THE AMENDMENT OF THE THREE STRIKES SENTENCING LAW

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I. INTRODUCTION

California's Three Strikes sentencing law was originally enacted in 1994. The Legislature's version of the law was created by amending Penal Code[1] section 667 to add subsections (b) through (i); the amendment became effective March 7, 1994. Thereafter, on November 8, 1994, the voters approved Proposition 184, which enacted a second version of the law by adding section 1170.12. Prior to the enactment of Proposition 36, the essence of the Three Strikes law was to require a defendant convicted of any new felony, having suffered one prior conviction of a serious felony as defined in section 1192.7(c), a violent felony as defined in section 667.5(c), or a qualified juvenile adjudication or out-of-state conviction (a "strike"), to be sentenced to state prison for twice the term otherwise provided for the crime. If the defendant was convicted of any felony with two or more prior strikes, the law mandated a state prison term of at least 25 years to life.

Although the list of serious and violent crimes was altered from time to time, the Three Strikes law itself remained unchanged for 18 years. However, on November 6, 2012 the voters approved Proposition 36 which substantially amended the law. The initiative contains two primary provisions. The first provision changes the requirements for sentencing a defendant as a third strike offender to 25 years to life. While the original version of the law applied to *any* new felony committed with two or more prior strikes, the new law requires the new felony to be a *serious or violent felony* with two or more prior strikes to qualify for the 25 year-to-life sentence as a third strike offender. The second major change made by Proposition 36 is the addition of a means by which designated defendants *currently serving* a third strike sentence may petition the court for reduction of their term to a second strike sentence, if they would have been eligible for second strike sentencing under the new law.

This memorandum will discuss the changes made by Proposition 36. The discussion generally will make reference only to section 667. Although there are some drafting differences between sections 667 and 1170.12, the courts have interpreted their operative provisions in same way. The full text of Proposition 36 is attached as Appendix A. The initiative makes a number of non-substantive technical changes in the law; these changes will not be discussed.

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

II. AMENDMENT OF PROVISIONS GOVERNING THIRD STRIKE SENTENCES

A. Effective Date and Application of the New Sentencing Provisions

Section 10 of Proposition 36 specifies its provisions become effective on the first day after enactment by the voters. Accordingly, the initiative became fully effective on November 7, 2012. There is no "savings clause" in Proposition 36 that would limit its application to crimes committed after its effective date.

Clearly the new law will apply to all crimes committed on or after the effective date. It also appears the new sentencing provisions will apply to any case not final as of November 7, 2012. As to cases not final as of November 7, 2012, the defendant will not be required to submit a petition for resentencing under section 1170.126, discussed in Section IV, *infra*. These defendants simply must request sentencing or resentencing under sections 667 and 1170.12 as they now exist.

Whenever a law is enacted that reduces the penalty for the crime, in the absence of an express savings clause stating otherwise, the new law will apply to all cases not yet final as of the effective date of the new legislation. The rule of statutory interpretation has been stated in the seminal case of *In re Estrada* (1965) 63 Cal.2d 740. As observed in *Estrada*: "The key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies." (*Id.* at p. 744.)

"When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Id.* at p. 745.)

For the purposes of determining the retroactive application of a statute that mitigates the consequences of a crime, a case is not final until the expiration of

the time for petitioning for a writ of certiorari in the United State Supreme Court. " 'In *Pedro T.* we cited with approval a case holding that, for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1046, citing *In re Pine* (1977) 66 Cal.App.3d 593, 594; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 ["The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)' (*People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.)" (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306.) A petition for writ of certiorari is considered timely filed if filed with the court within 90 days after entry of judgment of the state court of last resort. (Rules of the U.S. Supreme Court, Rule 13.1.)

B. Sentencing a Multiple Strike Offender as a Second Strike Offender

Proposition 36 made a substantial change in the way persons with two or more prior strikes ("third strike" offenders) are sentenced. The initiative amends section 667(e)(2)(A) to provide that "[e]xcept as provided in subparagraph (C)," a person with two or more prior strikes must be sentenced to state prison for a term of no less than 25 years to life. Subparagraph (C) specifies that if the defendant has two or more prior strikes, **but the new felony is not a serious or violent felony as defined in subparagraph (d)** (*i.e.*, a California adult conviction for a serious or violent felony, an out-of-state adult conviction that would qualify as a serious or violent felony under California law, or a designated juvenile adjudication), the defendant must be sentenced as a second strike offender under section 667(e)(1).

The change was made to eliminate the ability of the court, with certain exceptions, to send persons to prison for 25 years to life when the new felony is not serious or violent. In the ballot argument in favor of Proposition 36, the sponsors stated: "Precious financial and law enforcement resources should not be improperly diverted to impose life sentences for some non-violent offenses. ¶ Prop. 36 will help stop clogging overcrowded prisons with non-violent offenders, so we have room to keep violent felons off the streets."

Under the new law, if the defendant is convicted of a non-serious and non-violent felony as defined in section 667(d), the court must sentence the defendant as a second strike offender, irrespective of the number of his prior strikes. The sentence will be imposed in the traditional manner, taking into account all current charges and enhancements, and applicable rules regarding consecutive and concurrent sentencing of multiple counts. The court will be free to select any term from the triad for crimes punished under the Determinate Sentencing Law.

The initiative is not entirely clear regarding the sentencing of non-serious and non-violent new felonies when the defendant is also convicted in the current proceeding of a serious or violent felony. Clearly the traditional 25 year-to-life sentence may be imposed on the new serious or violent crime. It appears, however, any new non-serious and non-violent felony convictions should be sentenced as second strike offenses. Section 667(e)(2)(C) provides: "[i]f a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, *and the current offense is not a serious or violent felony as defined in subdivision (d)*, the defendant shall be sentenced pursuant to paragraph (1) of subdivision (e). . . " as a second strike offender. (Emphasis added.) The reference to "current offense" is not qualified in any manner to suggest that section 667(e)(2)(C) will not apply if the defendant is also convicted of a current serious or violent offense. Such an interpretation is consistent with the intent of Proposition 36 to prevent 25 year-to-life sentences for any non-serious and non-violent crimes.

C. Defendants Excluded From the New Sentencing Provisions

Even though the new felony is not a serious or violent felony, certain defendants are excluded from the new provisions and will be sentenced to at least 25 years to life as a traditional third strike offender. There are four exclusions, three of which relate to the current felony, and one of which relates to the defendant's past crimes. The prosecution *must pled and prove* the disqualifying factor. (§ 667(e)(2)(C).)

1. Defendants excluded because of current felony

A defendant will be excluded from the new sentencing provisions if the new felony is any of the following:

(a) The **current felony** is a controlled substance charge, in which an allegation under Health and Safety Code section 11370.4 [possession, possession for sale, or transportation or sale of designated substances with cocaine base or heroin, in excessive amounts] or 11379.8 [manufacturing of designated controlled substances in excessive amounts] is admitted or found true.

(b) The **current felony** is a felony sex offense defined in section 261.5(d) [unlawful sexual intercourse by a person over 21 with person under 16] or section 262 [rape of spouse], or any felony offense that results in mandatory registration as a sex offender pursuant to section 290(c,) *except* for violations of sections 266 [inveiglement or enticement of minor female for prostitution], 285 [incest], 286(b)(1) [sodomy with person under 18] and (e) [sodomy with person

confined in custody facility], 288a(b)(1) [oral copulation of a person under 18] and (e) [oral copulation of a person confined in a custody facility], 311.11 [possession of child pornography], and 314 [indecent exposure].

As noted above, section 667(e)(2)(C)(ii) excludes persons required to register under section 290(c), except for specified sex crimes. In this regard it is important to observe the precise words of the exclusion: the statute will exclude a defendant from second strike sentencing if he is convicted of "any felony offense that results in *mandatory registration* as a sex offender pursuant to [section 290(c). . . ." (Emphasis added.) Section 290(c) specifies all of the listed crimes mandate registration. But the listed sections must now be considered in light of the Supreme Court decision in *People v. Hofsheier* (2006) 37 Cal.4th 1185, which held registration for a conviction of section 288a(b)(1), oral copulation of a person under 18, is no longer mandatory but is discretionary. Cases following *Hofsheier* have extended its holding to section 288a(b)(2) [oral copulation of a person under 16 by a person over 21], and section 289(h) [sexual penetration of a person under 18]. Based on *Hofsheier* and its progeny, it can reasonably be expected that registration also will be discretionary for section 286(b)(2) [sodomy of a person under 16 by a person over 21], and section 289(i) [sexual penetration of a person under 16 by a person over 21]. Accordingly, since registration for these offenses is discretionary, persons required to register for these crimes will be eligible for sentencing as a second strike offender. Furthermore, the exclusion likely will not apply when registration is required as a matter of the court's discretion under section 290.006.

(c) The **current felony** was committed where the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person. The amendment does not require that great bodily injury actually be inflicted. Proposition 36 does not expressly require the defendant to personally use a firearm or personally be armed with a firearm or deadly weapon to be disqualified. Arguably the defendant would be disqualified if a principal other than the defendant used a firearm or was armed with a firearm or deadly weapon.

However, the court might consider that argument in the context of analogous case law. For the defendant to receive additional punishment for the use of a firearm, "an enhancement which neither expressly authorizes vicarious liability nor expressly includes a 'personally' limitation is read to apply only to defendants who personally engage in the proscribed conduct." (*People* v. *Gutierrez* (1996) 46 Cal.App.4th 804, 814; see also *People* v. *Piper* (1986) 42 Cal.3d 471, 478 [finding a *former* version of section 1192.7(c)(8), which rendered a felony a serious felony if a defendant simply "used" a firearm or deadly weapon, *did not apply* if the use was vicarious, even though personal use was not expressly required]; *People* v. *Rener* (1994) 24 Cal.App.4th 258, 267 [section

12022.3(a) firearm use enhancement requires personal use even though there is no reference in the statute to “personal” use].)

The law is less clear regarding "arming" with a firearm. *In re Travis W.* (2003) 107 Cal.App.4th 368, *In re Christopher R.* (1993) 6 Cal.4th 86, and *People v. Le* (1984) 154 Cal.App.3d 1, in the context of the statute being considered, did not require personal arming; vicarious arming was sufficient. *People v. Alvarez* (2002) 95 Cal.App.4th 403, and *People v. Reed* (1982) 135 CAl.App.3d 149, held personal arming was required.

Applying the exclusion to include vicarious liability would be consistent with the intent of Proposition 36 to assure longer prison terms for persons who commit serious and violent offenses. Limiting the exclusion to personal use or possession would be consistent with the intent of the initiative to have shorter prison terms for persons not directly committing dangerous crimes.

(d) Whether a defendant will be excluded because of any disqualified crime

The statute is not clear as to whether the defendant is excluded from relief as to *all* new felonies if he is excluded from relief as to *any* current crime. Nothing in sections 667(e)(2) or 1170.12(c)(2) limits the application of the new law in this manner. The plain meaning of the new law indicates its rules apply to each crime unless otherwise excluded.

Legislative intent on this issue is somewhat vague. On the one hand, exclusion of all new crimes if one crime is excluded is consistent with the intent of Proposition 36 to maintain lengthy prison terms for persons who commit serious and violent offenses. On the other hand, applying the exclusion only to the individual crime is consistent with the intent of the proposition to prevent lengthy prison terms for non-serious and non-violent offenses. The enactors also may simply have intended to honor both objectives by requiring longer terms for specified crimes and shorter sentences for the less serious crimes. In absence of an express broader exclusion in Proposition 36, the new sentencing provisions should be crime-specific, such that the defendant will be barred from the new sentencing provisions only as to crimes that specifically come within an exclusion.

2. Defendants excluded because of a prior crime

Defendants who have suffered a **prior serious and/or violent felony conviction**, as defined in section 667(d), **for any of the following felonies** will be excluded from the new penalty provisions:

(a) A "sexually violent offense" as defined in Welfare and Institutions Code section 6600(b) [Sexually Violent Predator Law]: " 'Sexually violent offense' means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code."

Although Proposition 36 makes reference to the list of crimes in Welfare and Institutions Code section 6600(b), nothing in the initiative suggests the defendant must have been *adjudicated* as a sexually violent predator to be disqualified.

(b) Oral copulation under section 288a, with a child who is under 14 years of age, and who is more than 10 years younger than the defendant, sodomy under section 286, with another person who is under 14 years of age and more than 10 years younger than the defendant, or sexual penetration under section 289, with another person who is under 14 years of age, and who is more than 10 years younger than the defendant.

(c) A lewd or lascivious act involving a child under 14 years of age, in violation of section 288.

(d) Any homicide offense, including any attempted homicide offense, defined in sections 187 to 191.5, inclusive. Convictions for voluntary manslaughter under section 192(a), involuntary manslaughter under section 192(b), and vehicular manslaughter under section 192(c) will not exclude the defendant from sentencing under the new procedures.

(e) Solicitation to commit murder as defined in section 653f.

(f) Assault with a machine gun on a peace officer or firefighter, as defined in section 245(d)(3).

(g) Possession of a weapon of mass destruction, as defined in section 11418(a)(1).

(h) Any offense punishable in California by life imprisonment or death. It is not clear whether the court is limited to consideration of only the punishment for the substantive offense, or whether the court also may consider enhancements

or alternative punishments that make the sentence a life term. The plain meaning of the statute suggests the court is limited to consideration of the base term.

3. No exclusion for dangerousness

As will be discussed in Section IV, *infra*, regarding a defendant's ability to apply for resentencing as a second strike offender, section 1170.126(f) permits the court to deny a request for resentencing if to do so would "pose an unreasonable risk of danger to public safety." **No such provision exists for the initial sentencing of third strike offenders under sections 667(e)(2) or 1170.12(c)(2)**. If the new felony is a non-serious and non-violent crime, and the defendant is not otherwise excluded from the new sentencing provisions, the court must sentence the crime as a second strike offense.

4. Second strike offenders

Except for the possible effect of an amendment to sections 1170.12(a)(7) and (8) regarding consecutive sentencing (discussed in Section III(C), *infra*), Proposition 36 makes no changes in the way defendants with one prior strike ("second strike" offenders) are sentenced. These offenders will be sentenced in the traditional manner under the Three Strikes law, even if they receive a life sentence because the underlying offense is sentenced under the Indeterminate Sentencing Law. As more fully discussed in Section IV(A), *infra*, second strike offenders also have no ability to petition for reconsideration of their sentence.

III. AMENDMENT OF OTHER SENTENCING PROVISIONS

A. Amendment of Sections 1170.12(a)(7) and (8) Regarding Consecutive Sentencing

Most of the changes made by Proposition 36 to section 667 were also made to section 1170.12. There are two other changes, however, that are not the same. These changes relate to how the court must deal with consecutive sentencing of multiple charges under the Three Strikes law, whether it is a second or a third strike sentence.

Proposition 36 amends sections 1170.12(a)(7) and (8), in context with subdivision (6), as follows:

> **(6)** If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in ~~paragraph (6) of this~~ subdivision *(b)*, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

~~(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.~~

1. Amendment to section 1170.12(a)(7)

Subdivision (6) mandates consecutive sentencing of multiple felony counts *of any type* in the same case, if the crimes were neither committed on the same occasion nor arose from the same set of operative facts.

Subdivision (7) relates to sentencing of multiple *serious or violent* felony counts in the same case. Originally subdivision (7) cross-referenced subdivision (6). The Supreme Court has read subdivisions (6) and (7) together to mean that multiple serious or violent felonies must be sentenced consecutively only if they were not committed on the same occasion or out of the same set of operative facts. (*People v. Hendrix* (1997) 16 Cal.4th 508, 513.) Section 1170.12(a)(7) has now been amended to delete the reference to subdivision (a)(6); it now refers to subdivision (b) - the portion of the statute defining which crimes are strikes.

The amendment to section 1170.12(a)(7) appears to abrogate *Hendrix* as to serious and violent crimes. The change eliminates the requirement that multiple serious or violent crimes be sentenced consecutively only if not committed on the same occasion or out of the same set of operative facts. The change now requires the court to sentence multiple current serious or violent felonies consecutively, *whether or not* they occurred on the same occasion or out of the same set of operative facts.

Left unchanged by Proposition 36 is the requirement in subdivision (7) that the sentence for multiple current serious or violent felonies shall be "consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." The change is also consistent with the provisions of section 1170.12(c)(2)(B): "The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein by shall commence at the time the person would otherwise have been released from prison." The language of

sections 1170.12(a)(7) and (c)(2)(B) is sufficiently broad to require sentencing of the current serious or violent felonies consecutively to any sentence the defendant already is serving.

But the amendment must also be considered against the fact that section 667(c), containing the same original statutory rule, was not amended. (See discussion in Section II(c)(3), *infra*.)

2. Deletion of section 1170.12(a)(8)

Proposition 36 deletes section 1170.12(a)(8) which had required *any* sentence imposed under the Three Strikes law on a new felony be served consecutively to any other term the defendant was then serving, unless otherwise provided by law. The deletion of subdivision (8) will allow courts to impose a *second strike* sentence on a new felony concurrently to any other term the defendant is serving unless consecutive sentencing (a) is required by subdivision (7), or (b) required by some other provision of law. If the current crime is being sentenced as a third strike offense, the term must be imposed consecutively to any existing term by reason of the requirements of section 1170.12(c)(2)(B).

The intent of the amendment becomes confused, however, because section 667(c)(8), containing the same language, was not deleted. (See discussion in Section II(c)(3), *infra*.)

3. Interpretation of conflicting code sections

The intent of the changes to sections 1170.12(a)(7) and (8) becomes unclear because Proposition 36 did not make corresponding changes to section 667(c). Section 667(c), which contains the original sentencing rules for strike offenders, states:

> **(6)** If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).
>
> **(7)** If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.
>
> **(8)** Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

Those provisions were not modified by Proposition 36.

There appears no clear legislative direction for dealing with the direct conflict between sections 667(c) and 1170.12(a). There is no discernible reason for amending one statute but not the other. The problem likely stems from a simple drafting error in failing to amend sections 667(c)(7) and (8) to conform to sections 1170.12(a)(7) and (8).

People v. Garcia (1999) 21 Cal.4th 1, 5-6, outlines the role of the court in resolving these kinds of conflicts where it appears the conflict results from drafting error: "The parties' briefs, lower court opinions and our own research have disclosed a number of possible resolutions of this postulated internal conflict, all based on the premise the distinction between paragraphs (B) and (D) of section 667, subdivision (d)(3) is a result of 'drafting error.' As we demonstrate later, however, each such resolution would require the court to disregard one of the two assertedly conflicting paragraphs or to rewrite some of their provisions. Although we may properly decide upon such a construction or reformation when compelled by necessity and supported by firm evidence of the drafters' true intent (see, e.g., *People v. Skinner* (1985) 39 Cal.3d 765, 775), we should not do so when the statute is reasonably susceptible to an interpretation that harmonizes all its parts without disregarding or altering any of them. 'It is fundamental that legislation should be construed so as to harmonize its various elements without doing violence to its language or spirit.' (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788.)"

It does not seem reasonably possible to harmonize the two sets of code sections since they deal with the same subject matter in different ways. The intent of the initiative is to maintain a system of lengthy prison terms for the truly dangerous and violent offenders. (See, *e.g*., the argument in favor of Proposition 36: "Prop. 36 will help stop clogging overcrowded prisons with non-violent offenders, so we have room to keep violent offenders off the streets." "Criminal justice experts and law enforcement leaders carefully crafted Prop. 36 so that the truly dangerous criminals will receive no benefits whatsoever from the reform.") The amended section 1170.12(a)(7), which requires all multiple serious or violent offenses to be sentenced consecutively, is consistent with this intent. The repeal of section 1170.12(a)(8) gives the sentencing judge the discretion to run non-serious and non-violent new felonies concurrently with other sentences being served. Such an interpretation also is consistent with the intent to reduce sentences for people who are not dangerous or violent offenders. Thus, looking to legislative intent may result in a determination that the amendment to sections 1170.12(a)(7) and (8) should override the different wording in sections 667(c)(7) and (8).

Prosecutors may be tempted to charge new crimes under the version of the statutes that will create the longest mandatory sentence for a particular offender. However, to make a selection between two conflicting statutes to obtain a different sentence for persons in the same situation might result in a violation of the Equal Protection Clause.

4. Summary of rules regarding consecutive sentencing

Based on the foregoing discussion of the changes made by Proposition 36, the rules regarding consecutive sentencing for crimes sentenced under the Three Strikes law may be summarized as follows:

(a) Multiple *second strike* counts, same case, non-serious and non-violent (§ 1170.12(a)(6))

- If the current crimes occurred on the same occasion or out of the same operative facts, they may be sentenced concurrently.

- If the current crimes did not occur on same occasion or out of the same operative facts, they must be sentenced consecutively.

(b) Multiple *second strike* serious and/or violent felonies counts, same case (§ 1170.12(a)(7))

- If there are multiple serious and/or violent felonies, they must be sentenced consecutively, whether or not the crimes occurred on the same occasion or out of the same operative facts.

- The statute requires at least two serious and/or violent felony counts to trigger mandatory consecutive sentencing. If there is only one serious and/or violent felony, it may be sentenced concurrently if as to the other counts, the crime arose out of the same occasion or out of the same operative facts. If the crime did not arise out of the same occasion or the same operative facts, then it must be sentenced consecutively pursuant to section 1170.12(a)(6).

(c) Multiple *third strike* counts (§ 1170.12(c)(2)(B))

- Multiple crimes sentenced as a third strike offense must be consecutively sentenced, whether or not the crimes occurred on the same occasion or out of the same operative facts.

(d) Terms already being served

- If the current felony is a non-serious and non-violent *second strike* crime, the court may sentence the crime concurrently with any other term being served. With the elimination of section 1170.12(a)(8), there is no statutory provision mandating consecutive sentencing.

- If the current felony is *one* serious and/or violent *second strike* felony, there does not appear to be any requirement of consecutive sentencing. If there are *multiple* serious and/or violent felonies being sentenced, however, section 1170.12(a)(7) would require the sentences to be "consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." The requirement is broad enough to include other terms being served.

- If the current felony is being sentenced as a *third strike* offense, the sentence must be imposed consecutively to any other term being served. (§ 1170.12(c)(2)(B).)

B. Other Amendments

1. Dismissal of strikes by the court

Section 667(f)(2) originally provided the prosecution had the authority to move for the dismissal of a strike in the interests of justice under section 1385 or if there is insufficient evidence to prove the prior conviction. Proposition 36 amends section 667(f)(2) to add that nothing "[i]n this section shall be read to alter a court's authority under Section 1385." Presumably the change was made to assure that section 667(f)(2) could not be interpreted in such a manner that limited the court's ability to dismiss strikes independently of a request by the prosecution.

2. Date of interpretation

Section 667(h) is amended to provide that all references to existing statutes in subdivisions (c) to (g) are to statutes as they existed on November 7, 2012. A similar change was made to section 667.1.

Courts must be sensitive to the date when the current crime was committed. If the current crime was committed prior to March 8, 2000, strike offenses will be defined by statutes as they existed on June 30, 1993. If the current crime occurred on or after March 8, 2000, but before September 20, 2006, the existence of strikes will be governed by statutes as they existed on March 8, 2000. If the current crime occurred on or after September 20, 2006, but before November 7, 2012, the existence of strikes will be governed by statutes as they existed on September 20, 2006. If the current crime occurred on or after

November 7, 2012, the existence of the strikes will be governed by the statutes as they existed on November 78, 2012.

IV. PETITION FOR RESENTENCING

The second major part of Proposition 36 is the enactment of section 1170.126, which will give many inmates now serving a third strike sentence an opportunity to request resentencing as a second strike offender if their "sentence under [Proposition 36] would not have been an indeterminate life sentence." (§ 1170.126(a).) Viewed at its basic level, the process involves the inmate petitioning the court for the requested relief and, where found appropriate, the holding of a hearing to determine whether the inmate qualifies for resentencing.

The process under section 1170.126 contemplates four distinct phases: (1) the filing of a petition for relief under section 1170.126; (2) an initial screening of the petition to determine whether the inmate meets the minimum statutory requirements for relief; (3) if a *prima facie* basis for relief has been shown, a qualification hearing to determine whether the inmate has met all of the statutory requirements for relief and, if so, whether the resentencing of the inmate will pose an unreasonable risk of danger to public safety; and (4) the order of the court on the issue of resentencing.

A. The Petition

Inmates who are serving an indeterminate life sentence as a third strike offender as a result of a "conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent" by sections 667.5(c) or 1192.7(c) "may file a petition for a recall of sentence, within two years after the effective date of " Proposition 36, "or later upon a showing of good cause. . . ." (§ 1170.126(b).) Inmates serving a second strike sentence are expressly ineligible to request relief. (§ 1170.126(c).) Second strike offenders are not entitled to relief even if serving a life sentence because the crime was sentenced under the Indeterminate Sentencing Law.

The petition, filed with the court that imposed the third strike sentence, must include the following information: (§ 1170.126(d))

- A request for resentencing as a second strike offender.
- All of the charged felonies which resulted in a third strike sentence.
- All of the prior strikes alleged and proved under section 667(d) and 1170.12(b).

For a discussion of the right to counsel in the preparation of the petition, see the discussion in Section IV(F), *infra*.

A proposed form of petition is in Appendix D.

B. Initial Screening of the Petition

The petition must be heard by the judge who originally sentenced the defendant as a third strike offender. (§ 1170.126(b).) If for some reason the original judge is unavailable, the presiding judge must designate another judge to rule on the petition.

An inmate states a *prima facie* basis for resentencing as a second strike offender if (1) he is currently serving a third strike life term for a non-serious and non-violent felony, (2) the current felony is not an excluded offense, and (3) the inmate is not otherwise excluded because of a prior conviction. To state a *prima facie* basis for relief, the inmate must show that *each* of the requirements are satisfied. (§ 1170.126(e).)

1. Service of a life term

To be entitled to relief, the inmate must be serving an indeterminate term as a third strike offender for "conviction of a felony or felonies that are not defined as serious and/or violent felonies by" sections 667.5(c) or 1192.7(c). In other words, he must show that the current felony which resulted in the 25 year-to-life sentence is not a serious or violent felony.

Section 1170.126 is not entirely clear regarding the eligibility of inmates who are serving 25 year-to-life sentences for multiple felonies, where the current felonies are a mix of serious or violent crimes and non-serious and non-violent crimes. Stated differently, the issue is whether an inmate who is serving an indeterminate term for *any* serious or violent felony is then disqualified from requesting relief as to all other felonies. Section 1170.126(e)(1) states an inmate is eligible for relief if, among other things, he "is serving an indeterminate term of life imprisonment imposed pursuant to [section 667(e)(2)] or [section 1170.12(c)] for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by [section 667.5(c)] or [section 1192.7(c)]." Clearly the inmate will not be permitted to apply for resentencing of a serious or violent felony. Nothing in section 1170.126, however, suggests the inmate would be prohibited from requesting relief for the other non-serious and non-violent crimes. Section 1170.126(e)(1) is not limited in any way to exclude inmates who are serving life terms for serious or violent felonies and other life terms for non-serious or non-violent felonies. Such an interpretation is consistent with the intent of Proposition 36 to eliminate indeterminate sentences for non-serious and non-violent crimes. However, such an interpretation may be inconsistent with the intent of the initiative to maintain long sentences for people who have committed serious or violent offenses.

2. Excluded felonies

The inmate must show the current sentence was not imposed for any of the offenses listed in section 667(e)(2)(C)(i) - (iii), or section 1170.12(c)(2)(C)(i) - (iii). In other words, if the inmate's current felony which resulted in the 25 year-to-life term was for any of previously listed exclusions from the new sentencing provisions (discussed in Section II(C), *supra*), the inmate is not entitled to resentencing, even if the current felony is not a serious or violent offense. To reiterate, the inmate will not be entitled to relief if:

(a) The **current felony** is a controlled substance charge, in which an allegation under Health and Safety Code section 11370.4 [possession, possession for sale, transportation or sale of designated substances with cocaine base or heroin in excessive quantities] or 11379.8 [manufacturing of designated controlled substances in excessive quantities] is admitted or found true.

(b) The **current felony** is a felony sex offense, defined in section 261.5(d) [unlawful sexual intercourse by a person over 21 with person under 16] or Section 262 [rape of spouse], or any felony offense that results in mandatory registration as a sex offender pursuant to section 290(c) *except for* violations of sections 266 [inveiglement or enticement of minor female for prostitution], 285 incest], 286(b)(1) [sodomy with person under 18] and (e) [sodomy with person confined in custody facility], 288a(b)(1) [oral copulation of a person under 18] and (e) [oral copulation of a person confined in a custody facility], 311.11 [possession of child pornography], and 314 [indecent exposure].

As noted above, section 1170.126(e)(2)(C)(ii) excludes persons required to register under section 290(c), except for specified sex crimes. In this regard it is important to observe the precise words of the exclusion: the statute will exclude defendants convicted of "any felony offense that results in *mandatory registration* as a sex offender pursuant to [section 290(c). . . ." (Emphasis added.) Section 290(c) specifies all of the listed crimes mandate registration. But the listed sections must now be considered in light of the Supreme Court decision in *People v. Hofsheier* (2006) 37 Cal.4th 1185, which held registration for a conviction of section 288a(b)(1), oral copulation of a person under 18, is no longer mandatory but is now discretionary. Cases following *Hofsheier* have extended its holding to section 288a(b)(2) [oral copulation of a person under 16 by a person over 21], and section 289(h) [sexual penetration of a person under 18]. Based on *Hofsheier* and its progeny, it can reasonably be expected that registration also will be discretionary for section 286(b)(2) [sodomy of a person under 16 by a person over 21], and section 289(i) [sexual penetration of a person under 16 by a person over 21]. Accordingly, since registration for these offenses is now discretionary, persons required to register for these crimes will not be excluded from the benefits of section 1170.126. Furthermore, the exclusion

likely will not apply when registration is required as a matter of the court's discretion under section 290.006.

(c) The **current felony** was committed where the inmate used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person. The amendment does not require that great bodily injury actually be inflicted. Proposition 36 does not expressly require the inmate to personally use a firearm or personally be armed with a firearm or deadly weapon to be disqualified. Arguably the inmate would be disqualified if a principal other than the defendant was armed with or used a firearm or deadly weapon.

However, the court might consider that argument in the context of analogous case law. For the defendant to receive additional punishment for the use of a firearm, "an enhancement which neither expressly authorizes vicarious liability nor expressly includes a 'personally' limitation is read to apply only to defendants who personally engage in the proscribed conduct." (*People* v. *Gutierrez* (1996) 46 Cal.App.4th 804, 814; see also *People* v. *Piper* (1986) 42 Cal.3d 471, 478 [finding a *former* version of section 1192.7(c)(8), which rendered a felony a serious felony if a defendant simply "used" a firearm or deadly weapon *did not apply* if the use was vicarious, even though personal use was not expressly required]; *People* v. *Rener* (1994) 24 Cal.App.4th 258, 267 [section 12022.3(a) firearm use enhancement requires personal use even though there is no reference in the statute to "personal" use].)

The law is less clear regarding arming with a firearm. *In re Travis W.* (2003) 107 Cal.App.4th 368, *In re Christopher R.* (1993) 6 Cal.4th 86, and *People v. Le* (1984) 154 Cal.App.3d 1, in the context of the statute being considered, did not require personal arming; vicarious arming was sufficient. *People v. Alvarez* (2002) 95 Cal.App.4th 403, and *People v. Reed* (1982) 135 CAl.App.3d 149, held personal arming was required.

(d) Whether an inmate will be excluded because of any disqualified crime

The statute is not clear as to whether the inmate is excluded from relief as to *all* new felonies if he is excluded from relief as to *any* current crime. Nothing in sections 667(e)(2) or 1170.12(c)(2) limits the application of the new law in this manner. The plain meaning of the new law indicates its rules apply to each crime unless otherwise excluded.

Legislative intent on this issue is somewhat vague. On the one hand, exclusion of all new crimes if one crime is excluded is consistent with the intent of Proposition 36 to maintain lengthy prison terms for persons who commit serious and violent offenses. On the other hand, applying the exclusion only to the individual crime is consistent with the intent of the proposition to prevent

lengthy prison terms for non-serious and non-violent offenses. The enactors also may simply have intended to honor both objectives by requiring longer terms for specified crimes and shorter sentences for the less serious crimes. In absence of an express broader exclusion in Proposition 36, the new sentencing provisions should be crime-specific, such that the inmate will be barred from the new sentencing provisions only as to crimes that specifically come within an exclusion.

3. Excluded inmates

To be entitled to resentencing, the inmate must show that he has no prior convictions listed in sections 667(e)(2)(C)(iv) or 1170.12(c)(2)(C)(iv): (1170.126(e)(3))

(a) A "sexually violent offense" as defined in Welfare and Institutions Code section 6600(b) [Sexually Violent Predator Law]: "'Sexually violent offense' means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code."

Although Proposition makes reference to the list of crimes in Welfare and Institutions Code section 6600(b), nothing in the initiative suggests the inmate must have been adjudicated as a sexually violent predator to be excluded.

(b) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by section 289.

(c) A lewd or lascivious act involving a child under 14 years of age, in violation of section 288.

(d) Any homicide offense, including any attempted homicide offense, defined in sections 187 to 191.5, inclusive. Convictions for voluntary manslaughter under section 192(a), involuntary manslaughter under section 192(b), and vehicular

manslaughter under section 192(c) will not exclude the inmate from eligibility for resentencing.

(e) Solicitation to commit murder as defined in section 653f.

(f) Assault with a machine gun on a peace officer or firefighter, as defined in section 245(d)(3).

(g) Possession of a weapon of mass destruction, as defined in section 11418(a)(1).

(h) Any felony offense punishable in California by life imprisonment or death. It is not clear whether the court is limited to consideration of only the punishment for the substantive offense, or whether the court also may consider enhancements or alternative punishments that make the sentence a life term. The plain meaning of the statute suggests the court is limited to consideration of the base term.

4. Procedure for initial screening

When a petition for resentencing is received by the court, it should be filed and transmitted to the original sentencing judge for initial review. (§ 1170.126(j).) The petition may be summarily denied without the inmate's appearance if the petition fails to include the minimum requirements specified in section 1170.126(d), if the petitioner is a second strike offender [section 1170.126(c)], or if the petitioner's current felonies or past record fails to qualify an inmate for resentencing under section 1170.126(e). A proposed form for this order is in Appendix E.

The initial screening must be limited to a determination of whether the inmate has presented a *prima facie* basis for relief under sections 1170.126(d) and (e). The initial screening of the petition for resentencing is similar to the initial screening of a petition for writ of habeas corpus. California Rules of Court, Rule 4.551(f) provides that "[a]n evidentiary hearing is required if . . . there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact."]

To properly rule on the petition, the court should request a copy of the petitioner's criminal record from the district attorney, the probation department, or CDCR. While most initial screenings may be accomplished with a review of the inmate's record, there may be circumstances where additional facts will be required. For example, it may not be possible from a review of the record alone to determine whether the inmate committed the current felony with the intent "to cause great bodily injury to another person." So long as the

record review of the petition states a *prima facie* basis for granting relief, however, the court should grant the inmate a full qualification hearing.

Caution must be used in the court's consideration of the information received from CDCR. Ex parte consideration of certain material may be contrary to sections 1203, 1204 and 1204.5. (*In re Calhoun* (1976) 17 Cal.3d 75; *In re Hancock* (1977) 67 Cal.App.3d 943.) The court may be restricted for considering such information except in the context of an actual sentencing proceeding.

If the petition survives the initial screening, the court should send a written request to the petitioner inquiring whether he wishes to waive personal attendance at the qualification and resentencing hearings. A proposed form of request is in Appendix F.

For a discussion of the right to counsel at the initial screening of the petition, see discussion in Section IV(E), *infra*.

C. The Qualification Hearing

The qualification hearing has two components: (1) a review of the inmate's past and current convictions to determine whether he meets the statutory qualifications for resentencing, and (2), if the inmate is statutorily eligible for resentencing, whether to do so would "pose an unreasonable risk of danger to public safety."

1. The hearing officer

The petition must be heard by the judge who originally sentenced the defendant as a third strike offender. (§ 1170.126(b).) If for some reason the original judge is unavailable, the presiding judge must designate another judge to rule on the petition. Presumably, however, both parties could make a knowing and intelligent waiver of the provision and have the matter heard by a different judge. (See *People v. Poole* (1985) 168 Cal.App.3d 516, 521 [defendant may waive right to be sentenced by same judge who took guilty plea, but a valid waiver of any right "presupposes an actual and demonstrable knowledge of the right being waived so that the waiver is deemed knowing and intelligent"].)

2. The setting of the hearing; notice; presence of petitioner

If the petition survives the initial screening procedure (discussed in Section IV(B), *supra*), the court should set the matter for a full qualification hearing. There is no time of hearing specified by section 1170.126. The hearing should be set within a "reasonable time."

The resentencing hearing is considered a "post-conviction release proceeding" under Article 1, section 28(b)(7) of the California Constitution (Marcy's Law). (§ 1170.126(m).) As such, the victim is entitled to notice of and, if requested, participation in the resentencing proceedings.

Proposition 36 expressly provides the petitioner may waive his appearance in the court for resentencing, notwithstanding section 977(b), "provided that the accusatory pleading is not amended at the resentencing, and that no new trial or retrial of the individual will occur." (§ 1170.126(i).) The waiver must be in writing and signed by the petitioner. If necessary, the court should issue an order of production to secure the petitioner's appearance in time for the hearing.

For a discussion of the right to counsel at the qualification hearing, see discussion in Section IV(E), *infra*.

3. Qualification hearing: confirmation of eligibility

The court must first undertake a second review the petition and the inmate's circumstances to confirm whether he satisfies the requirements of section 1170.126(e), discussed in Section IV(B), *supra*. Additional documentation may be presented by the parties which may be relevant to the determination of whether the inmate meets the minimum statutory requirements of eligibility for resentencing. If the inmate fails to show that he meets the minimum statutory requirements, the court may deny the petition without a need to determine whether resentencing would pose an unreasonable risk of danger to public safety.

If this matter cannot be resolved at the first court hearing or settlement conference, the petition may be set for a contested evidentiary hearing, giving the prosecution and defense sufficient time to gather information in support of or in opposition to the request for resentencing, including the determination of whether the inmate poses an unreasonable risk to public safety. The court should determine whether the matter should be referred to the probation department for a supplemental report on the issues relevant to the determination of the merits of the petition. A supplemental probation report is required for sentencing proceedings that "occur a significant period of time after the original report was prepared." (Cal. Rules of Court, Rule 4.411(c); *People v. Dobbins* (2005) 127 Cal.App.4th 176 [eight-month interval was a significant period of time].) On the other hand, a probation report is not *required* if the person is not eligible for probation. (*People v. Johnson* (1999) 70 Cal.App.4th 1429, 1432.)

The hearing itself likely would be conducted in the same manner as an original sentencing proceeding. There is nothing in Proposition 36 that suggests the rules of evidence and procedure would be any different than traditional sentencing proceedings.

If the inmate does not satisfy the minimum statutory requirements for eligibility for resentencing, the court should deny the petition and remand the inmate to CDCR for service of the original term. A proposed form of order is in Appendix G.

4. Qualification hearing: determination of unreasonable risk to public safety

If the petitioner does satisfy the statutory eligibility requirements, "the petitioner shall be sentenced" as a second strike offender, **"unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety."** (§ 1170.126(f).) The language in section 1170.126(f) is strong: the petitioner "shall" be resentenced as a second strike offender "unless" there is the finding of dangerousness.

In determining the dangerousness of the inmate, the court may consider: (§ 1170.126(g))

> **(1)** The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes;
>
> **(2)** The petitioner's disciplinary record and record of rehabilitation while incarcerated; and
>
> **(3)** Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.

It is important to observe that while the review of a petition under section 1170.126 has some similarity to consideration of a motion to dismiss strikes under section 1385, it is actually governed by a somewhat different standard. In ruling on a motion to dismiss a strike, the court must determine whether "in light of the nature and circumstances of the [defendant's] present felonies and the prior serious and/or violent felony convictions, and the particulars of his background, character and prospects, the defendant may be deemed to be outside the . . . spirit [of the Three Strikes law], in whole or in part." (*People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Garcia* (1999) 20 Cal.4th 490, 498-499.) Under section 1170.126(f), however, the petition for resentencing must be

granted unless the court "determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." While both sections 1385 and 1170.126(f) may involve a consideration of many of the same factors concerning the defendant (*e.g*, family ties, employment history, age, remoteness of the crime and prior strikes), including the defendant's dangerousness, the discretion of the court to refuse resentencing is more narrowly proscribed than under section 1385. While a defendant must prove he is "outside the spirit" of the Three Strikes law to obtain relief under section 1385, under section 1170.126(f) the defendant is entitled to relief unless the court finds an unreasonable risk to public safety. Accordingly, merely because the court may have previously denied a request for dismissal of a strike at the original sentencing does not mean the court should deny a request for resentencing without independently determining the defendant "poses an unreasonable risk of danger to public safety."

CDCR maintains considerable information about the inmate. See Appendix B for a list of its resource information. CDCR has indicated they will be creating the position of "Litigation Coordinator" at each prison to facilitate the release of pertinent information to the court. Some of the information will require the use of a subpoena or release, such as requests for medical records.

5. Amendment of the pleadings and retrial of the petitioner

As indicated in section 1170.126(i), the petitioner may waive his or her appearance for the resentencing, "provided that the accusatory pleading is not amended at the resentencing, and that no new trial or retrial of the individual will occur." That quoted phrase is the only time Proposition 36 mentions the possibility the petitioner may face amended charges and a retrial because of the request for resentencing. There is no risk of reinstating charges for a defendant convicted after a jury trial. Principals of double jeopardy would bar the retrial of any aspect of the case. There may be a risk, however, for petitioners who were sentenced as a result of a plea bargain. It is common for the prosecution to dismiss certain felony charges or enhancements if the defendant admits to a charge that will be sentenced as a third strike. If the case comes back for a resentencing as a second strike offense, the prosecution may argue it has been denied the benefits of the previous bargain such that all dismissed charges and allegations should be put back into play.

People v. Collins (1978) 21 Cal.3d 208 is instructive. There, the defendant entered into a plea bargain wherein he was allowed to plead to one count and 14 other counts were dismissed. Between the time of the plea and sentencing, the Legislature eliminated the crime defendant admitted. After determining the conviction must be reversed, the Supreme Court turned to the status of the 14 dismissed charges. "Critical to plea bargaining is the concept of reciprocal

benefits. When either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made. Thus, we held in *People v. Delles* (1968) 69 Cal.2d 906, 910, that a judgment contrary to the terms of a plea bargain may not be imposed without affording the defendant an opportunity to withdraw his guilty plea. (See also Pen. Code, § 1192.5; *People v. Johnson* (1974) 10 Cal.3d 868.) And we held in *In re Sutherland* (1972) 6 Cal.3d 666, 672, that when the defendant withdraws his guilty plea or otherwise succeeds in attacking it, counts dismissed pursuant to a plea bargain may be restored. (See also *People* v. *Kirkpatrick* (1972) 7 Cal.3d 480, 487; *In re Crumpton* (1973) 9 Cal.3d 463, 469; *People v. Hill* (1974) 12 Cal.3d 731, 769." (*Collins*, at pp. 214-215.) The court thereafter permitted a limited refilling of some of the charges, but in a manner not to permit a term longer than the provided in the original plea agreement. (*Id*. at pp. 216-217.) *Collins* is consistent with the restriction in section 1170.126(h) which prohibits the imposition of a term longer than the original sentence. In this context it should be noted that an indeterminate sentence is longer than any determinate sentence.

A prosecutor may wish to make a new plea offer to an inmate using previously dismissed charges or enhancements. Whether a prosecutor chooses to seek reinstatement of previous charges or enhancements obviously will depend on whether the People can retry all of the charges if the petitioner does not accept a new plea agreement. Whether a retrial can occur also may depend on the petitioner's ability to defend against the charges. (See, *e.g*., *Barker v. Wingo* (1972) 407 U.S. 514.)

D. Order of the Court on Resentencing

1. If resentencing is granted

If the court grants the resentencing, the court should state the full new sentence to be served, together any statement of reasons supporting any sentencing choices. A proposed form of order is in Appendix G. The court is free to select any term on the triad for crimes sentenced under the Determinate Sentencing Law. The sentence should be a standard second strike sentence, taking into account all crimes of which the defendant is convicted, any applicable conduct and status enhancements, and any special rules regarding consecutive and concurrent sentencing. In no event may the defendant be resentenced to a term longer than the original sentence. (§ 1170.126(h).) In comparing the length of the new sentence to the old, the court should not use the minimum 25-year term of the original sentence as the basis of comparison; an indeterminate life sentence is always longer than a determinate sentence.

In making the selection of the appropriate sentence from the triad for determinate crimes, the court likely will be limited to the facts of the crime and

the circumstances of the inmate at the time the crime was originally sentenced. Although section 1170.126 does not contain such a limitation, the resentencing process for the strike offender is similar to the process for sentencing a defendant to state prison or county jail under section 1170(h) after a violation of probation. Under such circumstances, California Rules of Court, Rule 4.435(b)(1) provides "[t]he length of the sentence must be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term or in deciding whether to strike the additional punishment for enhancements charged and found." Rule 4.435(b)(1) is entirely consistent with the purpose of resentencing - the inmate will receive a completely new sentence based on the crime that was committed. It is important to observe that section 1170.126(g) mentions consideration of the inmate's post-sentencing conduct only in connection with the determination of dangerousness. Accordingly, the inmate's conduct in CDCR, whether good or bad, is irrelevant to the resentencing portion of the court's decision.

The court should recalculate the custody credits as of the date of resentencing. The court is to calculate both the pre and post-sentence *actual time* credits; i.e., the actual time in the county jail prior to the original sentencing, the actual time in state prison, and the actual time the defendant serves in the county jail awaiting the resentencing. The court also should include the *pre-sentence conduct credits* earned under section 4019. Any post-sentence conduct credits are to be determined by the Department of Corrections and Rehabilitation under the provisions of sections 2932(c) and 2933(c). Even though the defendant has been returned to local custody because of the request for resentencing, he remains under the commitment to the Department of Corrections and Rehabilitation. (See *People v. Buckhalter* (2001) 26 Cal.4th 20; *People v. Saibu* (2011) 191 Cal.App.4th 1005; *People v. Myers* (1999) 69 Cal.App.4th 305.)

The court should direct the preparation of a new Abstract of Conviction. The petitioner thereafter should be remanded to the custody of the sheriff for return to CDCR on the amended abstract.

If the petitioner has completed the new sentence after application of all credits, he should be ordered discharged from actual custody and directed to report to the local parole office for processing of the discharge. Depending on his circumstances, the inmate may be required to complete a period on Post-release Community Supervision (PRCS) under sections 3450-3465. The parole office will determine whether the defendant is subject to this requirement.

2. If resentencing is denied

If the court denies the request for resentencing, the court should remand the defendant to the custody of the sheriff to redeliver him to CDCR under the

original sentence. If the defendant has waived his appearance, a simple denial of the petition would be sufficient. In either case, no new Abstract of Conviction would be required. A form of order is suggested in Appendix G.

E. The Right to Counsel

A criminal defendant has a Sixth Amendment right to be represented by counsel at all critical stages of the proceedings in which his substantial rights are at stake. (*People v. Crayton* (2002) 28 Cal.4th 346, 362, citing *Mempa v. Rhay* (1967) 389 U.S. 128, 134.) Sentencing is a stage where a defendant has a right to counsel. (See *Clemensen v. Municipal Court* (1971) 18 Cal.App.3d 492, 499.)

1. Preparation of the petition and initial screening

The procedure under section 1170.126 may be considered comparable to a habeas proceeding where the petitioner's right to counsel does not attach until the court determines petitioner has made a *prima facie* case for relief and issues an order to show cause. (See *In re Clark* (1993) 5 Cal.4th 750, 779 ["[I]f a petition attacking the validity of a judgment states a *prima facie* case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns"].) Therefore, it does not appear the defendant is entitled to counsel for the initial preparation of the petition or in connection with its initial screening.

2. The qualification hearing

Since section 1170.126 allows an inmate serving a life term to seek "resentencing," it would appear the inmate has a right to counsel in the court proceeding. There are several aspects of section 1170.126 that seem to support such a conclusion.

First, the trial judge presented with a petition for resentencing must determine whether the inmate has satisfied the criteria specified in section 1170.126, and also must exercise discretion in determining whether other factors outlined in the new law indicate that "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§§1170.126(f) and (g); see also §1170(d) [stating the court may not resentence petitioner to a term longer than the original sentence].)

Second, section 1170.126 indicates "a resentencing hearing ordered" under the new law constitutes "a 'post-conviction release proceeding' under paragraph (7) of subdivision (b) of Section 28 of Article I of the California Constitution (Marsy's Law)." (§1170.126(m).) Such a designation means any victim in the case has a

right to notice of the hearing, be at the hearing, and present argument if a right of the victim is at issue.

Accordingly, because on a petition for resentencing (1) the court exercises its discretion in deciding whether to resentence the inmate, and (2) trial court makes such a decision at a scheduled hearing during which the victim and prosecutor may present argument against the inmate, it would appear the procedure is one where the inmate's substantial rights are at stake and thus there is a right to counsel.

3. The resentencing

Unquestionably the petitioner has a right to the assistance of counsel for the actual resentencing stage of the proceedings. As noted above, sentencing is a stage where a defendant has a constitutional right to counsel. (See *Clemensen v. Municipal Court* (1971) 18 Cal.App.3d 492, 499.)

APPENDIX A: FULL TEXT OF PROPOSITION 36

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends and adds sections to the Penal Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

THREE STRIKES REFORM ACT OF 2012

SECTION 1. Findings and Declarations:

The People enact the Three Strikes Reform Act of 2012 to restore the original intent of California's Three Strikes law—imposing life sentences for dangerous criminals like rapists, murderers, and child molesters.

This act will:

(1) Require that murderers, rapists, and child molesters serve their full sentences—they will receive life sentences, even if they are convicted of a new minor third strike crime.

(2) Restore the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime.

(3) Maintain that repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession will receive twice the normal sentence instead of a life sentence.

(4) Save hundreds of millions of taxpayer dollars every year for at least 10 years. The state will no longer pay for housing or long-term health care for elderly, low-risk, non-violent inmates serving life sentences for minor crimes.

(5) Prevent the early release of dangerous criminals who are currently being released early because jails and prisons are overcrowded with low-risk, non-violent inmates serving life sentences for petty crimes.

SECTION 2. Section 667 of the Penal Code is amended to read:

667. (a)

(1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(2) This subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this subdivision to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this subdivision by a statute passed by majority vote of each house thereof.

(4) As used in this subdivision, "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(5) This subdivision shall not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of *one or more* serious and/or violent felony offenses.

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior *serious and/or violent* felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior *serious and/or violent* felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a *serious and/or violent* felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A *prior* conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison~~. A~~ *shall constitute a*

prior conviction of a particular *serious and/or violent* felony ~~shall include a~~ *if the prior* conviction in ~~another~~ *the other* jurisdiction *is* for an offense that includes all of the elements of ~~the~~ *a* particular *violent* felony as defined in subdivision (c) of Section 667.5 or *serious felony as defined in* subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior *serious and/or violent* felony conviction for purposes of sentence enhancement if:

(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a *serious and/or violent* felony.

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has ~~a~~ *one or more* prior *serious and/or violent* felony ~~conviction~~ *convictions*:

(1) If a defendant has one prior *serious and/or violent* felony conviction *as defined in subdivision (d)* that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2) **(A)** ~~If~~ *Except as provided in subparagraph (C), if* a defendant has two or more prior *serious and/or violent* felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the ~~greater~~ *greatest* of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior *serious and/or violent* felony convictions.

(ii) Imprisonment in the state prison for 25 years.

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(C) *If a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a serious or violent felony as defined in subdivision (d), the defendant shall be sentenced pursuant to paragraph (1) of subdivision (e) unless the prosecution pleads and proves any of the following:*

(i) *The current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true.*

(ii) *The current offense is a felony sex offense, defined in subdivision (d) of Section 261.5 or Section 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290 except for violations of Sections 266 and 285, paragraph (1) of subdivision (b) and subdivision (e) of Section 286, paragraph (1) of subdivision (b) and subdivision (e) of Section 288a, Section 311.11, and Section 314.*

(iii) *During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.*

(iv) *The defendant suffered a prior serious and/or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies:*

(I) *A "sexually violent offense" as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.*

(II) *Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289.*

(III) *A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.*

(IV) *Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.*

(V) *Solicitation to commit murder as defined in Section 653f.*

(VI) *Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.*

(VII) *Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.*

(VIII) *Any serious and/or violent felony offense punishable in California by life imprisonment or death.*

(f) **(1)** Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has ~~a~~ *one or more* prior *serious and/or violent* felony ~~conviction~~ *convictions* as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior *serious and/or violent* felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior *serious and/or violent* felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior *serious and/or violent felony* conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior *serious and/or violent* felony conviction, the court may dismiss or strike the allegation. *Nothing in this section shall be read to alter a court's authority under Section 1385.*

(g) Prior *serious and/or violent* felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony *serious and/or violent* convictions and shall not enter into any agreement to strike or seek the dismissal of any prior *serious and/or violent* felony conviction allegation except as provided in paragraph (2) of subdivision (f).

(h) All references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on ~~June 30, 1993~~ *November 7, 2012.*

(i) If any provision of subdivisions (b) to (h), inclusive, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

(j) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

SECTION 3. Section 667.1 of the Penal Code is amended to read:

667.1. Notwithstanding subdivision (h) of Section 667, for all offenses committed on or after ~~the effective date of this act~~ *November 7, 2012*, all references to existing statutes in subdivisions (c) to (g), inclusive, of Section 667, are to those statutes as they existed on ~~the effective date of this act, including amendments made to those statutes by the act enacted during the 2005–06 Regular Session that amended this section~~ *November 7, 2012*.

SECTION 4. Section 1170.12 of the Penal Code is amended to read:

1170.12. ~~(a)~~ *Aggregate and consecutive terms for multiple convictions; Prior conviction as prior felony; Commitment and other enhancements or punishment.*

(a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior *serious and/or violent* felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:

> **(1)** There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.
> **(2)** Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior *serious and/or violent* felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in ~~paragraph (6) of this~~ subdivision *(b)*, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

~~(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.~~

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior *serious and/or violent* conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior *serious and/or violent* felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior *serious and/or violent* conviction is a ~~prior~~ *serious and/or violent* felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A *prior* conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison~~. A~~ *shall constitute a* prior conviction of a particular *serious and/or violent* felony ~~shall include a~~ *if the prior* conviction in ~~another~~ *the other* jurisdiction *is* for an offense that includes all of the elements of the particular *violent* felony as defined in subdivision (c) of Section 667.5 or *serious felony as defined in* subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior *serious and/or violent* felony conviction for *the* purposes of sentence enhancement if:

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is

(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in this subdivision as a *serious and/or violent* felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has ~~a~~ *one or more* prior *serious and/or violent* felony ~~conviction~~ *convictions*:

(1) If a defendant has one prior *serious and/or violent* felony conviction *as defined in subdivision (b)* that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2) **(A)** ~~If~~ *Except as provided in subparagraph (C), if* a defendant has two or more prior *serious and/or violent* felony convictions, as defined in ~~paragraph (1) of~~ subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the ~~greater~~ *greatest* of*:*

(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior *serious and/or violent* felony convictions, or

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(C) *If a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a felony described in paragraph (1) of subdivision (b) of this section, the defendant shall be sentenced pursuant to paragraph (1) of subdivision (c) of this section, unless the prosecution pleads and proves any of the following:*

(i) *The current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true.*

(ii) *The current offense is a felony sex offense, defined in subdivision (d) of Section 261.5 or Section 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290 except for violations of Sections 266 and 285, paragraph (1) of subdivision (b) and*

subdivision (e) of Section 286, paragraph (1) of subdivision (b) and subdivision (e) of Section 288a, Section 314, and Section 311.11.

(iii) *During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.*

(iv) *The defendant suffered a prior conviction, as defined in subdivision (b) of this section, for any of the following serious and/or violent felonies:*

> ***(I)*** *A "sexually violent offense" as defined by subdivision (b) of Section 6600 of the Welfare and Institutions Code.*
>
> ***(II)*** *Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286 or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289.*
>
> ***(III)*** *A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.*
>
> ***(IV)*** *Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.*
>
> ***(V)*** *Solicitation to commit murder as defined in Section 653f.*
>
> ***(VI)*** *Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.*
>
> ***(VII)*** *Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.*
>
> ***(VIII)*** *Any serious and/or violent felony offense punishable in California by life imprisonment or death.*

(d) **(1)** Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has ~~a~~ *one or more* prior *serious and/or violent* felony ~~conviction~~ *convictions* as defined in this section. The prosecuting attorney shall plead and prove each prior *serious and/or violent* felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior *serious and/or violent* felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior *serious and/or violent* conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior *serious and/or violent* felony conviction, the court may dismiss or strike the allegation. *Nothing in this section shall be read to alter a court's authority under Section 1385.*

(e) Prior *serious and/or violent* felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior *serious and/or violent* felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior *serious and/or violent* felony conviction allegation except as provided in paragraph (2) of subdivision (d).

(f) *If any provision of subdivisions (a) to (e), inclusive, or of Section 1170.126, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.*

(g) *The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.*

SECTION 5. Section 1170.125 of the Penal Code is amended to read:

1170.125. Notwithstanding Section 2 of Proposition 184, as adopted at the November 8, 1994, ~~general election~~ *General Election*, for all offenses committed on or after ~~the effective date of this act~~ *November 7, 2012*, all references to existing statutes in ~~Section~~ *Sections* 1170.12 *and 1170.126* are to those ~~statutes~~ *sections* as they existed on ~~the effective date of this act, including amendments made to those statutes by the act enacted during the 2005–06 Regular Session that amended this section~~ *November 7, 2012*.

SECTION 6. Section 1170.126 is added to the Penal Code, to read:

1170.126.

(a) *The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence.*

(b) *Any person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the act that added this section.*

(c) *No person who is presently serving a term of imprisonment for a "second strike" conviction imposed pursuant to paragraph (1) of subdivision (e) of Section 667 or paragraph (1) of subdivision (c) of Section 1170.12, shall be eligible for resentencing under the provisions of this section.*

(d) *The petition for a recall of sentence described in subdivision (b) shall specify all of the currently charged felonies, which resulted in the sentence under paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, or both, and shall also specify all of the prior convictions alleged and proved under subdivision (d) of Section 667 and subdivision (b) of Section 1170.12.*

(e) *An inmate is eligible for resentencing if:*

> ***(1)*** *The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.*
>
> ***(2)*** *The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.*

(3) *The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.*

(f) *Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e). If the petitioner satisfies the criteria in subdivision (e), the petitioner shall be resentenced pursuant to paragraph (1) of subdivision (e) of Section 667 and paragraph (1) of subdivision (c) of Section 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.*

(g) *In exercising its discretion in subdivision (f), the court may consider:*

(3) *The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes;*

(4) *The petitioner's disciplinary record and record of rehabilitation while incarcerated; and*

(3) *Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.*

(h) *Under no circumstances may resentencing under this act result in the imposition of a term longer than the original sentence.*

(i) *Notwithstanding subdivision (b) of Section 977, a defendant petitioning for resentencing may waive his or her appearance in court for the resentencing, provided that the accusatory pleading is not amended at the resentencing, and that no new trial or retrial of the individual will occur. The waiver shall be in writing and signed by the defendant.*

(j) *If the court that originally sentenced the defendant is not available to resentence the defendant, the presiding judge shall designate another judge to rule on the defendant's petition.*

(k) *Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant.*

(l) *Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act.*

(m) *A resentencing hearing ordered under this act shall constitute a "post-conviction release proceeding" under paragraph (7) of subdivision (b) of Section 28 of Article I of the California Constitution (Marsy's Law).*

SECTION 7. Liberal Construction:

This act is an exercise of the public power of the people of the State of California for the protection of the health, safety, and welfare of the people of the State of California, and shall be liberally construed to effectuate those purposes.

SECTION 8. Severability:

If any provision of this act, or the application thereof to any person or circumstance, is held invalid, that invalidity shall not affect any other provision or application of this act, which can be given effect without the invalid provision or application in order to effectuate the purposes of this act. To this end, the provisions of this act are severable.

SECTION. 9. Conflicting Measures:

If this measure is approved by the voters, but superseded by any other conflicting ballot measure approved by more voters at the same election, and the conflicting ballot measure is later held invalid, it is the intent of the voters that this act shall be given the full force of law.

SECTION. 10. Effective Date:

This act shall become effective on the first day after enactment by the voters.

SECTION 11. Amendment:

Except as otherwise provided in the text of the statutes, the provisions of this act shall not be altered or amended except by one of the following:

(a) By statute passed in each house of the Legislature, by rollcall entered in the journal, with two-thirds of the membership and the Governor concurring; or

(b) By statute passed in each house of the Legislature, by rollcall vote entered in the journal, with a majority of the membership concurring, to be placed on the next general ballot and approved by a majority of the electors;

or (c) By statute that becomes effective when approved by a majority of the electors.

APPENDIX B: RESOURCES AVAILABLE FROM CDCR

The following materials are available from the files maintained on an inmate by the California Department of Corrections and Rehabilitation (CDCR). Some of the records, particularly medical and psychiatric records of an inmate, will require the use of a subpoena to meet HIPPA requirements. It is anticipated that CDCR will be appointing a "Litigation Coordinator" in each prison to facilitate requests for information.

1. The petitioner's criminal conviction history including the type of crimes committed and the extent of injury to victims may consist of the following CDCR documents:

    A. Probation officer's report
    B. Arrest report
    C. Charging documents
    D. Transcripts of the proceeding
    E. Institution staff recommendation summary

2. CDCR may provide the following documents regarding the length of prior prison commitments (§ 969b):

    A. Cover letter
    B. Abstract of Judgment
    C. Minute order
    D. CDC 112, chronological history
    E. Finger print cards for all CDCR cases
    F. Photograph
    G. Obtain current/discharged case numbers
    H. Certify all documents

3. The petitioner's disciplinary record and record of rehabilitation while incarcerated may consist of the following documents:

    A. CDC 804, Notice of Pending CDC 115 (current)
    B. CDC 115, Rules Violation Report with attached CDC 837, Incident Report.
    C. DA referral and response associated with Rule Violation Report
    D. Other incidents reports
    E. CDC 128-A, Custodial Counseling Chrono

F. CDC 128-G, Classification Chrono regarding Security Housing Unit Term
G. Other related forms and documents such as the following:
Institution Services Unit Investigation Reports
Drug Testing Lab Reports

4. The following documents may constitute a record of rehabilitation:

A. CDC 128-E, Education Chronos and all documents associated with education(*)
B. CDC 101, Work Report and all documents associated with work related issues
C. CDC 128-B related to volunteer work such as support groups/self help, etc.
D. CDC 128-B, General Chrono related to the following: Laudatory, Support Groups, Self Help, and training certificates
E. CDC 128-G MCC Chrono, Milestone Completion Credit
F. CDC 128-G Classification Chrono related to programming

5. Any other evidence the court within its discretion determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety, such as the following documents:

A. CDC 128-B2, Gang Validation Chrono
B. Lifer Hearings Packets when applicable
C. CDC 7377, Sexual Violent Predator screening form
D. CDC 812, Notice of Critical Case Information
E. Out/In State Hold/Warrants/Detainers

Note: (*) The aforementioned documents are maintained in the inmate's central file with the exception of educational documents. The educational documents are generated by CDCR's Office of Correctional Education.

APPENDIX C: CDCR TABLE OF DEFENDANTS POTENTIALLY ELIGIBLE FOR RECONSIDERATION OF SENTENCE

CDCR Table of the Number of Third Strike Inmates Potentially Eligible for Re-sentencing as a Second Strike Offender

Data is as of October 17, 2012

County	Number	Percent
Alameda	9	0.3%
Amador	3	0.1%
Butte	9	0.3%
Contra Costa	7	0.2%
Colusa	1	0.0%
Del Norte	2	0.1%
El Dorado	5	0.2%
Fresno	55	1.9%
Glenn	1	0.0%
Humboldt	2	0.1%
Imperial	3	0.1%
Inyo	1	0.0%
Kern	176	6.2%
Kings	34	1.2%
Los Angeles	1,029	36.1%
Lake	5	0.2%
Madera	15	0.5%
Marin	19	0.7%
Mendocino	1	0.0%
Merced	13	0.5%
Monterey	7	0.2%
Napa	3	0.1%
Nevada	2	0.1%
Orange	151	5.3%
Placer	15	0.5%
Riverside	183	6.4%
Sacramento	150	5.3%
Santa Barbara	27	0.9%
San Bernardino	291	10.2%
San Benito	2	0.1%
Santa Clara	149	5.2%
Santa Cruz	2	0.1%

San Diego	243	8.5%
San Francisco	3	0.1%
Shasta	20	0.7%
Sierra	1	0.0%
Siskiyou	3	0.1%
San Joaquin	26	0.9%
San Luis Obispo	7	0.2%
San Mateo	20	0.7%
Solano	4	0.1%
Sonoma	7	0.2%
Stanislaus	50	1.8%
Sutter	3	0.1%
Tehama	11	0.4%
Tulare	42	1.5%
Tuolumne	2	0.1%
Ventura	17	0.6%
Yolo	8	0.3%
Yuba	9	0.3%
Total	**2,848**	**100.0%**

APPENDIX D: PROPOSED PETITION FOR RESENTENCING

IN THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF _____

IN THE MATTER OF THE PETITION OF

No.

_____,
Petitioner.

PETITION FOR RESENTENCING
(Pen. Code, § 1170.126)

TO THE ABOVE-ENTITLED COURT:

1. I am the petitioner in the above-entitled matter.

2. I am currently serving a term in state prison as a third strike offender of at least 25 years to life, based on the conviction of a non-serious and non-violent felony, in criminal proceedings in _____County, in case number(s) _____. **[Use a separate petition for each county where you received a 25-life sentence as a third strike offender. If you had multiple cases in the county, list all cases.]**

3. I am currently serving a term in state prison of at least 25 years to life because I was convicted of and sentenced on the following crimes: **[List <u>each</u> crime for which you received a sentence of at least 25 years to life as a third strike offender. List the code section (for example: "PC 487"), and the name of the crime (for example: "grand theft")]**

   a. Code section _____; name _____
   b. Code section _____; name _____
   c. Code section _____; name _____
   d. Code section _____; name _____
   e. Code section _____; name _____

4. List <u>each</u> prior strike that was alleged and proved (or admitted) in the case: **[List the code section (for example: "PC 211"), and the name of the crime (for example: "robbery")]**

   a. Code section _____; name _____
   b. Code section _____; name _____
   c. Code section _____; name _____
   d. Code section _____; name _____

e. Code section _____; name _____
f. Code section _____; name _____

5. My current mailing address is:

Name: _____
Address: _____
_____
_____
_____

CDCR No. _____

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

Signed on the date indicated below at _____, California.

Dated: _____ _____
Petitioner

APPENDIX E: PROPOSED ORDER DENYING PETITION FOR RESENTENCING AFTER INITIAL SCREENING

IN THE MATTER OF THE PETITION OF

No.

_____,
Petitioner.

ORDER DENYING PETITION FOR RESENTENCING (Pen. Code, § 1170.126)

The petitioner in the above-entitled action submitted a petition for resentencing pursuant to Penal Code section 1170.126. The court has reviewed the sufficiency of the petition in accordance with sections 1170.126(c), (d), and (e). GOOD CAUSE APPEARING, the petition is hereby denied for the following reason(s):

☐ 1. Petitioner is serving a term of imprisonment as a second strike offender. (Pen. Code § 1170.12(c).)

☐ 2. Petitioner has failed to include a statement of all currently charged felony convictions which resulted in a third strike sentence being imposed. (Pen. Code § 1170.126(d).) The petition is denied without prejudice to the filing of a new petition with the correct information.

☐ 3. Petitioner has failed to include a statement of all prior convictions alleged and proved as prior strikes. (Pen. Code § 1170.126(d).) The petition is denied without prejudice to the filing of a new petition with the correct information.

☐ 4. Petitioner's life sentence was based on a serious or violent felony.

☐ 5. Petitioner's sentence was imposed for an excluded crime listed in Penal Code sections 667(e)(2)(C)(i) or (ii), or Penal Code sections 1170.12(c)(2)(C)(i) or (ii). (Pen. Code § 1170.126(e)(1) and (2).)

☐ 6. Petitioner has previously been convicted of a crime listed in Penal Code sections 667(e)(2)(C)(iv) or 1170.12(c)(2)(C)(iv). (Pen. Code § 1170.126(e)(3).)

☐ 7. Other reason(s):

Dated: _____ _____

Judge of the Superior Court

APPENDIX F: PROPOSED WAIVER OF PERSONAL APPEARANCE BY PETITIONER

IN THE MATTER OF THE PETITION OF

No.

_____,
Petitioner

WAIVER OF PERSONAL APPEARANCE FOR RESENTENCING (Pen. Code § 1170.126)

TO THE PETITIONER: After an initial review of your petition for resentencing under Penal Code section 1170.126, the court has determined that you may be eligible for the relief you request. The final decision on your case will not be made until the court conducts a hearing, giving you, your attorney, the district attorney, and any victim, an opportunity to present information to the court and comment on your request. To complete the hearing on this matter, the court needs to know whether you wish to personally appear in court in connection with your petition. **The right to personally attend court proceedings is an important legal right you have in a criminal case. Please read the following form carefully before answering the question.**

RIGHT OF PERSONAL APPEARANCE

You have the right to be personally present at any court hearing held in connection with your application for resentencing. You may give up this right and proceed on your petition without your personal presence. You should understand that the resentencing proceedings may take some time while the court and the attorneys gather information about your case. Please initial the proper box stating whether you want to personally appear or whether you would like to give up this right. If you do not answer the question, the court will assume you want to appear and will bring you to court. You may later change your decision to appear or not appear. You should understand that the court will require you to appear if the proceedings will involve the amendment of the original charging document or there will be a new trial or retrial.

☐ 1. I wish to appear at all court hearings in connection with my petition for resentencing.

☐ 2. I give up my right to appear at the court proceedings held in connection with my petition for resentencing.

Signed on the date indicated below at _____, California.

Dated: _____ _____

Petitioner

APPENDIX G: PROPOSED ORDER RE HEARING ON REQUEST FOR RESENTENCING

IN THE MATTER OF THE PETITION OF

No.

_____,
Petitioner.

ORDER RE PETITION FOR RESENTENCING (Pen. Code § 1170.126)

The above-entitled matter having come on for hearing on _____, both oral and documentary evidence having been presented, the matter having been argued by the parties, and the matter having been submitted to the court for decision, and after giving full consideration to the matters presented to the court, GOOD CAUSE APPEARING, the court hereby enters its decision as follows:

☐ 1. The petition for resentencing is denied. Petitioner is ordered to serve the sentence originally imposed by the court on _____.

☐ 2. The petition for resentencing is granted. Petitioner is ordered to serve the modified sentence as more fully set forth in the record of these proceedings.

☐ 3. The court having determined petitioner has served the amended sentence ordered by this court, petitioner is hereby discharged from custody and is directed to report within two business days to the local state parole office for final processing of this case. If state parole determines petitioner should serve a period of Post-release Community Supervision (PRCS), petitioner shall report to the probation officer of this county as directed by the parole officer.

☐ 4. Petitioner having been personally present for these proceedings, petitioner is hereby remanded to the custody of the sheriff of this county for delivery to the Department of Corrections and Rehabilitation on the ☐ original sentence ordered by the court; ☐ on the amended sentence ordered by the court.

☐ 5. Other orders:

Dated: _____ _____
Judge of the Superior Court