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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT PEREZ,

Defendant and Appellant.

H039982

(Santa Clara County

Super. Ct. No. 211361)

Defendant Robert Perez was convicted after a court trial of participating in a criminal street gang (Pen. Code, §186.22, subd. (a)).<sup>1</sup> He admitted allegations that he had suffered two prior serious or violent felony convictions, i.e., strikes (§§ 667, subd. (b), 1170.12, subd. (c)(1)), and that he had been previously convicted of two felonies for which he had served prison terms (§§ 667.5, subd. (b)). Defendant thereafter sought to dismiss the prior strike allegations in accordance with *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The court denied the *Romero* motion and sentenced defendant to an aggregate prison term of 35-years-to-life.

On appeal, defendant argues the denial of his *Romero* motion constituted an abuse of discretion. He contends the court failed to give adequate consideration to such factors

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise stated.

as his subsequent renunciation of gang membership and the remoteness of his prior strike offenses. He also argues his 35-years-to-life sentence constitutes cruel and unusual punishment. We find no merit to either argument and will affirm the judgment.<sup>2</sup>

## FACTS

### *I. The Current Offense*

The current offense was submitted for a court trial on the basis of (1) the transcript of grand jury proceedings (with the exception of the testimony of one witness) involving defendant and 19 codefendants; (2) exhibits to the grand jury proceedings; (3) a letter from defendant to Superior Court Judge Phillip Pennypacker dated August 30, 2010; and (4) one page of the transcript of Sammy Ramirez’s testimony from another trial. Counsel stipulated at trial that both the Nuestra Familia Organization (hereafter, sometimes NF) and the Nuestra Raza organization (hereafter, sometimes NR) qualified and met the legal definition of a criminal street gang under section 186.22, subdivision (f). Our summary of the underlying facts concerning the current offense is taken from those documents.

Defendant—also known as “Happy”—was recruited in 2007 by Enrique Rodriguez to become part of Nuestra Familia. At the time, Rodriguez was the second-in-command to Sammy Ramirez, commander of an NF regiment. Rodriguez had recruited two other people for the regiment. Sammy Ramirez’s NF regiment was active in the sale of methamphetamine and phencyclidine (PCP). In addition, Rodriguez testified that during the latter part of 2007, he, on behalf of Ramirez, was involved with others in

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<sup>2</sup> Defendant filed a petition for writ of habeas corpus on June 4, 2014 (*In re Robert Perez*, H041066), which this court ordered to be considered with this appeal. Defendant amended his petition on July 28, 2014. In his amended petition, defendant renews the argument made in his appeal that the trial court failed to consider that he had renounced all Norteño gang ties. He asks this court to consider documentation, not available to the trial court, corroborating that he withdrew as a gang member. Defendant’s habeas petition is denied by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

arranging Norteño gang members to perform “hits” (shootings) of several rival Sureño gang members, resulting in several serious injuries and deaths. (There was no evidence from Rodriguez or other witnesses in the grand jury proceedings that defendant played a direct role in these violent acts.)

Rodriguez testified that at the time he recruited defendant to join NF in 2007, defendant was a member of Nuestra Raza. Rodriguez supplied defendant with methamphetamine for sale in daily quantities of between one-quarter and one-half pound. After Rodriguez returned to prison on a parole violation in November 2007, defendant became second-in-command of Sammy Ramirez’s regiment. According to Ramirez, defendant’s role in the regiment was “collecting the regiment money and making sure that everybody stood in line.”

The prosecution’s gang expert, Campbell Police Sergeant Dan Livingston, testified that Ramirez himself was at one time physically involved in procuring and distributing drugs. Over time, Ramirez “got a little bit smarter and realized he was going to eventually get caught, so he started using sources within his regiment . . . to distribute methamphetamine or PCP.” One such person was defendant. “Anybody who needed drugs, they would call [defendant]. He would drop off to them.”

In 2008, defendant approached Rodriguez after he had gotten out of prison and asked him to become part of defendant’s crew (the Ramirez regiment). Rodriguez declined, saying he had other orders from another NF member. Defendant said “he was working under Sam [Ramirez] and that . . . Sam had told him to stop collecting dues, and stop education, and just lay low.” When law enforcement conducted a series of coordinated searches of homes associated with gang members in February 2008, defendant texted Ramirez indicating, “it’s all bad. The police are hitting houses.” Sergeant Livingston testified that during the coordinated searches, the police found in Danny Castillo’s home a pay/owe sheet that totaled over \$85,000. The pay/owe sheets were a means for larger drug dealers to track amounts owed them after they “front[ed

drugs] out to people below them . . . [so that] they [were] not caught with large quantities of methamphetamine.” The pay/owe sheet recovered in the search contained an entry for “Hap,” referring to defendant, who was supplied large amounts of methamphetamine by Castillo.

In his August 30, 2010 letter to Judge Pennypacker, defendant admitted he was “guilty of joining the (NF) at the age of 17 years old and continuing in some way or another while in prison and in society to assist this organization<sup>[3]</sup>s criminal element.” He also indicated that he had been “in charge of running [a regiment] for the (NF) when [he] was active.” And he indicated he had dropped out of the gang and had debriefed law enforcement concerning his gang involvement.

## *II. The First Strike Prior<sup>3</sup>*

On January 6, 2000, a jury found defendant guilty of making criminal threats (§ 422), a strike (§§ 667, subd. (b), 1170.12). On May 12, 2000, defendant was sentenced to two years in state prison.

Defendant was convicted of making criminal threats after a female victim reported to police that she had been threatened on May 27, 1999. She had received two threatening voicemails from defendant. In one voicemail, defendant said, “ ‘I’m going to get you hard, hard, where it hurts.’ ” The victim then asked her brother’s friend to call defendant while she listened in on the call. During that phone call, defendant said he had a “ ‘hit’ ” out on the victim and there were people waiting outside her mother’s house for a telephone call from him. The victim contacted the police because she feared for her safety and that of her family.

The victim told the police that defendant’s threats stemmed from her previous report of having been a victim of domestic violence at the hands of her boyfriend, a

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<sup>3</sup> Our summaries of the prior strike offenses are taken from the respective probation reports associated with those convictions.

member of the Los Norteños Locos (LNL) gang. She told the police that defendant had founded LNL in approximately 1993. After the victim's boyfriend was arrested in March 1999 for domestic violence, the victim fled to Los Angeles because she feared retaliation from defendant or other LNL members. When she returned to San José, the victim moved to an apartment with defendant. He exerted control over her, and she began selling drugs because she was fearful of defendant and his fellow gang members. She ultimately moved to a friend's apartment, at which time defendant sent her threatening messages.

Approximately one month after defendant was arrested for threatening the victim, she was approached on the street by another LNL member. The LNL member demanded she get out of her car, saying “ ‘I saw paper work on you<sub>[s]</sub> bitch.’ ” The LNL member then said he had “ ‘picked up the paper,’ ” which the victim understood to mean that he “had agreed to ‘go after her’ ” to prevent her from testifying against defendant.

The probation officer reported that LNL was a Norteño gang affiliated with Nuestra Familia. Defendant was the subject of a field interview in 1998. At that time, he admitted that he went by the moniker “Happy.” He was observed having multiple tattoos associated with Norteño street gangs, including LNL, a tattoo signifying 14, and “ENE” (signifying “N,” the first letter of “Norteño”).

### *III. The Second Strike Prior*

On October 28, 2003, defendant pleaded guilty to two felonies: assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)); and first degree burglary (§§ 459/460, subd. (a)), a strike (§ § 667, subd. (b), 1170.12). He received a six-year prison sentence. The burglary and assault were performed at defendant's direction by his two codefendants, Daniel Ybarra and Arturo Smith. At the time of the offense, defendant was in custody for a parole violation.

The victim, Trung Nguyen, first met defendant during a drug sale in which Ybarra was the seller. At that time, Nguyen lamented that his laptop had been stolen. Defendant

offered to help him. Defendant returned the laptop to Nguyen two days later, leaving Nguyen feeling indebted to defendant. Nguyen then lent defendant his car and did other favors for him. After defendant was arrested for a parole violation, he asked Nguyen if his (defendant's) girlfriend, Melissa Guinn, could stay in Nguyen's apartment until defendant was released from custody. Nguyen agreed. Defendant also asked Nguyen to pose as his fictitious boss and to provide false paystubs for defendant's parole hearing.

Guinn sold crystal methamphetamine from Nguyen's apartment and was arrested twice. On January 20, 2002, Guinn accused Nguyen of going through her belongings, an accusation he denied. Nguyen then said Ybarra had been at the apartment and had gone through Guinn's belongings. Later, Ybarra and Smith arrived and demanded that Nguyen pay them money they claimed he owed them. After Nguyen denied owing them money, Ybarra and Smith punched and kicked Nguyen. Because Nguyen was going to appear at defendant's parole hearing, they wrapped their hands with socks so they would not leave marks on his face. They continued to punch and kick Nguyen when he said repeatedly he did not have any money. During the assault, defendant, who was incarcerated, called Nguyen and instructed him to pay Ybarra and Smith the money he owed. Defendant also ordered Nguyen to attend his parole hearing and to bring the fictitious paystubs.

Ybarra and Smith stole Nguyen's laptop, VCR, Sony Playstation, 27-inch television, \$5,000 worth of football cards, and autographed Oakland Raiders memorabilia. Guinn ripped the telephone cord from the wall so Nguyen would not call the police, and she took his car keys.

#### PROCEDURAL BACKGROUND

On December 4, 2008, the prosecution filed a consolidated 43-count indictment involving 20 defendants. Defendant was charged with two felonies: participating in a criminal street gang (§ 186.22, subd. (a); count 1); and conspiracy to sell methamphetamine (§ 182, subd. (a)(1); Health and Saf. Code § 11379, subd. (a); count 2). As to count 2, it was alleged the crime was committed for the benefit of a criminal

street gang under section 186.22, subdivision (b)(1)(A). It was alleged further that defendant had suffered three strike priors (§§ 667, subds. (b)-(i), 1170.12 ); two prison priors (§ 667.5(b)); and two prior violent felonies (§ 667, subd. (a)).

On November 29, 2012, as part of an agreement between the prosecution and the defense, the prosecution dismissed count 2 and defendant waived a jury. The parties submitted count 1 as a court trial based upon the grand jury transcript and exhibits, defendant's letter to the court, and one page of the transcript of Sammy Ramirez's testimony from the criminal trial of Lorenzo Guzman. Defendant also agreed to plead no contest to misdemeanor resisting, delaying, or obstructing a peace officer (§ 148, subd. (a)) charged as count 3 in another case (Santa Clara Superior Court No. CC827451) in exchange for the dismissal of counts 1 and 2 in that case. The prosecution at that time also amended the indictment to dismiss one of defendant's prior strikes.

On December 6, 2012, the court found defendant guilty of count 1, and defendant admitted the enhancements alleged in the indictment.

On January 22, 2013, defendant filed a motion asking the court to exercise its discretion to dismiss the two prior strike allegations in accordance with *Romero, supra*, 13 Cal. 4th 497. The People opposed defendant's *Romero* motion. Defendant thereafter filed a rebuttal to the People's response. After a two-day hearing, the court denied the *Romero* motion on June 21, 2013.

The court imposed a sentence of 25 years to life on count 1 pursuant to the Three Strikes law. The court also imposed an additional consecutive ten years for the two violent felony priors (§ 667, subd. (a)) for a total prison term of 35 years to life. The court stayed one of the prison priors and dismissed the other prison prior pursuant to section 1385. The court also sentenced defendant for the misdemeanor conviction to 90 days in jail that were deemed served.

## DISCUSSION

### *I. Denial of Romero Motion*

#### *A. Applicable Law*

The California Supreme Court held in *Romero* that the trial court, on its own motion, is empowered under section 1385, subdivision (a) to dismiss or strike prior felony conviction allegations in cases that are brought under the “Three Strikes” law. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) The court’s discretion, however, is limited to instances in which dismissing such strikes is in the furtherance of justice, as determined by giving “ ‘ ‘consideration both of the constitutional rights of the defendant, and the interests of society represented by the People . . . .’ ” ( *Id.* at p. 530, original italics.) Thus, the court may not strike a sentencing allegation “solely ‘to accommodate judicial convenience or because of court congestion[’ citation, or] simply because a defendant pleads guilty. [Citation.] Nor would a court act properly if ‘guided solely by a personal antipathy for the effect that the [T]hree [S]trikes law would have on [a] defendant,’ while ignoring ‘defendant’s background,’ ‘the nature of his [or her] present offenses,’ and other ‘individualized considerations.’ [Citation.]” ( *Id.* at p. 531.)

The Supreme Court later explained “the ‘concept’ of ‘furtherance of justice’ within the meaning of Penal Code section 1385[, subdivision] (a)[, which *Romero* had recognized as being] ‘ ‘amorphous.’ ” [Citation.]” (*People v. Williams* (1998) 17 Cal.4th 148, 159 (*Williams*)). It noted that in deciding whether to dismiss a strike “ ‘in furtherance of justice,’ or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his [or her] present felonies and prior serious and/or violent felony convictions, and the particulars of his [or her] background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he [or she] had not previously been convicted of one or more serious and/or violent felonies.” ( *Id.* at p. 161.) The sentence to be meted out to the defendant “is also a relevant consideration . . . in fact, it is

the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences. [Citation.]” (*People v. Garcia* (1999) 20 Cal.4th 490, 500 (*Garcia*).

If the court strikes or dismisses one or more prior conviction allegations, its reasons for doing so must be stated in an order entered on the minutes. (*Romero, supra*, 13 Cal.4th at pp. 530-531.) Conversely, the trial court has no obligation to set forth its reasons for deciding *not to* strike or dismiss prior strikes. (*In re Large* (2007) 41 Cal.4th 538, 546, fn. 6; see also *In re Coley* (2012) 55 Cal.4th 524, 560.) As our high court has explained: “The absence of such a requirement [that the court set forth its reasons for refusing to dismiss a strike] merely reflects the legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the [T]hree [S]trikes law.” (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*).

The granting of a *Romero* motion is “subject to review for abuse of discretion. This standard is deferential. [Citations.] But it is not empty. Although variously phrased in various decisions [citation], it asks in substance whether the ruling in question ‘falls outside the bounds of reason’ under the applicable law and the relevant facts. [Citations.]” (*Williams, supra*, 17 Cal.4th at p. 162; see also *Garcia, supra*, 20 Cal.4th at p. 503.) The abuse of discretion standard also applies to appellate review of the denial of *Romero* motions. (*Carmony, supra*, 33 Cal.4th at pp. 374-376; see also *id.* at p. 375: “ ‘Discretion is the power to make the decision, one way or the other.’ ”) It is the defendant’s burden as the party attacking the sentencing decision to show that it was arbitrary or irrational, and, absent such showing, there is a presumption that the court “ ‘acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ ” [Citations.]” (*Id.* at p. 377.) Such a discretionary decision “ ‘will not be reversed merely because reasonable people might disagree.’ ” (*Ibid.*)

Placing in context the circumstances under which a court properly exercises its discretion in granting a *Romero* motion, the California Supreme Court has explained the heightened burden the defendant bears in seeking reversal of an order denying a *Romero* motion: “[T]he [T]hree [S]trikes law not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances.” (*Carmony, supra*, 33 Cal.4th at p. 378.) “Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he [or she] squarely falls once he [or she] commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Ibid.*; see also *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1382 (*Gutierrez*) [“trial courts’ decisions to strike a prior conviction should be ‘“extraordinary” ’ ”].)

B. Defendant’s *Romero* Motion

1. *Motion Papers*

Defendant argued below that the court should dismiss the prior strike allegations in the interests of justice because he did not “fall within the spirit of the [T]hree [S]trikes law.” As to the present offense, he asserted that of the 20 defendants named in the indictment, he was a peripheral defendant and the grand jury testimony against him was “vague and general, bereft of detail, [and] without reference to date, time or place.” Defendant emphasized the lenient treatment received by Rodriguez—the principal witness against him who testified to providing firearms to and otherwise assisting fellow gang members in murders and attempted murders of several rival Sureño gang members.

The District Attorney reduced Rodriguez's felony charge of participating in a criminal street gang (§ 186.22, subd. (a)) to a misdemeanor, and Rodriguez received a 30-day jail sentence. Defendant argued that the court, in exercising its discretion, should consider the much shorter sentences imposed on several of his codefendants.

Defendant argued further that the first strike prior (making criminal threats) was not considered a strike at the time of his conviction, and the crime involved no violence. And he asserted that, although the second prior strike did involve violence, the victim did not seek medical treatment for his injuries. Under the heading "future prospects" (capitalization and emphasis omitted), defendant argued that he had dropped out of gang life completely and, as a result, faced the specter of violence and retribution from his former gang members.

Defendant also submitted a letter he wrote to the court in which he expressed remorse for his actions and asked the court to afford him "the opportunity to return to society and resume living within society again." He indicated that if he were released, he planned to (1) reside in a stable home with his mother; (2) immediately enroll in truck driving school to obtain a Class A license; (3) seek employment as a truck driver; and (4) enroll in junior college to obtain a GED diploma.

The People argued in opposition that, viewing all of the relevant circumstances, defendant did not fall outside the spirit of the Three Strikes law. They asserted that defendant's lengthy criminal history, consisting of four felony and eight misdemeanor convictions, did not support the dismissal of the strike allegations. The People also emphasized defendant's lengthy involvement in the Nuestra Familia organization, the sophistication of its criminal operation, and defendant's participation in its drug trafficking operation. Further, they discounted the sincerity of defendant's letter to the court in which he asked for a chance "to prove and show [him]self worthy of a return back into society," noting that defendant had made a similar plea in a letter to the court before he was sentenced in 2000 in connection with the first strike prior.

## 2. *Hearing*

At the two-day hearing on defendant's *Romero* motion, the court heard testimony from three witnesses: Dayle Carlson, Kathleen Powell, and Andrew Tursi. Defendant also had four people speak on his behalf: Eduardo Balterez, Sr. (defendant's stepfather), Eduardo Balterez, Jr. (defendant's younger brother), Irene Sota (defendant's mother), and Kathleen Powell. Defendant also addressed the court.

Defendant's sentencing expert, Dayle Carlson, testified he is a "correctional consultant in private practice" who evaluates cases on behalf of defense counsel. He holds a Master's degree in psychology and previously worked as a probation officer. He authored a report that was submitted in connection with defendant's *Romero* motion. In reviewing defendant's case and after meeting with defendant, Carlson concluded that an appropriate sentence in this instance was six to nine years in prison. He believed it was within the court's power to dismiss both of the prior strike offenses. He based this conclusion upon a number of circumstances.

In assessing the present offense, Carlson observed it was a crime in which there was no evidence of violence: "It's simply participation in the gang." He noted that defendant's first conviction as an adult occurred in 2000 for making a criminal threat, an offense which was not a strike at the time. And he indicated there was no physical injury or violence associated with that crime. Carlson also testified that defendant's second and third felony convictions that arose out of defendant's having sent two friends to Trung Nguyen's apartment to demand money owed to him did not result in Nguyen's requiring medical attention. Indeed, defendant told his friends not to hurt the victim, because he was going to assist defendant at his parole hearing.

Carlson testified that defendant was released from prison on August 15, 2007. Shortly after his release, defendant began a relationship with a woman who had a small child. The three of them lived together with his girlfriend's mother. After some effort, defendant obtained employment working as a mechanic repairing tortilla manufacturing

equipment. After his parole and until he was arrested on December 3, 2008, defendant had assumed a very positive role assisting in the care of the child while all three adults had a daily routine of working at their respective jobs. Carlson concluded that defendant had made efforts to personally rehabilitate himself in the year after his parole.

Carlson noted that sometime in 2009 while defendant was incarcerated, he dropped out of the Nuestra Familia gang, and he expressed a willingness to be debriefed. After dropping out, he assumed protective custody status, was unable to participate in any programs, and was subject to lockdown 23 and one-half hours per day. At the time of the *Romero* hearing, defendant had been in custody for approximately 50 months.

Carlson testified there were six other NF gang members who, like defendant, were at one time second-in-command in the Sammy Ramirez regiment. The most severe sentence received by any of them was a prison term of 10 years 4 months, while Rodriguez received the most lenient sentence of 30 days in county jail.

In determining an appropriate sentence, Carlson opined that defendant presented a low level of future danger because (1) he had renounced the gang lifestyle so he could not return to it; (2) he was 33 years old which made it statistically less likely he would reoffend; and (3) he had no history of drug or alcohol abuse. Carlson acknowledged that defendant's prospects were "[v]ery difficult," but he had family support.

On cross-examination, Carlson acknowledged a number of circumstances less favorable to defendant's position. Carlson admitted that defendant, while a juvenile, had engaged in multiple fights with rival Sureño gang members that resulted in the juvenile court imposing gang orders as part of his probation. Carlson also acknowledged that probation officers indicated in reports that defendant was one of the founding members of the LNL Norteño gang, and that the victim involved in the first strike offense was so fearful of defendant she would not disclose her telephone number to the probation department, insisting that any communication be routed through her mother. Carlson also conceded that after defendant was paroled the first time after two years in prison, he

violated parole on two occasions, including an incident involving a hit and run offense and resisting, obstructing or evading a peace officer.

Carlson also acknowledged on cross-examination that as to many of defendant's Nuestra Familia codefendants named in the indictment, they either had not had prior strikes or Carlson did not know whether such enhancements were alleged. And Carlson agreed the absence of such allegations could have "a big impact" on the codefendants' sentencing. Carlson also agreed that a person who cooperates with law enforcement and provides testimony that permits the prosecution of other violent persons is entitled to some consideration, and that defendant had declined the opportunity to cooperate in the prosecution of NF members.

Kathleen Powell, the mother of defendant's girlfriend, testified she had allowed defendant to live in her home after his release from prison. Powell indicated that defendant had made her daughter promise to give up methamphetamine, and he had "got[ten her] straight, and she's still straight." Later in the proceedings when she made a statement to the court, she said that while defendant was living in her home, she "never saw any gang activity."

Attorney Andrew Tursi represented defendant for several years in connection with the criminal proceeding below. In May 2009, he had received a letter from the District Attorney's Office listing the names of the 20 defendants in the indictment in the approximate order of their sophistication within the Nuestra Familia gang. Defendant was listed twelfth in the indictment. After renouncing his gang affiliation, defendant debriefed with law enforcement on two occasions during which he identified the members of the gang and provided information about their activities. Tursi volunteered at the end of his testimony that during his several years of representing defendant, he felt that, while their relationship was contentious, defendant was always respectful. And Tursi felt over time that defendant had become a different person, one whom he trusted and whom Tursi felt was deserving of a chance.

After submitting the matter, the court denied defendant's *Romero* motion on the basis that defendant did not fall outside the spirit of the Three Strikes law.

### C. Discussion Regarding Denial of *Romero* Motion

Defendant argues the court abused its discretion by failing to dismiss the two strike priors because it failed to consider significant facts that supported the granting of the motion. Specifically, defendant contends the court failed to consider: (1) defendant's withdrawal from the Nuestra Familia gang; (2) there were only five members of the Sammy Ramirez regiment of which defendant was second-in-command; (3) the prior strike convictions were remote in time; and (4) there was a disparity between his sentence and the sentences of most of his fellow indicted gang members. He argues, citing *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391, that because the court did not consider these factors, it "failed to exercise its 'informed discretion'" and the case should be remanded for further consideration of defendant's *Romero* motion.

The court, in considering the *Romero* motion, was obliged to consider the three factors identified by the California Supreme Court in *Williams*, namely, "[ (1) ] the nature and circumstances of [defendant's] present felonies[, (2) the nature and circumstances of defendant's] prior serious and/or violent felony convictions, and [(3)] the particulars of [defendant's] background, character, and prospects . . . ." (*Williams, supra*, 17 Cal.4th at p. 161.) We presume the court knew and followed the law in deciding whether to exercise its discretion to dismiss the strike allegations, including its consideration of the three factors enunciated in *Williams, supra*, 17 Cal.4th at page 161, and its assessment of whether the sentence was otherwise unjust. (See *People v. Coddington* (2000) 23 Cal.4th 529, 644, disapproved on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

In his argument in support of his appellate claim, defendant (1) ignores the first *Williams* factor; (2) glosses over the second factor by noting only the age of the prior strikes; and (3) omits any consideration of the third factor *other than* defendant's

postarrest action of withdrawing from the Nuestra Familia gang. We address each of these three factors below.

1. *The Present Offenses*

We address the first *Williams* factor—the nature and circumstances of the present felony offense of participation in a criminal street gang. The evidence was that defendant was recruited by Enrique Rodriguez in 2007 to become part of the Sammy Ramirez regiment of the Nuestra Familia street gang, a regiment that sold methamphetamine and PCP. At the time Rodriguez recruited him, defendant was already a member of Nuestra Raza. Defendant became second-in-command of the regiment in November 2007, after Rodriguez was incarcerated. Rodriguez had supplied defendant daily with a large quantity of methamphetamine to sell (between one-quarter and one-half pound). Defendant thus facilitated the generation of significant income for the criminal enterprise through drug trafficking.

Defendant provided Sammy Ramirez, the regiment’s leader, with insulation from criminal liability,. As Sammy Ramirez described it, defendant “was out there collecting the regiment money and making sure that everybody stood in line.” And, as described in the testimony of Rodriguez, the Sammy Ramirez regiment was not only involved in drug trafficking. At least two of its members (Ramirez and Rodriguez) were involved in carrying out violent (including deadly) attacks by Norteño gang members upon rival Sureños.

In addition, when police orchestrated searches of the homes of several gang members in February 2008, defendant texted his boss, Sammy Ramirez, saying, “it’s all bad. The police are hitting houses.” And a pay/owe sheet recovered in the search of one gang member, Danny Castillo, contained an entry for “Hap” (referring to defendant), indicating that Castillo was supplying defendant large amounts of methamphetamine. Furthermore, in his August 2010 letter to Judge Pennypacker, defendant admitted he had

been a Nuestra Familia gang member and had been a gang member since he was 17. He stated he had been “in charge of running [a regiment] for the (NF) when [he] was active.”

Defendant in his appeal discounts the evidence of his significant gang participation. And he disputes the following statement of the trial court: “[Defendant] held a very high position of authority and leadership as second in command in the Nuestra Familia street regiment, [and he] committed the present offense while on parole.” Defendant notes that this finding was based solely on Rodriguez’s testimony and ignores Rodriguez’s statement that the regiment was comprised of only five members. Notwithstanding the small number of individuals in the regiment, defendant was directly involved in large scale trafficking of methamphetamine for the financial benefit of the Nuestra Familia gang. The evidence therefore showed that defendant’s gang involvement was “more than nominal or passive.” (*People v. Castenada* (2000) 23 Cal.4th 743, 747.) And it is of no consequence that evidence of defendant’s gang involvement was based largely upon the testimony of a single witness. (*People v. Scott* (1978) 21 Cal.3d 284, 296 [“uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable”].)

Defendant below emphasized that there was “no evidence of physical violence” associated with his conviction in this case. But in assessing the current crime, neither the absence of resulting physical harm to others nor the nonviolent nature of the crime serves as a basis for the granting of a *Romero* motion. (See *People v. Strong* (2001) 87 Cal.App.4th 328, 344 [reversing order granting *Romero* motion which was based in part on nonviolent nature of current offense; “the nonviolent or nonthreatening nature of the felony cannot alone take the crime outside the spirit of the law”]; *People v. Gaston* (1999) 74 Cal.App.4th 310, 321 (*Gaston*) [although current crime of car theft “not as serious as many felonies,” it was “far from trivial”].) Far from being a victimless crime, participation in a criminal street gang in violation of subdivision (a) of section 186.22 is itself a “serious felony” (§ 1192.7, subd. (c)(28); see *People v. Briceno* (2004) 34

Cal.4th 451), and the Legislature has declared that the activities of members of “violent street gangs [consisting of] . . . threaten[ing], terroriz[ing], and commit[ting] a multitude of crimes against the peaceful citizens of their neighborhoods . . . present a clear and present danger to public order and safety and are not constitutionally protected.” (§ 186.21.)

## 2. *The Prior Strikes*

Addressing the second *Williams* factor, the first prior strike of making a criminal threat in violation of section 422—the offense having been committed on May 27, 1999—involved a threat of physical harm to the girlfriend of defendant’s friend and fellow LNL gang member. The threat arose out of defendant’s displeasure at the victim’s having reported domestic violence that resulted in the arrest of defendant’s friend. Defendant twice threatened the victim with voice mail messages. He then restated the threat to a friend of the victim’s brother, saying he (defendant) had placed a “ ‘hit’ ” out on the victim and there were people waiting outside her mother’s house for a telephone call from him. As the trial court stated: “The defendant’s first strike . . . involved a threat of force and violence arising out of Mr. Perez’s association and affiliation with LNL . . . , a street gang which he himself founded.” Defendant served a two-year prison term for that offense.

The second prior strike of first degree burglary (§§ 459/460)—combined with defendant’s conviction of aggravated assault (§ 245, subd. (a)(1))—arose out of a violent incident occurring on January 20, 2002. After defendant had been returned to custody on a parole violation, his two friends went to the home of Trung Nguyen to attempt to collect money. After Nguyen said he did not owe anyone money, they punched and kicked him repeatedly, and stole his property. While the assault was ongoing, defendant telephoned from jail and instructed Nguyen to pay his friends the money that was owed. As the trial court noted: “[Defendant’s] second strike in 2002 for first degree burglary . .

. also involved violence at the direction of defendant.” Defendant was sentenced to six years for the strike (first degree burglary) and assault convictions.

Defendant argues the trial court failed to “giv[e] meaningful consideration” to the age of the prior strike convictions. The prior strikes were committed in May 1999 and January 2002. The current offense was committed in 2007 (when defendant joined the NF Sammy Ramirez regiment). Thus, the prior strikes are not remote in time to the commission of the current crime.<sup>4</sup>

Furthermore, defendant did not live a crime-free life either before or after his commission of the strike offenses. He committed his second strike prior shortly after being paroled from prison after serving his sentence on the first strike prior. And he committed the current offense very shortly after being paroled after serving his sentence for the second strike prior. Under these circumstances, the age of the prior strike offenses provides no support for defendant’s position that he falls outside of the spirit of the Three Strikes law. (See *People v. Pearson* (2008) 165 Cal.App.4th 740, 749 [rejecting argument that prior strikes should have been dismissed because they were remote where the current crime was violent and defendant had led a continuous life of crime and had performed poorly on probation and parole]; *Gaston, supra*, 74 Cal.App.4th at p. 321 [remoteness of prior strikes “not significant” in view of the defendant’s lengthy criminal history].)

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<sup>4</sup> We disagree with defendant’s assertion that the facts of the instant case “are somewhat analogous to those in” *People v. Bishop* (1997) 56 Cal.App.4th 1245. Not only were the two prior strikes that the trial court in *Bishop* dismissed remote, i.e., 17 and 20 years old. (*Id.* at p. 1248.) The current offense in *Bishop*—petty theft with a prior involving the theft of six videotapes from a drug store (*id.* at pp. 1247-1248)—was in no way similar to the current offense here, and the defendant in *Bishop* was 50 (*id.* at p. 1248), while defendant here, at the time of sentencing, was 34.

### 3. Defendant's Background, Character, and Prospects

#### a. Criminal Background

A defendant's criminal history is one aspect of his or her background that must be considered in evaluating the propriety of dismissing a strike prior. (See *People v. Philpot* (2004) 122 Cal.App.4th 893, 906 (*Philpot*) [noting defendant's "criminal history was extensive and serious" and he had "manifested a persistent inability to conform his conduct to the requirements of the law"]; *Gaston, supra*, 74 Cal.App.4th at p. 320 [finding abuse of discretion in dismissing 17-year-old strike prior where defendant had an "unrelenting record of recidivism"].) The record (excluding parole violations) shows that defendant was convicted of four felonies and nine misdemeanors.<sup>5</sup> His first conviction, a misdemeanor, occurred in 1999, and his first felony conviction for making criminal threats occurred less than a year later. He performed poorly on parole after having been released in May 2001, and he returned to prison three times for parole violations. Defendant committed the second strike offense and the aggravated assault in January 2002 while in custody for a parole violation. After being sentenced to six years for these convictions, he was paroled in August 2007. While on parole, he committed the offenses that resulted in his arrest in December 2008 and his ultimate conviction of gang participation in December 2012.

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<sup>5</sup> Defendant's criminal conviction history is chronologically as follows (with "F" denoting felonies and "M" denoting misdemeanors): (1) violation of Veh. Code, § 14601.1, subd. (a) in November 1999 (M); (2) violation of § 422 in May 2000 (F [strike]); (3) violation of § 261.5, subd. (b) in March 2001 (M); (4)-(8) violations of § 148, subd. (a)(1) (M), and Veh. Code, §§ 14601.1, subd. (a) (M), 16028, subd. (a) (M), 20002, subd. (a) (M), and 23222, subd. (b) (M), in July 2003; (9) violation of Veh. Code, § 14601.1, subd. (a) in December 2003 (M); (10)-(11) violations of §§ 245, subd. (a)(1) (F) and 459-460, subd. (a) (F [strike]) in March 2004; (12)-(13) violations of § 148, subd. (a) (M) and § 186.22, subd. (a) (F [strike]) in June 2013.

Thus, the record demonstrates a pattern of criminality over defendant's entire adult life. And his performance on parole after serving his prison sentences for both strike offenses was poor.

b. Gang Involvement

In evaluating defendant's background and character, it cannot be overlooked that defendant had a history of continuous gang participation that commenced with his founding of LNL in approximately 1993 and his continued gang membership through 2008. Defendant minimizes this history, and he asserts the court improperly relied on his past affiliations with Nuestra Familia in denying his *Romero* motion. He contends the court erred when it made the following finding: "What has been very disappointing to the court is that for some reason [defendant] has consistently shown that he is unable to extricate himself from gang membership and gang life[.]style." Defendant argues he indisputably had withdrawn from the gang in 2009, and that the court's comments demonstrate it "ignored [this] uncontroverted evidence."

The court's findings concerning defendant's inability to renounce his gang ties did not refer to his gang status at the time of the sentencing hearing in 2013. Rather, the court's comments referred to defendant's gang history and status at the time he was arrested in December 2008.<sup>6</sup> As such, the court's statement finds support in the record. For a period of approximately 15 years, and despite multiple incarcerations, defendant had consistently been affiliated with the Norteño gang: first, in founding LNL, later as a member of NR, and most recently as second-in-command of the Sammy Ramirez regiment of NF.

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<sup>6</sup> Defendant's counsel conceded at oral argument that the trial court's comments about defendant's inability "to extricate himself from gang membership and gang life[.]style" *could be construed* as referring to defendant's lengthy gang involvement up to the time of his arrest in December 2008.

In addition, defendant's argument that the trial court ignored that he had dropped out of the gang in 2009 suggests the court somehow "missed" this evidence. We will not presume that the trial court erred. (*People v. Coddington, supra*, 23 Cal.4th at p. 644 [trial court presumed to know and apply correct law, "to distinguish admissible from inadmissible evidence, relevant from irrelevant facts, and to recognize those facts which properly may be considered in the judicial decisionmaking process"], overruled on other grounds by *Price v. Superior Court, supra*, 25 Cal.4th at p. 1069, fn. 13.) The suggestion that the court overlooked defendant's gang withdrawal is belied by the *extensive* reference to the gang evidence submitted in connection with the *Romero* motion. The fact of defendant's withdrawal from the gang in 2009 was mentioned in (1) the moving papers; (2) the reply papers; (3) defense counsel's declaration; (4) defendant's August 2010 letter to Judge Pennypacker; (5) the probation report; (6) the testimony of defendant's expert, Carlson; and (7) the testimony of defendant's former attorney, Tursi. We cannot conclude the trial court overlooked this evidence.

It would be improper to place too much emphasis upon the above-quoted one-sentence comment by the trial court. The court's comment was made after a lengthy, multi-session hearing. After hearing argument, the court, in addition to the above-quoted sentence, (1) indicated it had spent a great deal of time reviewing the testimony; (2) noted that the Three Strikes law restricts the court's discretion in sentencing repeat offenders and imposes very stringent standards in determining whether to dismiss a prior strike allegation; (3) observed that defendant had held a position of authority in his gang; (4) indicated the first strike offense involved a threat of violence arising out of his gang affiliation; (5) observed that the second strike offense also involved violence at the direction of defendant; (6) credited evidence presented by defendant's family and friends that defendant was intelligent, compassionate, and had helped people; (7) noted that the protection of society was of greatest significance; and (8) found that defendant did not fall outside the spirit of the Three Strikes law. The court's stated disappointment

concerning defendant's inability to remove himself from gang involvement must be read in context with the entire proceedings. The court's comment emphasized by defendant does not demonstrate error.

In addressing whether the court's denial of a *Romero* motion constituted an abuse of discretion, "[w]e view the totality of the court's statement, not just one snippet." (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 983.) The evidence was uncontroverted that defendant renounced his ties with the gang some time in 2009, after his latest arrest. This action is laudable, but it in no way negates his 15-year history of gang involvement and activity. Furthermore, while it is not evident from the court's comments that it specifically considered defendant's renunciation of ties with the Nuestra Familia gang, there is also nothing to suggest the court did not consider this evidence. Nor was the trial court required to identify whether it considered this issue or otherwise provide reasons for its denial of the *Romero* motion. (*In re Large, supra*, 41 Cal.4th at p. 546, fn. 6 [trial court need not specify reasons for denying *Romero* motion].)

c. Character and Prospects

Defendant presented evidence at the hearing, through witnesses and persons speaking on his behalf, that he was intelligent; had changed; had provided stability and support for his girlfriend and her child after his release from prison in 2007; and had helped his girlfriend fight her drug habit. The court acknowledged this evidence in its ruling. But the court also acknowledged other significant aspects of defendant's character that were unfavorable to his position, including his criminal history and long-term gang affiliation. Furthermore, defendant's prospects did not appear to be good. Although defendant presented evidence that he had found employment after his release from prison in 2007 and, through his letter to the court, indicated his plans for training, education, and employment, assuming his release from custody, his own expert acknowledged that defendant's prospects were "[v]ery difficult."

#### 4. *Other Considerations*

Lastly, defendant contends the trial court failed to consider that by denying the *Romero* motion, it was sentencing him “to a longer sentence than all but a very few of the defendants named in his indictment and the related gang indictments.” He argues the court thus did not address the goal of “ ‘uniformity in sentencing’ ” enunciated in California Rules of Court, rule 4.410(a)(7)) as being among the general objectives of sentencing. This claim lacks merit.

First, defendant presented evidence that a number of his codefendants in the indictment, as well as other gang members, received sentences lower than his. But the individual circumstances of these other criminal cases—such as the charged crimes, criminal history, existence or nonexistence of enhancements, and cooperation or lack of cooperation with the prosecution—are not (or not sufficiently) developed in the record, so it is difficult to draw too much meaning from this comparison of sentences. Indeed, defendant’s expert, Carlson, acknowledged that a large number of the codefendants were either not charged with strike priors or it was unknown to him (Carlson) whether they had been charged with prior strikes. Carlson also acknowledged that the absence of strike allegations could have “a big impact” on individual sentencing; persons cooperating with law enforcement are entitled to some consideration in sentencing; and defendant was given the chance to cooperate but declined.

Second, although the court did not specifically identify that it considered any disparity in sentencing as between defendant and his codefendants or other gang members, we do not construe this as the court’s not having done so. Again, the court was not required to enunciate its full reasoning in denying the *Romero* motion (*In re Large*, *supra*, 41 Cal.4th at p. 546, fn. 6). Any failure to specifically declare that it considered the sentences received by codefendants and other gang members was not error.

## 5. Conclusion

We are cognizant of the impact the Three Strikes law has upon recidivists such as defendant. And we are aware that in some or many individual cases, the defendant may raise legitimate arguments that the punishment meted out by applying the Three Strikes law may be unduly harsh. We are also conscious of the numerous criticisms that have been levied over the years concerning the law. These considerations notwithstanding, we are bound by the Three Strikes law and by the limitations imposed by the California Supreme Court in the review of trial court rulings declining to dismiss prior strike enhancements. (See *Ewing v. California* (2003) 538 U.S. 11, 28 (*Ewing*) [criticisms of Three Strikes law are “appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme”].)

The court—after giving due consideration to the specifics of the current offense, the nature of the prior strike offenses, and defendant’s background character and prospects (including his criminal record)—did not abuse its discretion by concluding that the circumstances presented by defendant were not so “ ‘extraordinary’ ” as to fall outside of the letter and spirit of the Three Strikes sentencing scheme. (*Carmony, supra*, 33 Cal.4th at p. 378.)

### II. Cruel and Unusual Punishment

#### A. Background and Forfeiture

Defendant contends that his sentence of 35-years-to-life in prison constitutes cruel and unusual punishment and is thus violative of the United States and California Constitutions. He argues that because he will not be eligible for parole until a time nearing the end of his life expectancy, he received a de facto sentence of life imprisonment without the possibility of parole. The Attorney General contends this argument is forfeited, and in any event, is meritless.

Defendant does not deny that his counsel failed to raise the issue below. But he contends that this court has the authority to consider such a challenge where the record is sufficiently developed to resolve it. He argues this is such a case. In the alternative, he contends that trial counsel's failure to object constituted ineffective assistance of counsel. We will exercise our discretion to consider defendant's contention on the merits in the interest of judicial economy. (See *People v. Christensen* (2014) 229 Cal.App.4th 781.)

#### B. Discussion of Constitutional Claim

The Eighth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” (U.S. Const., 8th Amend.) Article 1, section 17, of the California Constitution likewise declares that “[c]ruel or unusual punishment may not be inflicted or excessive fines imposed.” The state and federal prohibitions are not coextensive. (*People v. Anderson* (1972) 6 Cal.3d 628, 634.)

A punishment is cruel and unusual 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.” (*Gregg v. Georgia* (1976) 428 U.S. 153, 173; see also *Ewing*, *supra*, 538 U.S. at p. 21; *Lockyer v. Andrade* (2003) 538 U.S. 63, 72.) Cruel and unusual punishment under this state's constitution occurs when a penalty is “so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*)). Thus, the federal constitution “affords no greater protection than the state Constitution.” (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.)

Because a sentence that is constitutional under the California criteria for cruel and unusual punishment is also constitutional under the Eighth Amendment, we evaluate defendant's claim that his sentence constitutes cruel and unusual punishment under California Supreme Court authority, which has identified three factors to be considered in

this inquiry: (1) “the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society” (*Lynch, supra*, 8 Cal.3d at p. 425); (2) a “compar[ison of] the challenged penalty with the punishments prescribed in the *same jurisdiction for different offenses* which, by the same test, must be deemed more serious” (*id.* at p. 426, original italics); and (3) “a comparison of the challenged penalty with the punishments prescribed for the *same offense in other jurisdictions* having an identical or similar constitutional provision” (*id.* at p. 427, original italics). The defendant bears the burden of establishing that the punishment prescribed for his offense is unconstitutional. (*People v. King* (1993) 16 Cal.App.4th 567, 572.)

Defendant refers to *Lynch, supra*, 8 Cal.3d 410, but fails to apply the three-factor analysis presented by the Supreme Court in that case. For instance, defendant’s only reference to the particulars of his case that may relate to the first *Lynch* factor is the following sentence: “[Defendant’s] conduct, albeit serious, is not such that it should be considered an appropriate candidate for this very harsh sentence of what in essence is likely life imprisonment without possibility of parole.” We are not required to address such conclusory arguments. (*People v. Yuksel* (2012) 207 Cal.App.4th 850, 857 [conclusory discussion regarding harmless error waives point on appeal].) Furthermore, defendant’s brief does not address the second or third factors enunciated in *Lynch*. Because defendant makes no argument regarding the second and third *Lynch* factors, we need not address them here. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [legal argument for which there is no citation of authorities may be deemed forfeited on appeal]; *People v. Miralrio* (2008) 167 Cal.App.4th 448, 452, fn. 4 [appellate court not required to address undeveloped claims or ones inadequately briefed].)

We view defendant’s constitutional challenge as essentially an assertion that the application of the Three Strikes law in this instance constitutes cruel and unusual punishment. Numerous cases have rejected such challenges. (See, e.g., *In re Coley* (2012) 55 Cal.4th 524, 530-531; *People v. Mantanez* (2002) 98 Cal.App.4th 354, 359;

*People v. Cooper* (1996) 43 Cal.App.4th 815, 820-824.) In *Ewing, supra*, 538 U.S. at pages 20 to 21, the United States Supreme Court rejected a challenge that a 25-years-to-life sentence—where the defendant, who had an extensive criminal history including two residential burglary convictions and was convicted after shoplifting three golf clubs—constituted cruel and unusual punishment. Three justices concluded that the defendant’s sentence was not grossly disproportionate under the Eighth Amendment. (*Ewing*, at pp. 30-31.) And two more justices joined the majority on the basis that the Eighth Amendment’s prohibition against cruel and unusual punishment did not include a ban on grossly disproportionate sentences in noncapital cases. (*Ewing*, at pp. 31-32 (conc. opns. of Scalia, J. and Thomas, J.)) Thus, defendant’s apparent claim that the application of the Three Strikes law in these circumstances is cruel and unusual lacks merit.

Defendant has failed to meet his burden of establishing that his punishment was cruel and unusual. (*People v. King, supra*, 16 Cal.App.4th at p. 572.) We conclude that, under either the state or federal constitution, the trial court’s decision to impose the term of 35 years to life was not “so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*Lynch, supra*, 8 Cal.3d at p. 424.)

#### DISPOSITION

The judgment is affirmed.

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Márquez, J.

WE CONCUR:

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Rushing, P.J.

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Grover, J.