4th 68.)

C. Challenges to Priors Under *Guerrero*

A challenge to the validity of a prior may be preserved by court trial on priors held in conjunction with a guilty plea to the current offense. The issue may also arise as an appellate claim of ineffective assistance of counsel in permitting admitting the defendant to admit to an invalid prior conviction.

Recent cases, such as *People v. Trujillo* (2006) 40 Cal.4th 165, have given a narrow interpretation of *People v. Guerrero* (1988) 44 Cal.3d 343, insofar as *Guerrero* permits examination of the entire record of the prior conviction in determining whether it is a qualifying prior. Due process considerations noted by the California Supreme Court in *Guerrero* that there would be too much use of extrinsic facts related to the prior conviction have now been joined by Double Jeopardy concerns. So, the California Supreme Court has limited the use of information from probation reports in the records of prior convictions on the grounds that the reports were not part of the prior conviction. (*People v. Trujillo, supra*, 40 Cal.4th at p. 179 [citing *Texas v. Cobb* (2001) 532 U.S. 162].)

The challenge to be preserved as to *Guerrero* are that federal constitutional law requires proof of priors be limited to the facts necessary to be litigated in the prior proceeding, and nothing more. This argument relies on two United States Supreme Court cases assessing Congressional intent, *Taylor v. United States* (1990) 495 U.S. 575, and *Shepard v. United States* (2005) 544 U.S. 13, but these cases are also based in Double Jeopardy. The CCAP website contains a sample argument raising this challenge.

II. *Blakely-Cunningham* Problems Arising in Guilty Plea Cases

A. Older cases

When there are "recidivist" factors such as "the defendant was on parole when the crime was committed" and "the defendant's prior performance on probation or parole was unsatisfactory" as of this writing is before the California Supreme Court in *People v. Towne*, review granted June 18, 2004 (125677/B166312).

When there was a sentencing "lid," the defendant does not need a certificate to raise a challenge under *Cunningham v. California* (2007) 549 U.S. 296. (*People v. French* (2008) 43 Cal.4th 36.) A related issue as of this writing is still before the court in *People v. Cuevas* (2006) 142 Cal.App.4th 1141, review granted January 3, 2007 (S147510/B168269), involving a plea agreement that did not specify a maximum sentence (but the defendant was advised of the legal maximum sentence).

Whether a habeas corpus petitioner whose conviction became final under *Blakely v. Washington* (2004) 542 U.S. 296, but before *Cunningham v. California*, *supra*, entitled to the benefit of the *Blakely* decision is as of this writing before the California Supreme Court in *In re Gomez* (2007) 153 Cal.App.4th 1516, review granted October 24, 2007 (S155425/B166312).

B. Newer cases

Look for issues arising under *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Blakely v. Washington* (2004) 542 U.S. 296, other than the upper term arguments. For example, is a jury trial determination required on the determination of multiple punishment under Penal Code section 654. The issue is briefed in the California Supreme Court case, *People v. Hernandez*, review granted February 7, 2007 (S148974/D047682), but is not one of the issues mentioned in the Supreme Court press releases.

Can a prior juvenile adjudication of a criminal offense in California constitutionally subject a defendant to the provisions of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) although there is no right to a jury trial in juvenile wardship proceedings in this state? This issue is pending before the court as of this writing in *People v. Nguyen* (2007) 152 Cal.App.4th 1205, review granted October 10, 2007 (S154847/H028798).

Also at some time it may be possible to develop a challenge under *Cunningham v. California, supra*, 549 U.S. 270 [166 L.Ed.2d 856], to the current California determinate sentencing scheme under the new amendments to Penal Code section 1170 (stats. 2007, ch. 3, sec. 2), especially if the statute is interpreted to require at least one factor in aggravation to impose a term beyond the middle term.