REPORTED THREE STRIKES OPINIONS AS OF APRIL 5, 2016

By Gary M. Mandinach

PENDING CASES BEFORE THE CALIFORNIA SUPREME COURT

1. *People v. Conley* REVIEW GRANTED; FORMERLY AT: (2013) 216 Cal.App.4th 1482, the Third Appellate District, after rehearing, held that where the defendant sought in the appeal to vacate his sentence due to the passage of Proposition 36, this past November 7, 2012, are not entitled to full retroactive application of that measure, even if their convictions are not yet final. The defendant sought an application of *In re Estrada* (1965) 63 Cal.2d 740, 744-746, which this court rejected. The Court of Appeal found that *Estrada* does not apply since the language of Proposition 36 establishes a procedure to put those provisions into place. (See § 1170.126, subd. (b).) Those persons who have been sentenced recently can recall their case within 120 days pursuant to section 1170, subdivision (d). Those who cannot meet that time limit can petition for recall of sentence pursuant to section 1170.126, subdivision (b). The court also rejected an equal protection claim.

2. *People v. Lewis* REVIEW GRANTED; FORMERLY AT: (2013) 216 Cal.App.4th 468, the Fourth Appellate District, Division 2 held that Proposition 36, the Three Strikes Reform Act of 2012, is fully applicable to a defendant whose conviction was not yet final on appeal when the reform act was adopted and essentially follows the dictates of *In re Estrada* (1965) 63 Cal.2d 740, and rejects the analysis from *People v. Yearwood* (2013) 213 Cal.App.4th 161, and *People v. Conley* (2013) 216 Cal.App.4th 1482. Therefore, the Court of Appeal concluded that the defendant must be sentenced under section 667, subdivision (e)(2)(C).

3. *People v. Lester* (2013) REVIEW GRANTED; FORMERLY AT: 220 Cal.App.4th 291, the majority of the Fourth Appellate District, Division 2 held, over the dissent by Justice Hollenhorst, that *People v. Estrada* (1965) 63 Cal.2d 740 does not apply to Proposition 36, reform of the Three Strikes Law (§ 1170.126), where a previously sentenced defendants whose convictions were not yet final when the law was enacted, except as set forth in the law's limited retroactivity provision.

4. *People v. Contreras* (REVIEW GRANTED; FORMERLY AT: (2013) 221 Cal.App.4th 558, the Fourth Appellate District, Division 3 held that The Three Strikes Reform Act of 2012, (Proposition 36) applies retroactively to all non-final judgments, within the interpretation of *People v. Estrada* (1965) 63 Cal.2d 740, so that a defendant who was sentenced approximately one month before the amendment of the criminal statute but before final judgment, is able to have the benefit of the new more lenient law and to be resentenced as a two-strike offender. The Court of Appeal acknowledges that there is a split of authority on this issue; however concluded that there is no indication that the electorate intended the Reform Act to solely be prospective, and as such, retroactive applicability in this case is appropriate.

5. *In re Martinez* REVIEW GRANTED; FORMERLY AT: (2014) 223 Cal.App.4th 610, the Fourth Appellate District, Division 1 held that the trial court did not err in failing to resentence appellant under Proposition 36, section 1170.126, since his prior serious (§ 667.5, subd. (c)) and violent felony conviction (§ 1192.7, subd. (c)) for spousal rape (§ 262), excluded him from consideration for resentencing, pursuant to section 1170.126, subdivision (e)(2)(C)(ii). The trial court must consider every felony that led to an indeterminate life sentence under the Three-Strikes Law to determine whether a defendant is eligible for resentencing under section 1170.126. However, appellant argued that he should have been resentenced to a term of 25-L, rather than his original sentence of 50-L, based on the fact that his other current conviction did not render him ineligible for resentencing per se; he just could not be resentenced as a second strike offender under section 1170.126, subdivision (e).

6. *Braziel v. Superior Court* REVIEW GRANTED: FORMERLY AT: (2014) 225 Cal.App.4th 933, the Second Appellate District, Division 7 held that the trial court did not err in denying petitioner's motion pursuant to section 1170.126, to recall his indeterminate sentence under the section 667, subdivision (e)(2). In determining whether a defendant is eligible for recall of his three strikes sentence under Proposition 36, section 1170.126, subdivision (e)(1), the court must consider whether "any" of the crimes were serious and/or violent at the time of commission "or" under current law. Defendant is not eligible for recall of a three strikes sentence on an individual count that is not a serious and/or violent felony, where ineligible for recall of three strikes sentences on other counts. (See *In re Martinez* (2014) 223 Cal.App.4th 610, 618-620.)

7. *People v. Dunckhurst* REVIEW GRANTED; FORMERLY AT: (2014) 226 Cal.App.4th 1034, the Third Appellate District held that under the limited retroactivity provision of the Three Strikes Reform Act, section 1170.126, the defendant's commission, in 2010, of assault upon an inmate with a deadly weapon or force likely to cause great bodily injury while in prison, made him ineligible for recall of his earlier three-strikes sentence. The defendant argued that that offense, which came after the 2005, non-serious, non-violent offense for vehicle theft is not a prior and can disqualify him for resentencing under section 1170.126. This Court of Appeal found that the phrase "prior conviction," as used in the act, means any conviction that occurs before the court decides whether the inmate is eligible for resentencing. There are two parts to the Act: the first part is "prospective" only, reducing he sentence to be imposed in future three strike cases where the third strike is not a serious or violent felony; the second part is "retrospective", providing relief to third strike defendants already serving a three-strike sentence where the third strike was not serious or violent; the third requirement is that the inmate has no prior convictions for any certain specified felonies.

8. *People v. Soto* REVIEW GRANTED; FORMERLY AT: (2014) 228 Cal.App.4th 967, the Second Appellate District, Division 3 held that the trial court did not err when it denied petitioner's motion to be resentenced under section 1170.126, subdivision (f). The

petitioner had a prior conviction for being armed with a firearm during the commission of the prior offense within the meaning of section 1170.126, subdivision (e)(2)(C)(iii), and was therefore not eligible for resentencing under the Three Strikes Reform Act, even if the sentence for the prior conviction was stayed. Additionally, the Court of Appeal held that even though petitioner would appear to be eligible for resentencing on another count that, if standing alone, would qualify for resentencing, the court found that to be an idle act and one in which this court will not recognize.

9. *People v. Hubbard* REVIEW GRANTED; FORMERLY AT: (2014) 228 Cal.App.4th 1442, the Third Appellate District held that where the defendant has multiple current commitment convictions arising from a single case, including at least one conviction for an offense that precludes resentencing under the Three Strikes Reform Act, section 1170.126, the defendant is not eligible for resentencing as to any count, because the disqualification applies to the judgment as a whole, not merely to specific counts. Since the prior convictions consisted of a violent felony and non-violent felonies, this is what is being referred to as a "hybrid" indeterminate life sentence.

10. *People v. Chaney* REVIEW GRANTED; FORMERLY AT: (2014) 231 Cal.App.4th 1391, the Third Appellate District established the defendant filed a petition to modify his Three Strike sentence, under section 1170.126, subdivision (f). He contended that the newly created definition of danger to public safety, as defined in the newly passed Proposition 47, should apply to his case. That provision reads, "unreasonable risk of public safety, he sought to have the definition of "an unreasonable risk of danger to public safety" means an "unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of section 667. (§ 1170.18, subd. (c)." The Court of Appeal found that this new definition does not apply retroactively, as it does not per se effect appellant's sentence. (See *People v. Brown* (2012) 54 Cal.4th 314, 319-325.)

11. *People v. Valencia* REVIEW GRANTED; FORMERLY AT: (2014) 232 Cal.App.4th 514, the Fifth Appellate District held that section 1170.18, subdivision (a), a provision of Proposition 47 by which a person currently serving a felony sentence for an offense that is now a misdemeanor may petition for a recall of that sentence and request resentencing. However, the trial court denied this Three-Strike offender's sentence modification since there is nothing in Proposition 47 that permits the modification or resentencing provisions of Proposition 36, the Three Strikes Reform Act, to be changed. Appellant had argued that the new definition of "unreasonable risk of public safety," codified in Proposition 47 in section 1170.18, subdivision (c), which reads "an unreasonable risk of danger to public safety" means an "unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of

subdivision (e) of section 667, does not apply to a person, like the defendant, who comes under the provisions of the Proposition 36, section 1170.126; therefore, the trial court did not abuse its discretion in failing to resentence him applying the new definition of "unreasonable risk to public safety."

12. *People v. Aparicio* REVIEW GRANTED; FORMERLY AT: (2015) 232 Cal.App.4th 1065, the Fourth Appellate District, Division 1 held, on rehearing, that the court of appeal uses an abuse of discretion standard applies when reviewing an appeal from a trial court's denial of a petition under Proposition 36, section 1170.126, when the trial court denied petitioner's resentencing based on the trial court's finding that release of the petitioner would present an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).) Petitioner had a very long, and violent, prior history of crime, but recently he had obtained his GED, participated in vocational programs and began Alcoholics and Narcotics Anonymous. This court held that it was not going to determine whether the new definition of "unreasonable risk of danger to public safety," as defined in Proposition 47, applies retroactively to cases coming under Proposition 36, the Three-Strikes Reform Act. That issue has been discussed in *People v. Chaney* (2014) 231 Cal.App.4th 1391, and *People v. Valencia* REVIEW GRANTED; FORMERLY AT: (2014) 232 Cal.App.4th 514, reported on December 18, 2014, in 2014 Los Angeles Daily Journal 16634. This court held that the petitioner can file a writ in the superior court under section 1170.18, Proposition 47, to determine if the definition of "unreasonable risk of danger to the community," as applied to Proposition 36, should be given the meaning as defined in Proposition 47, or whether it did not apply retroactively.

13. *People v. Superior Court (Burton)* REVIEW GRANTED; FORMERLY AT: (2015) 232 Cal.App.4th 1149, the Fourth Appellate District, Division 2 held that the trial court erred when it ordered the petitioner's petition for resentencing under the Three Strikes Reform Act, section 1170.126, continued for two years, so that the inmate could prove to the court he was no longer a danger to society, was without statutory authority. Where the trial court found the inmate to be a danger to the public as of the date of the hearing, the petition should have been denied.

14. *People v. Superior Court (Williams)* REVIEW GRANTED; FORMERLY AT: (2015) 232 Cal.App.4th 1149, the Fourth Appellate District, Division 2 held that trial court erred when it ordered the petitioner's petition for resentencing under the Three Strikes Reform Act, section 1170.126, for two years, so that the inmate could prove to the court he was no longer a danger to society, was without statutory authority. Where trial court found inmate to be a danger to the public as of the date of the hearing, petition should have been denied.

15. *People v. Crockett* REVIEW GRANTED; FORMERLY AT: (2015) 234 Cal.App.4th 642, the Third Appellate District held that the defendant does not have a constitutional right to a jury trial on the issue the issue of "dangerousness to public safety" pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], nor is the prosecution held to a higher standard of proof than preponderance of the evidence. (See *People v. Elder* (2014)

227 Cal.App.4th 1308, 1315; *People v. Superior Court (Kaulick*) (2013) 215 Cal.App.4th 1279, 1304-1305). The Court of Appeal found that the trial court did not abuse its discretion in concluding that the defendant's history of recidivism and parole violations established that he was a danger to the public despite his successful participation in prison numerous rehabilitation programs.

16. *People v. Galvan* REVIEW GRANTED; FORMERLY AT: (2015) 235 Cal.App.4th 1318, the Fourth Appellate District, Division 3 held that the trial court did not err in denying resentencing under section 1170.126, since in determining whether the prior conviction, which would make him ineligible, was a violent or serious felony, is the classification of that crime as of the date section 1170.126, came law, and not the date when appellant suffered the prior conviction. This issue is currently pending in *Braziel v. Superior Court*, formerly at: (2014) 225 Cal.App.4th 933.

17. *People v. Guzman* REVIEW GRANTED; FORMERLY AT: (2015) 235 Cal.App.4th 847, the Fourth Appellate District, Division 3 held that the definition of "unreasonable risk of danger to public safety," spelled out in Proposition 47, section 1170.18, subdivision (c), which permits resentencing of certain defendants previously convicted of felonies that have been reduced to misdemeanors by that initiative, does not apply to resentencing petitions brought by three-strikes defendants under Proposition 36 under section 1170.126. Additionally, the court did not abuse its discretion in denying the petition to modify his sentence within the meaning of section 1170.126.

18. *People v. Sledge* REVIEW GRANTED; FORMERLY AT: (2015) 235 Cal.App.4th 1191, the Fourth Appellate District, Division 3 held that in denying resentencing due to the fact that the court found the defendant posed "a substantial risk to public safety" within the meaning of section 1170.126, subdivision (f), the trial court was entitled to consider all relevant evidence, including evidence that defendant used a firearm during the commission of a past crime, even though no firearm enhancement was imposed, since the court heard the facts at the trial, and was entitled to consider witness statements in a presentence report. (§ 1170.126, subd. (g)(3).) The alleged error of the trial court in relying on facts not supported by the record, with respect to resentencing motion, was harmless where it was undisputed that defendant had a history of heavy drug use, criminal violence and mental illness. Additionally, the trial court found that the definition of "unreasonable risk of danger to public safety," spelled out in Proposition 47, section 1170.18, subdivision (c), which permits resentencing of certain defendants previously convicted of felonies that have been reduced to misdemeanors by that initiative, does not apply

to resentencing petitions brought by three-strikes defendants under section 1170.126.

19. *People v. Lopez* REVIEW GRANT AND HOLD; FORMERLY AT: (2015) 236 Cal.App.4th 518, the Sixth Appellate District held that the trial court did not err in denying the petitioner a modification of his Three-Strike sentence within the meaning of section 1170.126. The Court of Appeal ruled that he is not entitled to a jury trial, pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, on the issue of whether such resentencing would create "an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f); *People v. Superior Court (Kaulick*) (2013) 215 Cal.App.4th 1279, 1302-1303.) Trial court did not abuse its discretion in finding that petitioner was unreasonably dangerous given his long history of criminal violence. Petitioner's lack of recent violence in the environment of a high-security prison did not compel the conclusion that he would not return to a life of criminal violence once released. Finally, Proposition 47, section 1170.18, which permits certain felons to be resentenced as misdemeanants absent an "unreasonable risk of danger to public safety," as that phrase is narrowly defined by that proposition, did not alter the broader definition of the phrase as used in Proposition 36.

20. *People v. Armogeda* REVIEW GRANTED; FORMERLY AT; (2015) 233 Cal.App.4th 428, the Fourth Appellate District, Division 3 held that Postrelease Community Supervision Act of 2011, section 3450 et. sec., which was passed by the legislature, to the extent it permits revocation of postrelease community supervision for a person who commits a non-violent drug possession (NVDP) offense, (see § 3455) and permits confinement time, conflicts with voter-approved Proposition 36, which was passed in 2000, and thus violates the state Constitution. Appellant contended, and the Court of Appeal agreed that he should have been classified as a parolee under section 3063.1 and given drug treatment instead of jail.

CASES DECIDED BY THE CALIFORNIA SUPREME COURT

---

1. PENAL CODE SECTION 1385 ISSUES

a. *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. Footnote 13 is modified in 13 Cal.4th 1026a as follows:

A defendant serving a sentence under the Three Strikes law imposed by a court that misunderstood the scope of its discretion to strike prior felony conviction allegations in furtherance of justice pursuant to section 1385, subdivision (a), may raise the issue on appeal, or, if relief on appeal is no longer available, may file a petition for habeas corpus to secure reconsideration of the sentence.

In an opinion by Justice Werdeger, the court holds that a defendant serving a sentence under the three strikes law may file a writ of habeas corpus in the trial court to secure reconsideration of the sentence. Such a petition may be summarily denied if the record shows that the sentencing court was aware that it had discretion to strike prior felony conviction allegations and did not strike them, or if the record shows that the sentencing court clearly indicted that it would not, in any event, have exercised its discretion to strike the allegations. (See fn. 13.)

As a result of the modified footnote 13, it is clear that there is no dual jurisdiction. When the matter is in the appellate courts, ask for a remand to the Superior Court for that court to make its discretionary determination under section 1385, subdivision (a). If appeal is no longer available (e.g., remittitur has issued, or the court has dismissed the appeal, see *People v. Couch* (1996) 48 Cal.App.4th 1053 [see # 14 (d) under plea bargain issues]), then the "writ" should be filed in the Superior Court in the appropriate case. (See *People v. Fuhrman* (1997) 16 Cal.4th 930.)

b. *People v. Garcia* (1999) 20 Cal.4th 490, the Supreme Court maintained its consistent set of rulings providing the trial court with the discretion to strike a strike. Here, the High Court stated that the trial court has the discretion to strike a strike as to other or subordinate counts while not striking the same strikes on the principle count. In other words, in a three strike case, if the court has the legal right to sentence the defendant to 100 plus years to life, based on four counts, but determines that the sentence would be sufficient if

it imposed a 25 to life term, it now has the right to strike the strikes as to counts 2-4, but impose a three strike sentence as to count 1. This theoretically will give the defendant the chance of getting out of prison before the grim reaper takes him/her of natural or unnatural causes.

c. *In re Large* (2007) 41 Cal.App.4th 538, the California Supreme Court held that the fact that the court denied petitioner's original petition for writ of habeas corpus, pursuant to *Romero*, which asked for dismissal of one or more of his prior strike convictions, but at a new hearing three years later, based on the same information available at the first hearing, struck petitioner's prior conviction for first degree burglary and resentenced him to lesser term, did not demonstrate that the court's original ruling, which was reinstated by the court of appeal after it reversed the later order, was reached in an improper manner. The supreme court held that petitioner failed to overcome the strong presumption under *People v. Carmony* (2004) 33 Cal.4th 367, 378, that the trial judge properly exercised his discretion in refusing to strike a prior conviction allegation.

2. A BURGLARY, NOT LISTED WITHIN 1192.7, SUBD. (C)(18), CAN BE USED AS A STRIKE

a. *People v. Cruz* (1996) 13 Cal.4th 764. The supreme court in some tortured logic to dance around statutory interpretation concepts, finds that a house boat is a dwelling and is included as an inhabited vessel; therefore, a boat is a house for section 460 and 1192.7 purposes.

3. AMENDING THE INFORMATION TO ADD PRIORS AFTER DEFENDANT PLED

a. *People v. Valladoli* (1996) 13 Cal.4th 590. Post verdict amendment to the information is permitted before the jury is discharged to add a prior conviction.

4. OUT OF STATE PRIORS AND STRIKES AFTER THE INITIATIVE

a. *People v. Hazelton* (1996) 14 Cal.4th 101. Out-of-state priors qualify as strikes under both the statute and the initiative. All of the justices concurred in the aforementioned conclusion, but for differing reasons. The majority of justices reasoned that, given the ambiguity in the statute, they could look to the intent of the voters and other extrinsic material to reach the conclusion that out-of-state priors are admitted and qualify as strikes.

b. *People v. Avery* (2002) 27 Cal.4th 49, the California Supreme Court held that a Texas conviction for burglary qualified as a serious felony as the intent requirement was similar to that in California. The High Court stated that, even though larceny requires an intent to permanently deprive the owner of possession of the property, it is also satisfied if the property is taken temporarily, but for so extended a period of time as to deprive the owner of a major portion of its value or enjoyment. The court specifically disapproved *People v. Marquez* (1993) 16 Cal.App.4th 115, to the extent that it is inconsistent with this holding. Finally, the court held that the rule of "lenity," whereby courts must resolve doubts as to the meaning of a statute in a defendant's favor, does not compel a different result.

5. THE TRIAL COURT HAS DISCRETION TO REDUCE A WOBBLER TO A MISDEMEANOR AND THE SCOPE OF DISCRETION IS NOT LIMITED TO A DEFENDANT'S BAD RECORD – OTHER FACTORS MUST BE CONSIDERED

a. *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968. The trial court has the power to reduce a wobbler to a misdemeanor if it is not merely to avoid a particular statutory scheme such as the minimum 25 to life term in the three strikes scheme. The trial court can take into account whether the defendant was: (1) cooperative with law enforcement, (2) his prior record, (3) public safety, (4) the age of the priors, (5) whether the priors involved violent conduct, (6) the defendant's demeanor during trial, (7) and other mitigating factors particular to the defendant. The court explicitly indicated that they were not establishing a "floor" below which reviewing courts may never find an abuse of discretion. They also reiterated the age old precept that the Court of Appeal cannot merely reverse because it disagrees with the result of the trial court. The trial court's determination must be irrational or arbitrary before the Court of Appeal is permitted to reverse a sentencing decision. The burden is on the appellant to clearly show that the trial court's sentencing decision was not arbitrary nor capricious, but was an impartial discretion, guided and controlled by fixed legal principles and grounded by sound reasoned judgment. An appellate tribunal is not permitted to substitute its judgment for the judgment of the trial court. Therefore, in arguing this issue, present as much mitigation as humanly possible – let your mind wonder and be creative given the fact that the discretionary floor is not set by this case.

6. CONSECUTIVE SENTENCES ARE NOT MANDATED UNDER THE THREE STRIKES LAW WHEN A DEFENDANT ON PROBATION COMMITS A NEW OFFENSE AND IS SENTENCED FOR BOTH THE NEW OFFENSE AND THE ORIGINAL OFFENSE FOLLOWING THE REVOCATION OF PROBATION

a. *People v. Rosbury* (1997) 15 Cal.4th 206. The Supreme Court reversed Second District, Division 5, and found that a defendant who was granted probation, was not "sentenced" within the technical meaning of the term, and as a result, he was not "serving a term" within the meaning of section 667, subdivision (c)(8). The High Court also indicated that the defendant had not suffered a "current conviction," based on the probation violation for the "prior offense," within the meaning of section 667, subdivision (c)(6), and therefore, consecutive sentences were not mandated. This is the first opinion where the High Court clearly indicates that a defendant is not "sentenced" until he has been delivered to the sheriff for delivery to state prison, and "likely not until the sheriff delivered him to prison."

7. EX POST FACTO

a. *People v. Helms* (1997) 15 Cal.4th 608, the High Court held that the ex post facto doctrine does not apply to a pre-strikes case wherein the punishment on the pre-strikes case does cause the punishment on the non-strikes case to be increased. Quite frankly, I find this to be a very confusing opinion from Justice Mosk.

8. THE THREE STRIKES LAW DOES NOT SUPERSEDE THE DEATH PENALTY LAW

a. *People v. Samayoa* (1997) 15 Cal.4th 795, the High Court held that, consistent with its previous ruling in *People v. Alvarez* (1996) 14 Cal.4th 155, and one from the Court of Appeal in *People v. Williams* (1995) 40 Cal.App.4th 446, 457-458, the death penalty law has not been superseded by the three-strikes law wherein the death penalty is not imposed and the provisions of section 667, subdivision (e) are imposed.

9. A FITNESS FINDING IS NOT REQUIRED FOR A JUVENILE ADJUDICATION TO QUALIFY AS A STRIKE

a. *People v. Davis* (1997) 15 Cal.4th 1096. The Supreme Court, in a 4-3 split, ruled that there does not have to be an express finding of fitness for a juvenile adjudication to qualify as a strike within the meaning of section 667, subdivision (d)(3)(C), it may be implied. The court specifically did not state what type of juvenile priors would qualify as strikes, leaving open the question of whether the felony must be within sections 1192.7, subdivision (c), 667.5, subdivision (c) or Welfare and Institutions Code section 707, subdivision (b). The noted exception between the code sections is that residential burglary is not a Welfare and Institutions Code section 707, subdivision (b) offense. This question was answered in *People v. Garcia* (1999) 21 Cal.4th 1.

The Supreme Court either dismissed or transferred the following cases back to the Court of Appeal in light of *Davis: People v. Renko* (1996) 44 Cal.App.4th 620; *People v. Callahan* (1996) 50 Cal.App.4th 1723; *People v. Graham* (1997) 53 Cal.App.4th 1288; *People v. Venegas* (1997) 47 Cal.App.4th 1605.

10. SERIOUS FELONY PRIORS ARE ADDED ON TOP OF THE DESIGNATED LIFE TERM IN A THREE STRIKES CASE

a. *People v. Dotson* (1997) 16 Cal.4th 547. In an unanimous opinion, the High Court ruled, wherein: (1) appellant was found guilty of one count of first degree burglary, (2) four serious felony prior conviction allegations were found true, and (3) where the sentence calculated under the (iii) provision of subdivision (e)(2)(A), was greater than 25 to life, the determinate term "enhancements" for the serious felony prior convictions, within the meaning of subdivision (a)(1) of section 667, are added to the minimum term under either subdivisions (i), (ii) or (iii). The court, despite the specific wording of the statute, basically found that it would not be fair for the appellant who has the more egregious prior history, to obtain a lesser sentence by not adding the enhancements to the (iii) term, when they are added to the (i) and (ii) calculation when either of those provisions is calculated to be the greatest term. Additional, the Supreme Court simply adopted the prosecution's analysis of our *Jenkins* argument, finding that the introductory language in section 667, subdivision (e), which indicates that "in addition to any other enhancements or punishments provisions that may apply," is sufficiently distinguishable from the language in section 667.7, the statute which the

Jenkins' court decided that the enhancements were not added onto the minimum term. Therefore, that effectually puts an end to this issue. It is now formally considered dead. *People v. Jenkins* (1995) 10 Cal.4th 234.

11. MANDATORY CONSECUTIVE V. DISCRETIONARY CONCURRENT SENTENCES

a. *People v. Hendrix* (1997) 16 Cal.4th 508, held that the trial court has discretion to impose a concurrent sentence wherein the defendant has two or more prior felony convictions, and then commits serious or violent felonies against multiple victims on the same occasion. The court found that the language in section 667, subdivision (c)(6), which indicates that concurrent sentences can be imposed when the acts are based on "the same set of operative facts" and occur on the "same occasion," is incorporated into subdivision (c)(7) by reference. The court found that the difference between subdivisions (c)(6b) and (7) is that in subdivision (c)(7), the trial court must impose the sentences for these offenses which are not committed on the same occasion, consecutive to each other and "consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner proscribed by law." (I.e., that would include a misdemeanor sentence.) The High Court rejected the prosecution's contention that subdivision (c)(6) and (7) only apply to "two strike" cases. The court specifically did not address the meaning of "same set of operative facts" or "same occasion." Additionally, Justice George noted that the majority opinion does not address the issue of whether section 654 applies, or whether the fact that the crimes were committed against multiple victims would not prohibit multiple punishment, even though the acts were committed on the same occasion and arose out of the same set of operative facts. These issues were answered in *People v. Deloza* (1998) 18 Cal.4th 585, infra, next. CAUTION: SINCE THE PASSAGE OF PROPOSITION 36, THE AMENDMENTS TO THE THREE STRIKE STATUTE, SECTION 1170.12, SUBDIVISION (A)(7) WAS MODIFIED AND NOW IT APPEARS THAT THE COURT MUST SENTENCE CONSECUTIVELY FOR ANY CURRENT OFFENSE(S) THAT ARE SERIOUS OR VIOLENT FELONIES–ESSENTIALLY ABROGATING *HENDRIX AND DELOZA, INFRA.*

b. *People v. Deloza* (1998) 18 Cal.4th 585. The High Court determined that the phrase "not committed on the same occasion," as used in section 667, subdivisions (c)(6)(7), was given, as I had urged the court, the plain meaning, that is, a degree of temporal and spacial proximity to the current

offenses. The court also found, as we stated in the briefing, and contrary to the position taken by the Court of Appeal opinions, that section 654 is totally inapplicable to the situation where multiple victims are involved. The court did not define the phrase "same set of operative facts," which is answered in *People v. Lawrence* (2000) 24 Cal.4th 219, infra., next. CAUTION: SINCE THE PASSAGE OF PROPOSITION 36, THE AMENDMENTS TO THE THREE STRIKE STATUTE, SECTION 1170.12, SUBDIVISION (A)(7) WAS MODIFIED AND NOW IT APPEARS THAT THE COURT MUST SENTENCE CONSECUTIVELY FOR ANY CURRENT OFFENSE(S) THAT ARE SERIOUS OR VIOLENT FELONIES–ESSENTIALLY ABROGATING *HENDRIX AND DELOZA.*

c. *People v. Lawrence* (2000) 24 Cal.4th 219, the California Supreme Court, in a very narrow interpretation of the phrase "same set of operative facts," essentially equated the "same occasion" rule it pronounced in *People v. Deloza* (1998) 18 Cal.4th 585, to the "same set of operative facts" test, to determine whether the trial court can impose other offenses concurrently rather than mandatorily consecutively within the meaning of section 667, subdivisions (c)(6) and (c)(7). Essentially, the majority stated that they did not believe the voters intended that the mandatory consecutive sentence provision not to apply to a situation wherein the crimes were perpetrated on different groups of victims merely because there was a flight from the initial crime scene, even though all the events took place within minutes of the other. The High Court indicated that there must be, similar to "same occasion" rule, the same concept of closeness in time and space for either prong to apply. The bottom line is, there is virtually no difference between, the "same occasion" rule and the "same set of operative" facts rule, even though the statute provides that the court can impose concurrent time if either of those factors can be proven.

12. BROUGHT AND TRIED SEPARATELY/RECIDIVIST ARGUMENTS

a. *People v. Fuhrman* (1997) 16 Cal.4th 930, held that even though all of the convictions which qualified as appellant's strikes were brought and tried together, each of the convictions qualified as strikes. The court found that the brought and tried separately language is found exclusively in section 667, subdivision (a)(1) and not within subdivisions (b) through (i). That subdivision (a)(1) is not within the three-strikes law, and therefore it simply does not apply. The court never addressed the concept of sequential sentencing, nor the public policy briefing behind the habitual offender statutes that was briefed for the court. Simply this issue is now dead.

b. *People v. Sasser* (2015) 61 Cal.4th 1, the California Supreme held that where a defendant's second-strike sentence includes multiple determinate terms for several offenses, and he has suffered a 5-year prior serious felony enhancement within the meaning of section 667, subdivision (a)(1), that enhancement may not be applied to the term imposed for each current offense, but may be added only once to multiple determinate terms. (See § 1170.1, subd. (a); *People v. Tassell* (1984) 36 Cal.3d 77, 89-92.)

13. NO REMAND IN SILENT RECORD CASES

a. *People v. Fuhrman* (1997) 16 Cal.4th 930, recognized the split in the Court of Appeal between the *People v. White Eagle* (1996) 48 Cal.App.4th 1511 line of cases (i.e., no remand on a silent record), and the *People v. Ervin* (1996) 50 Cal.App.4th 259 line of cases, (i.e., remand on a silent record cases), and held that in the absence of any affirmative indication in the record that the trial court committed error or would have exercised discretion under section 1385 to strike the prior conviction if it believed it had such discretion, relief on appeal is not appropriate in this context. In other words, to obtain relief in a silent record case, a "*Romero*" writ must be filed in the Superior Court. Based on footnote 10, the showing must be very specific and cannot be boilerplate. Practically, it must be very specific as the court can deny relief based on the document alone, and the petitioner, your client, does not have to be present when the court makes this determination. See footnote 11 in *Fuhrman*, for all of the cases that permitted remand in the silent record context, and they are disapproved to the extent that they are inconsistent with this opinion.

b. *People v. Gutierrez* (2009) 174 Cal.App.4th 515, the Fifth Appellate District held that assuming that battery on a custodial officer is a "wobbler" and not a straight felony, trial judge's lack of explicit consideration of a misdemeanor sentence was not reversible error where defendant failed to establish that trial judge was unaware of sentencing discretion. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496; *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1521-1523 [on a silent record, the court is assumed to know applicable law, and the record does not show that the court did not know that it had discretion].) Additionally, it is clear that the trial judge would have imposed a felony sentence in any event, having found several circumstances in aggravation and none in mitigation, and having made specific reference to defendant's past criminal history, long record of violence, and poor performance on probation and parole.

14. IN A NON-CAPITAL CASE, NEITHER THE STATE OR FEDERAL PROHIBITIONS AGAINST DOUBLE JEOPARDY APPLY TO A RETRIAL WHEN THE COURT OR JURY DETERMINES THE TRUTH OF THE PRIOR CONVICTION ALLEGATION IN INSUFFICIENT

a. *Monge v. California* (1998) 524 U.S. 721 [141 L.Ed 2d 615, 118 S.Ct. 2246], in a 5-4 opinion the High Court held that the double jeopardy clause does not apply to noncapital sentencing proceedings, thereby upholding the opinion of the California supreme Court, infra. The majority failed to make the ruling established in *Bullington v. Missouri* (1981) 451 U.S. 430 [68 L.Ed.2d 270, 101 S.Ct. 1852], applicable to a sentencing proceeding in a noncapital case. The court held that a sentencing proceeding is not an offense within the meaning of the double jeopardy clause, and that an enhanced sentence is not viewed as either new jeopardy or an additional penalty for the earlier crimes, but as a stiffened penalty for the new offense. The dissenting opinions provide that the enhancements that the defendant was subjected to constituted an element of the new offense and therefore was subject to double jeopardy protections.

b. *People v. Monge* (1997) 16 Cal.4th 826. In what can only be called an unbelievable opinion, as demonstrated by the dissenting opinion written by Justice Werdeger and joined in by Justices Mosk and Kennard, the plurality majority ruled that the prohibition against double jeopardy does not bar a retrial on a prior conviction allegation (e.g., an enhancement), in a non-death penalty case, even though the Court of Appeal found the evidence insufficient to support a true finding on the enhancement. The majority made this finding based on both the federal and state constitutions. The court expressed no opinion whether due process protections would preclude the prosecution from retrying the prior conviction allegation.

15. THE COURT OF APPEAL MAY REVIEW A TRIAL COURT'S DETERMINATION TO STRIKE A STRIKE UNDER AN ABUSE OF DISCRETION STANDARD

a. *People v. Williams* (1998) 17 Cal.4th 148. Quite simply, the Supreme Court found that the Court of Appeal did not err when it reviewed the trial court's ruling to strike a strike under an abuse of discretion standard. That standard being whether the Superior Court's order fell outside the bounds of reason under the applicable law and relevant facts. However, the Supreme Court did not uphold the Court of Appeal's ruling which supplanted a different

sentence for that of the trial court. It ordered the matter remanded to the trial court for the defendant to be allowed to withdraw his plea as the trial court's ruling was "ineffective." The trial court's comments to appellant, before he entered his plea, that it was willing to consider striking one of the strikes, definitely influenced his decision to plead straight up, and as a result, he was entitled to withdraw the plea rather than have the Court of Appeal reinstate the stricken strike, and impose a 25 to life sentence. Specifically note footnote 6, which indicates that the Court of Appeal can, on its own, raise the question whether the trial court abused its discretion, even if the prosecution did not object in the trial court, and even if the prosecution is bared from raising it for the first time on appeal. This could lead to many unanticipated adverse consequences; therefore, with the client that has a long record like Mr. Williams, you better have a long discussion with him or her before proceeding with an appeal when the trial court has stricken a strike, and you are in a district and/or division that is prone to reviewing a sentence in a manner similar to Second District, Division 5.

I would argue, based on footnote 7, that the Court of Appeal must remand the matter back to the Superior Court to allow the defendant to place on the record any other evidence that would support the striking of the strike. This evidence must be new and different from that which was presented at the first motion to strike, and which the Court of Appeal found was an abuse of discretion.

Additionally, in any motion to strike, I would suggest trying to establish how appellant has changed, or improved his or her lot in life. *Williams* seemed to emphasize the fact that nothing ever changed for the better, and his line of criminality was continual. Additionally, when the court has agreed to strike a strike, make sure that all of the court's favorable reasons are on the record. If the court has not stated all of them in its statement of reasons, make sure that you get them on the record; that way the Court of Appeal will have a more difficult time in finding an abuse of discretion.

16. A DEFENDANT MUST BE PRESENT FOR THE *ROMERO* REMAND (RESENTENCING), BUT NOT FOR A *ROMERO* WRIT PROCEEDING

a. *People v. Rodriguez* (1998) 17 Cal.4th 253. The Supreme Court ruled, consistent with its prior ruling in *In re Cortez* (1971) 6 Cal.3d 78, and within the parameters of section 977, subdivision (b)(1), that the defendant has a right to be a personally present when an appellate court "remands" a sentence back to the trial court. The High Court held that the defendant has

a right to be present at this hearing, just as he had a right to be at the initial sentencing hearing, unless he waived that appearance pursuant to section 977, subdivision (b)(1). The Supreme Court expressly distinguished this situation from the silent record case in *People v. Fuhrman* (1997) 16 Cal.4th 930, where the court held that the appellate court did not have to remand the matter back to the trial court, that appellant's only remedy was to file a *Romero* writ, and the defendant did not have to be personally present.

17. AN ASSAULT WITH A DEADLY WEAPON MUST EITHER SHOW THE DEFENDANT PERSONALLY USED A WEAPON OR PERSONALLY INFLICTED GREAT BODILY INJURY ON A PERSON OTHER THAN AN ACCOMPLICE

a. *People v. Rodriguez* (1998) 17 Cal.4th 253. When the record only reflects that an assault with a deadly weapon has been committed, and there is no other evidence that the defendant personally inflicted great bodily injury on a person other than an accomplice, or that appellant did not use a firearm, the evidence is insufficient to establish that he committed a serious prior felony within the meaning of section 1192.7, subdivision (c). A defendant may commit the assault with force likely to cause great bodily injury, without actually causing great bodily injury or using a deadly weapon. Therefore, as in this case, wherein the only evidence the prosecution presented was the abstract of judgment, and no other document established appellant's actual conduct (see *People v. Guerrero* (1988) 44 Cal.3d 343, 355-356 [the prosecution can prove the allegation by going beyond the least adjudicated elements test and using the entire record to prove the defendant had in fact committed great bodily injury], the prosecution did not establish the requisite conduct on the part of appellant, and as a result, the prior was insufficient as a matter of law.

18. A COURT OF APPEAL OPINION CAN CONSTITUTE A RECORD OF CONVICTION FOR PURPOSE OF PROVING A SERIOUS FELONY ENHANCEMENT

a. *People v. Woodell* (1998) 17 Cal.4th 448, the High Court held that the appellate court opinion which, affirms a conviction, is part of the record of conviction and may be considered in determining whether that conviction was for a serious felony within the meaning of Penal Code section 667. The Supreme Court concluded that there was no valid reason to limit the record of conviction to the trial court proceedings. The High Court stated that noticing an appellate opinion for the limited purpose of proving the existence of the conviction does not require consideration of the facts

beyond those necessarily adjudicated in the prior proceeding. The Supreme Court also gave short shrift to appellant's argument that the statements in the opinion were in large part hearsay, and therefore inadmissible. The High Court held that the Court of appeal opinion can be considered for a nonhearsay purpose to establish the basis for the conviction, and may also be admitted within the meaning of Evidence Code section 1280, as an official record.

19. A DEFENDANT WHO PLED GUILTY WITHOUT A NEGOTIATED DISPOSITION OR BARGAINED FOR SENTENCE WHICH LIMITS THE TRIAL COURT'S SENTENCING DISCRETION, CAN RAISE CLAIMS OF SENTENCING ERROR ON APPEAL WITHOUT HAVING FIRST OBTAINED A CERTIFICATE OF PROBABLE CAUSE

a. *People v. Lloyd* (1998) 17 Cal.4th 658. Appellate pleaded to a second degree robbery and the trial court made adverse finding as to the three strikes allegations. Prior to pleading open to the court, he was informed by his counsel that "there might be some decisions [i.e., referring to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497] by the higher courts which would change the way in which priors are imposed. Prior to the Supreme Court deciding *Romero*, the court imposed sentence, but stated that it did not believe that it had the power to strike a strike. Appellant then filed a notice of appeal. While the appeal was pending, the High Court decided *Romero*. Thereafter, the prosecution moved to dismiss appellant's appeal, and the Court of Appeal complied, for appellant's failure to secure a certificate of probable cause within the meaning of Penal Code section 1237.5 and California Rules of Court, Rule 31(d). This court held that, the aforementioned sections indicate that when appellant personally files a written statement, under oath, showing reasonable grounds for proceeding, and the Superior Court then executes a certificate of probable cause, the appeal should not proceed. (*People v. Panizzon* (1996) 13 Cal.4th 68, 75.) One exception to this general rule is that a certificate of probable cause is not needed if the basis for the appeal is premised solely on the ground occurring after entry of the plea, and which do not challenge the plea's validity. (*Id.*)

Given the fact that a notice of appeal is to be construed liberally, (CRC, rule 31(b)), the court found the notice of appeal sufficient even though the notice of appeal did not use the magic terms of the statute, but merely indicated that defendant was appealing from the "sentence." Here, the court found that the appeal did not challenge, "in substance" the validity of the plea, as it did in

Panizzon, supra [wherein the appeal was also only challenging appellant's sentence, but as a part of a plea bargain]. This court found that appellant's pleading open, was not a plea bargain and that the basis for the appeal was not "fact bound," but based solely on a "question of law," whether the trial court could, on its own motion strike a strike.

20. A PREVIOUSLY STAYED CONVICTION CAN BE USED AS A STRIKE SOMETIMES AND NOT OTHERS

a. *People v. Benson* (1998) 18 Cal.4th 24, the 4-3 majority found that the legislature intended that when a defendant had previously been convicted of 2 serious felonies, but one of them had been stayed pursuant to section 654 and *People v. Pearson* (1986) 42 Cal.3d 351, both of the felonies counted as strikes, thereby mandating a minimum of 25 to life, unless the court struck one of the priors pursuant to *Romero*. They have left open the question whether it would be an abuse of discretion for the trial court not to dismiss such a strike prior, where, the prior felonies are so closely related, that being, when multiple convictions arise out of a single act as distinguished from multiple acts committed in an indivisible course of conduct. (See footnote 8.)

b. *People v. Sanchez* (2001) 24 Cal.4th 983, the California Supreme Court reiterated its expression in *People v. Benson* (1998) 18 Cal.4th 24, that in the appropriate case, the trial court may strike a prior felony conviction under section 1385, and that they left open the possibility that there are some circumstances in which two prior felony convictions are so closely connected that a trial court would abuse its discretion under section 1385 in failing to strike one of the priors. (*Id*., 18 Cal.4th at p. 36, fn. 8.)

c. *People v. Vargas* (2014) 59 Cal.4th 635, the California Supreme Court held that prior convictions for robbery and carjacking, wherein both arose out of a single act against a single victim cannot constitute separate strikes under the Three Strikes Law and is inconsistent with the spirit of the that law. The trial court should have dismissed one of them and sentenced the defendant as if he had only one and not two qualifying convictions.

21. THE TRIAL COURT DOES NOT HAVE TO ADVISE APPELLANT OF HIS LIMITS ON HIS ABILITY TO EARN CONDUCT CREDITS AND THAT HE MUST SERVE 4/5TH OF THE TOTAL SENTENCE BEFORE HE IS ELIGIBLE FOR PAROLE AND IT IS NOT A VIOLATION OF *BOYKIN/TAHL/BUNNELL* LINE OF CASES

a. *People v. Barella* (1999) 20 Cal.4th 261, the Supreme Court held that, the trial court's failure to advise appellant of his limits on his ability to earn conduct credits and that he must serve 4/5th of the total sentence before he is eligible for parole is not a violation of *Boykin/Tahl/Bunnell* (*Boykin v. Alabama* (1969) 395 U.S. 238 23 L.Ed.2d 274, 89 S.Ct. 1709]) line of cases. (See *Bunnell v. Superior Court* (1975) 13 Cal.3d 592.) This holding is now in line with *People v. Cortez* (1997) 55 Cal.App.4th 426 decided by the Fifth District. The High Court analogized to the United States Supreme Court's ruling in *Hill v. Lockhart* (1985) 474 U.S. 52, 55-56 [82 L.Ed.2d 203, 106 S.Ct. 366], wherein the court ruled that a defendant's parole eligibility date is not a direct consequence of which a defendant must be apprized before he enters a plea. That the credit limitation contained within the Three Strikes law is the functional equivalent of a parole eligibility date, and that neither the California nor federal constitutions require that the defendant be advised of this prior to his entering a plea.

22. AN ADJUDICATION QUALIFIES AS A STRIKE IF IT IS AN OFFENSE LISTED IN WELFARE AND INSTITUTIONS CODE SECTION 707, SUBDIVISION (B) AS WELL AS PENAL CODE SECTION 1192.7. HOWEVER, IN A MULTIPLE COUNT PETITION, IF THE MINOR IS FOUND TO BE A WARD FOR ONE OFFENSE THAT IS A SECTION 707 , SUBDIVISION (B) OFFENSE AND THE OTHER(S) ARE NOT 707, SUBDIVISION (B) OFFENSE(S), THEN THE MINOR QUALIFIES FOR MULTIPLE STRIKES AND NOT MERELY ONE

a. *People v. Garcia* (1999) 21 Cal.4th 1, modified at 21 Cal.4th 85a, the Supreme Court, with the backdrop of a lengthy discussion of legislative history and harmonizing legislative intent, hold that a juvenile adjudication for a non-707, subdivision (b) offense will qualify as a strike if ANY offense that is listed in Welfare and Institutions Code section 707, subdivision (b) had been sustained and if the same offense would be a strike for an adult if the offense is listed in Penal Code section 1192.7, subdivision (c). Here, burglary is not listed in Welfare and Institutions Code section 707, subdivision (b), but it is a serious felony under section 1192.7, subdivision (c); therefore, the sustained petition for burglary is not a strike. However, if

the defendant had a sustained petition for a robbery with a gun use, and a burglary, and both counts were found true within one petition, then both of the offenses qualify as strikes. Therefore, depending on the particular offense(s), a juvenile sustained petition may qualify as multiple strikes or no strikes.

23. A DEFENDANT SENTENCED TO A "LIFE" TERM IS SENTENCED TO DOUBLE THE TERM PROSCRIBED IN SECTION 3046 OR A HIGHER TERM ESTABLISHED PURSUANT TO ANOTHER SECTION OF THE LAW-HERE, SECTION 186.22, SUBDIVISION (b)(4)

a. *People v. Jefferson* (1999) 21 Cal.4th 86, the Supreme Court held that when a defendant is sentenced to a "life" term, the minimum term is set forth in section 3046 or as stated in section 3046, to the term that establishes a minimum period of confinement under a life sentence before eligibility for parole. In this case, the defendant, in addition to the attempted murder charge was also convicted under the gang statute section 186.22. Section 186.22, subdivision (b)(4) provides that a defendant shall not be eligible for parole until he has served a minimum of fifteen years. Therefore, since another term was provided that was greater than the 7 year term set forth in section 3046, that greater term is doubled within the meaning of section 667, subdivision (e)(1). The High Court held that section 3046 is not an enhancement, nor is section 186.22, subdivision (b)(4), as they do not "add" a period of confinement to the offense for which the defendant was convicted, but merely set a "minimum term" which can be either doubled as a "two-striker" or possibly tripled as a "three-striker." The majority rejected the defense and dissenting justices' contention that the Legislature knew how to include the provisions of section 3046 into the strike statute for a "two-striker" as they did so for a "third-striker," and since they chose not to, intended that the Board of Prison Terms determine when the defendant should be released after the statutory period of parole ineligibility.

24. IN A TWO STRIKE SENTENCE, THE SUBORDINATE COUNTS ARE DOUBLED AT ONE-THIRD THE MID TERM AND NOT DOUBLED AT FULL TERM

a. *People v. Nguyen* (1999) 21 Cal.4th 197, the Supreme Court held that, consistent with virtually every published Court of Appeal decision on the matter, in a "two-strike" case, the subordinate term(s) of the determinate portion of the sentence, are doubled at one-third the middle term and are not

doubled at full term within the commonly known principles of section 1170.1.

25. THE COURT, AND NOT THE JURY MAKES THE DETERMINATION THAT A PRIOR CONVICTION IS A SERIOUS OR VIOLENT FELONY

a. *People v. Kelii* (1999) 21 Cal.4th 452, the California Supreme Court, in a 4-3 opinion determined, despite clear legislative intent to the contrary, that the court and not the jury is to determine whether a prior conviction is a serious or violent felony. The majority of the court found that the Legislature, in its 1998 amendment to section 1025, upheld its prior decision in *People v. Wiley* (1995) 9 Cal.4th 580, and in fact supported the position that the Legislature intended that the court and not the jury determine the issue. However, as the dissent by Justice Werdeger points out, there is clear legislative intent that the Legislature only wanted the court to determine the identity of the person who committed the prior felony, and that the jury was to determine all other issues. In a separate dissenting opinion, Justice Kennard, joined by Justice Mosk, conclude that the denial of the jury trial on any issue by identification is a structure error, and is reversible per se.

<u>NOTE</u>: THIS HOLDING SHOULD BE VIEWED WITH CAUTION AND AN APPLICATION OF *APPRENDI v. NEW JERSEY* (2000) 530 U.S. 466 [147 L.Ed. 2d 435, 120 S.Ct. 2348] SHOULD BE CONSIDERED IN LIGHT OF JUSTICE THOMAS'S STATEMENT IN THAT OPINION. HE HAS NOW DISAVOWED HIS VOTE IN *ALMENDAREZ-TORRES v. UNITED STATES* (1998) 523 U.S. 224 [140 L.Ed.2d 350, 118 S.Ct. 1219] WHICH HELD THAT A SENTENCE ENHANCEMENT STATUTE NEED NOT BE ALLEGED IN AN INDICTMENT AS IT IS ONLY A SENTENCING FACTOR, NOT A CRIMINAL OFFENSE. *APPRENDI* NOTES THAT "IT IS ARGUABLE THAT *ALMENDAREZ-TORRES* WAS INCORRECTLY DECIDED AND THAT A LOGICAL APPLICATION OF OUR REASONING TODAY SHOULD APPLY IF THE RECIDIVIST ISSUE WERE CONTESTED...."

26. A DEFENDANT WHO IS SUBJECT TO AN INDETERMINATE THREE STRIKE SENTENCE, IS NOT LIMITED TO 15% PRESENTENCE CREDITS WHEN HE WAS CONVICTED OF A DETERMINATE SENTENCE CRIME WHICH WOULD NOT SUBJECT HIM TO A LIFE TERM WITHIN THE MEANING OF SECTION 667.5, SUBDIVISION (C) (7)

a. *People v. Thomas* (1999) 21 Cal.4th 1122, the Supreme Court held that a defendant who is subject to a life term under the three-strikes law, is not limited to the 15% limitation on presentence credits, when the underlying crime, would not in and of itself, subject appellant to a life sentence. This case relied on the rationale first set forth in *People v. Henson* (1997) 57 Cal.App.4th 1380, which made explicitly clear that the limitation on presentence credits is limited to the crime as originally charged, rather than the ultimate sentence that the defendant received. The High Court concluded that a strike defendant is entitled to presentence credits under section 4019. However, the court holds open the question, in footnote 3, whether three strike defendants are entitled to presentence conduct credits when he solely has an indeterminate term, and not the mixed determinate and indeterminate term as in this case.

27. COMPUTER PRINTOUTS OF THE DEFENDANT'S CRIMINAL HISTORY ARE ADMISSIBLE UNDER BUSINESS RECORD EXCEPTION (EVIDENCE CODE SECTION 1280) TO PROVE A PRIOR FELONY CONVICTION OR PRIOR PRISON TERM

a. *People v. Martinez* (2000) 22 Cal.4th 106, the California Supreme Court held that uncertified computer printouts of a felon's criminal history are admissible as evidence under the official records exception to the hearsay rule within the meaning of Evidence Code section 1280. The prosecution is able to use the CLETS (California Law Enforcement Telecommunications System) documents to fill in for the uncertified records IF all three elements of Evidence Code section 1280 are satisfied. The Supreme Court specifically overruled *People v. Matthews* (1991) 229 Cal.App.3d 930.

28. THE DEFENDANT IS NOT ENTITLED TO POST-SENTENCE CREDITS ON HIS/HER INDETERMINATE TERM WHICH WAS IMPOSED SOLELY DUE TO HIS THREE STRIKE SENTENCE WHERE THE CREDITS WOULD NOT ATTACH TO A DETERMINATE TERM

a. *In re Cervera* (2001) 24 Cal.4th 1073, held that a defendant is not entitled to section 2933 credits on the indeterminate portion of his sentence. The defendant was sentenced to 25 to life based on the third strike, and was also sentenced to a determinate 12 years based upon 2 five-year priors, and 2 prior prison terms. The credits can be applied to the determinate term, but not the indeterminate term of imprisonment.

29. THE PROSECUTION CANNOT AMEND THE INFORMATION TO ADD STRIKES AFTER THE JURY HAS COMPLETED THE GUILT PHASE AND HAS BEEN DISCHARGED

a. *People v. Tindall* (2000) 24 Cal.4th 767, the California Supreme Court answered the question that they had left open in *People v. Valladoli* (1996) 13 Cal.4th 590, whether a post-verdict amendment to an information, to add prior conviction allegations, is permissible before sentencing but after the jury was discharged. The High court answered, that, based on the facts of this case, under Penal Code section 1025, subdivision (b), it is not permissible, as the defendant has the statutory right to have the same jury decide both the issue of guilt and the truth of any prior conviction allegations. Since the defendant had the right to the same jury, and section 1025 was violated, there will be no retrial of the matter.

30. DENIAL OF A JURY TRIAL ON A DEFENDANT'S PRIOR OFFENSES IS NOT STRUCTURAL ERROR

a. *People v. Epps* (2001) 25 Cal.4th 19, the California Supreme Court, in an opinion not straying to far afield from its holding in *People v. Kelii* (1999) 21 Cal.4th 452, held that a defendant still has a right to a jury trial on his prior conviction, albeit a limited one. They essentially limited the jury function to answering the question of whether the documents presented to them establish whether appellant's prior convictions are authentic and prove the offense for which the prosecution has alleged. The High Court chose to leave open the significance of *Apprendi v. New Jersey* (2000) 530 U.S. 466, [147 L.Ed.2d 435,120 S.Ct. 2348], to situations like that presented in *Kelii*, wherein some fact needed to be proven, such as whether a prior burglary was residential, in order to establish the prior conviction. But, on the facts of this case, wherein it was only whether the defendant had committed the prior,

this court held that *Apprendi* was inapplicable. The majority found that under the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818) harmless error standard, a different result would not have occurred had the defendant been given a jury trial, and as a result, reversed the Court of Appeal's decision.

31. NON-FORCIBLE SEXUAL OFFENSE AGAINST A MINOR UNDER 14 DOES CONSTITUTE A STRIKE

a. *People v. Murphy* (2001) 25 Cal.4th 136, the California Supreme Court held that a violation of section 288 (a), subdivision (c) (oral copulation) is a strike even though it is not specifically listed in section 1192.7, subdivision (c) or section 667.5, subdivision (c) and they find that it is a violation of section 288, subdivision (a), which is a strikeable offense. Next, the Supreme Court found that appellant could be sentenced to multiple 25 to life counts under section 667.71 for each new conviction that places him under that provision. Finally, the High Court held that both the One Strike law (§ 667.71) and the Three Strike could both be applied in one sentence based on the legislative intent of the Three Strikes law.

b. *People v. Hammer* (2003) 30 Cal.4th 756, the California Supreme Court held that a conviction of child molesting under section 288, subdivision (a), is a triggering offense for application of the 25 to life term of section 667.61, to a subsequent sex crime conviction, even if the earlier conviction resulted in probation. The matter was remanded to the lower court in order for the court to determine whether it should exercise its discretion under *Romero* and the application of section 667, subdivisions (b)-(i), as the one strike law and the three strike law both come into play in this case. (See *People v. Murphy* (2001) 25 Cal.4th 136, 157; *People v. Acosta* (2002) 29 Cal.4th 105.)

32. A JUROR IS NOT PERMITTED TO ENGAGE IN JURY NULLIFICATION

a. *People v. Williams* (2001) 25 Cal.4th 411, the California Supreme Court rejected the notion that jury nullification can be condoned, and a unanimous Supreme Court ruled that jury nullification is contrary to our ideal of equal justice and permits both the prosecution's and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law. The High Court reaffirmed the rule that jurors are required to determine the facts and render a verdict in accordance with the court's instructions on the law. Therefore, pursuant to section 1089, a juror who refuses to do so may be removed from the jury by the court.

33. IT IS NOT IMPROPER TO USE AN ELEMENT OF THE OFFENSE TO DOUBLE THE DEFENDANT'S TERM; THEREBY NOT APPLYING *EDWARDS* TO STRIKE CASES BASED ON THE WORDING OF THE STATUTE

a. *People v. Garcia* (2001) 25 Cal.4th 744, the California Supreme Court held that the language of section 667, subdivision (d)(1), which provides that: "Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section," essentially makes its prior ruling in *People v. Edwards* (1976) 18 Cal.3d 796, 800, inapplicable to "strike" cases. The High Court found, as did the Court of Appeal in *People v. Tillman* (1999) 73 Cal.App.4th 771, and as they did in *People v. Murphy* (2001) 25 Cal.4th 136, that the strikes law would be frustrated by any other interpretation of the section. Therefore, based on the doubling provisions of section 667, subdivision (e)(1), the dual use of the prior as an element of the offense, and to sentence under the "Three-strikes" law, is not error.

34. A DEFENDANT IS NOT ENTITLED TO GOOD BEHAVIOR CREDITS UNDER SECTION 4019 FOR THE TIME HE SPENT IN COUNTY JAIL WHILE AWAITING REMAND FOR RESENTENCING. HOWEVER, THE TRIAL COURT, AT THE TIME OF THE REMAND MUST RECALCULATE ALL ACTUAL DAYS OF CUSTODY CREDITS EARNED AT THE TIME OF THE REMAND WHETHER IN JAIL OR PRISON AND AWARD SUCH IN THE NEW ABSTRACT OF JUDGMENT

a. *People v. Buckhalter* (2001) 26 Cal.4th 20, the California Supreme Court held that a defendant, who is returned to the trial court for a remand and resentencing is not entitled to have section 4019 credits for the time he has spent in prison prior to the remand. Once the defendant is delivered to the Department of Corrections on the original sentence, he is precluded from earning any further 4019 credits. He is only entitled to have the trial court, on remand, determine the actual number of days he has spent in both local and state custody. The High Court specifically found that any other ruling in *People v. Thornburg* (1998) 65 Cal.App.4th 1173, *People v. Chew* (1985) 172 Cal.App.3d 45, or *People v. Robinson* (1994) 25 Cal.App.4th 1256, inconsistent with this opinion are specifically disapproved. There is language in the opinion that indicates that a defendant begins to serve his term in state prison when he is delivered to the state prison.

35. DOES SECTION 667.61 (THE ONE STRIKE LAW) AND THE THREE STRIKES LAW, OPERATE JOINTLY, AND CAN THE MINIMUM TERM OF THE ONE STRIKE LAW BE TRIPLED UNDER THE THREE STRIKES LAW?

a. *People v. Acosta* (2002) 29 Cal.4th 105, the California Supreme Court determined whether the one-strike law and the three-strikes law operate together or exclusively of one another, and secondly whether the same prior conviction finding can be used both to trigger application of a 25 year-to-life sentence under the one-strike law and as a "strike" under the three-strike law, and/or to enhance the defendant's sentence by five years under section 667, subdivision (a). The High Court held that the one strike law and the three strike law operate jointly, and that the court could triple, rather than merely doubling his sentence under section 667, subdivision (e)(1). The defendant was eligible for a 25 to life sentence under the one strike law, due to the prior sex offense within subdivision (c) of section 667.61. Appellant also had another prior sex offense that the court used as a prior strike. (See § 667, subd. (f) [if any additional circumstance or circumstances specified in (d) have been pled and proved, the minimum number of circumstances shall be used as a basis for imposing the either the 15 or 25 to life term, and any other additional circumstance shall be used to impose any punishment or enhancement under any other law, here, the three-strike law.) The majority of the Supreme Court held that the court could use both of the priors within the meaning of the three strike law, and as a result, the trial court did not err by imposing a three-strike tripled sentence, rather than the two-strike doubled sentence. When a defendant is given a term of 25 years to life under the one strike law (see § 667.61), the minimum eligible parole date can be tripled under section 667, subdivision (e)(2)(A)(i), and is not limited to options (ii) of (iii) of the same subdivision, and the section 667, subdivision (a)(1) enhancements can be added if the sentencing option under section 667, subdivision (e)(2)(iii) is used to set the minimum term.

36. RETRIAL OF A JUVENILE STRIKE PRIOR IS PERMISSIBLE

a. *People v. Barragan* (2004) 32 Cal.4th 236, the California Supreme Court held that the retrial of a strike allegation after the trier of fact finds the allegation to be true, but an appellate court reverses that finding for insufficient evidence, does not violate constitutional requirement of fundamental fairness, equitable principles of res judicata and law of the case, or any statute. In effect, without specifically indicating, this court overruled

People v. Mitchell (2000) 81 Cal.App.4th 132 on the question of fundamental fairness and res judicata/collateral estoppel.

37. PLEA IN ARIZONA TO AGGRAVATED ASSAULT WITH A HANDGUN QUALIFIES AS A STRIKE EVEN THOUGH DEFENDANT WAS PLACED ON PROBATION AND THE CASE ULTIMATELY DISMISSED

a. *People v. Laino* (2004) 32 Cal.4th 878, the California Supreme Court, in a 7-0 opinion, ruled that the full faith and credit clause of the United States Constitution does not prevent our courts from determining whether the defendant suffered a prior conviction by reason of his guilty plea in *Arizona* for the assault with a handgun on his wife. (See *People v. Shear* (1999) 71 Cal.App.4th 278, 284-289.) The Supreme Court held that the prior was still considered a strike even though appellant had been placed on probation for the offense, and then the matter was ultimately dismissed in *Arizona*.

38. A DEFENDANT IS ENTITLED TO A "REDUCTION OF SENTENCE" UNDER SECTION 2935 FOR HIS LIFE SAVING ACTION, AND IS NOT LIMITED BY THE 20% CREDIT LIMITATION OF SECTION 667, SUBDIVISION (C) (5)

a. *In re Young* (2004) 32 Cal.4th 900, the California Supreme Court held that a two-strike defendant, who unquestionably saved a state prison employee from choking to death, would qualify for a "reduction" in his term pursuant to section 2935, and that the "credit" limitation in section 667, subdivision (c)(5), did not preclude such a reduction for this class of inmate. The term "credits" are different than the "reduction" of sentence pursuant to section 2935, and said section does not use the term "credits" in it provision.

39. WHEN THE TRIAL COURT DISMISSES A PRIOR CONVICTION UNDER THE THREE STRIKE LAW, WITH RESPECT TO THE COMPUTATION OF THE TERM TO BE IMPOSED ON SOME BUT NOT ALL COUNTS, THE DEFENDANT IS NONETHELESS SUBJECT TO THE MANDATORY CONSECUTIVE SENTENCE ON ALL CONVICTIONS ARISING OUT OF THE SAME SET OF OPERATIVE FACTS, INCLUDING THOSE COUNTS AS TO WHICH THE PRIOR CONVICTIONS WERE DISMISSED

a. *People v. Casper* (2004) 33 Cal.4th 38, the California Supreme Court held that where a defendant is subject to the Three Strikes Law is convicted of multiple offenses, consecutive sentences are required for all current felony convictions, regardless of whether a strike allegation attaches to them, within

the meaning of *People v. Garcia* (1999) 20 Cal.4th 490, if the crimes did not arise on the same occasion or under the same set of operative facts. (See *People v. Deloza* (1998) 18 Cal.4th 585, 594.) Here, the court struck the one prior as to all but the principle count, leaving him with no strikes as to the other current convictions. However, the majority held that the consecutive sentencing provisions of section 667, subdivision (c) must apply even though no strikes attach to them.

40. THE TRIAL COURT'S DECISION NOT TO STRIKE A STRIKE IS REVIEWED BASED ON A DEFERENTIAL ABUSE OF DISCRETION STANDARD

a. *People v. Carmony* (2004) 33 Cal.4th 367, the California Supreme Court held that the lower court's decision not to strike a strike is reviewed under the deferential abuse of discretion standard. The High Court overruled *People v. Benevides* (1998) 64 Cal.App.3d 728, to the extent that it is inconsistent with this opinion. The High Court found that the refusal to strike such an allegation, in this case where the defendant was convicted of failing to register as a sex offender, was not an abuse of discretion due to the fact the he had been informed of his duty to register on several occasions, had a lengthy and violent criminal record, which included two prior convictions for failing to register, had substance abuse problems for which he did not diligently seek treatment, had a spotty work history, and appeared unlikely to be law-abiding in the future.

41. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING A STRIKE, BY CONSIDERING EVIDENCE PRESENTED AT THE PRELIMINARY HEARING IN THE PRIOR CASE THAT PRECEDED DEFENDANT'S GUILTY PLEA IN THAT MATTER

a. *People v. Wallace* (2004) 33 Cal.4th 738, the California Supreme Court held that where the defendant pled no contest to a pending charge and admitted a prior conviction, the court's order that the prior conviction allegation be stricken pursuant to section 1385, primarily because the magistrate, after conducting the preliminary hearing, had held that there was insufficient evidence to hold the defendant to answer on that charge, a charge which was later reinstated and to which the defendant entered a negotiated plea, was based on a factor extraneous to the Three Strikes law and was an abuse of discretion within the meaning of section 1385.

42. PRIOR SERIOUS FELONY CONVICTIONS ARE ADDED TO EACH INDETERMINATE COUNT IN A THREE STRIKES CASE

a. *People v. Williams* (2004) 34 Cal.4th 397, the California Supreme Court held that a defendant sentenced to an indeterminate Third Strike case of at least 25 to life, the court is to impose, on each of the substantive count(s) pursuant to section 667, subdivision (e)(2)(i-iii) and who is also subject to determinate serious felony prior(s) pursuant to section 667, subdivision (a), the court shall add the serious felony priors to each count. The rule set forth in section 1170.1, and in *People v. Tassell* (1984) 36 Cal.3d 77, only applies to determinate term sentencing (see *People v. Nguyen* (1999) 21 Cal.4th 197, 205), and not indeterminate terms.

43. SECTION 1192.7, SUBDIVISION (B)(28), A PROVISION PERTAINING TO CRIMINAL STREET GANG "ENHANCEMENTS" DOES TRANSFORM THE UNDERLYING OFFENSE OF SECTIONS 12021, OR 12025 INTO SERIOUS FELONIES FOR PURPOSES OF A THREE-STRIKE SENTENCE OR SERIOUS FELONY ENHANCEMENT

a. *People v. Briceno* (2004) 34 Cal.4th 451, the California Supreme Court held that when an "enhancement" within the meaning of section 186.22, subd. (b)(1) is found true, section 1192.7, subd. (c)(28) does transform the underlying offense of either section 12021, or 12025 into serious felonies. As a result, they do qualify as strikes or prior serious felony enhancements, in the future, and they would be serious felonies within section 667, subd. (a)(1). Therefore, any felony offense that was also committed for the benefit of a criminal street gang within the meaning of section 186.22, subd. (b)(1) is a serious felony pursuant to section 1192.7, subd. (c)(28) for future or later enhancing purposes. It is impermissible "bootstrapping" to also sentence appellant to a enhancement under section 186.22, subdivision (b)(1).

44. UNDER *APPRENDI v. NEW JERSEY* (2000) 530 U.S. 466, THE DEFENDANT WAS NOT ENTITLED TO A JURY TRIAL ON THE QUESTION OF WHETHER HIS PRIOR CONVICTION FOR ROBBERY IN NEVADA CONSTITUTED A SERIOUS FELONY FOR PURPOSES OF SENTENCING UNDER THE THREE STRIKES LAW WHEN THE ELEMENTS OF THE NEVADA OFFENSE DIFFERED FROM THE ELEMENTS OF ROBBERY UNDER CALIFORNIA LAW AND THE SENTENCING ISSUE THUS DEPENDED UPON WHETHER THE RECORD OF THE PRIOR CONVICTION ESTABLISHED THAT THE DEFENDANT'S PRIOR CONDUCT AMOUNTED TO ROBBERY UNDER CALIFORNIA LAW

a. *People v. McGee* (2006) 38 Cal.4th 682, the California Supreme Court held, in this 5-2 opinion, that in sentencing proceedings where the defendant had two prior convictions for robbery under Nevada law, and the elements of the Nevada crime differed from the elements of the California crime, in that the Nevada convictions did not qualify on their face as convictions for purposes of sentence enhancement under California's three strikes law, the trial court did not violate the defendant's federal constitutional right to jury trial in examining the record of the prior robbery convictions to determine whether each of the offenses constituted a conviction of a serious felony. The dissent contends, that *Apprendi v. New Jersey* (2000) 530 U.S. 466, requires that the existence of any fact increasing a defendant's sentence beyond the statutory minimum be determined by the jury based on proof beyond a reasonable doubt. *Apprendi* indicates that its decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, which found an exception to this rule to prove "facts of a prior conviction," is arguably incorrect. (*Apprendi, supra,* 530 U.S. at p. 489.) Given this statement, the dissent indicates that *Apprendi* should be construed narrowly, rather than in the expansive manner in which it continues to interpret the law. Given the fact that the defendant never admitted the *conduct* underlying his Nevada convictions that are now being used to increase his sentence, he should have been given a right to a jury trial on the issue.

45. A DEFENDANT IS NOT SUBJECT TO A SENTENCE ENHANCEMENT UNDER EITHER SECTION 667, SUBDIVISION (A), OR 667, SUBDIVISIONS (B)-(I) WHERE IT IS NOT SHOWN THAT THE PRIOR CRIME, HERE ONE FROM NEBRASKA, AMOUNTED TO A SERIOUS FELONY, SPECIFICALLY UNDER SECTION 1192.7, SUBDIVISION (C)(6). THE PROSECUTION FAILED TO SHOW THE SPECIFIC INTENT ELEMENT FOR LEWD AND LASCIVIOUS CONDUCT ON A CHILD UNDER 14

a. *People v. Warner* (2006) 39 Cal.4th 548, the California Supreme Court held that were the defendant was convicted a violation of section 288, subdivision (a) (lewd or lascivious conduct with a child under 14 years of age), and found that he had suffered prior felony conviction in Nebraska for child sexual assault, but did not find that he had acted with specific lewd intent in the Nebraska crime as no facts to that offense were presented by the prosecution. The court erred in imposing the serious felony enhancement under 667, subdivision (a), and for a strike, where the Nebraska crime, which required intentional touching that could be "reasonably construed as being for the purpose of sexual arousal or gratification" did not contain the "specific intent of arousing" element of California's definition of that felony. The court distinguished *People v. Murphy* (2001) 25 Cal.4th 136, as nothing in *Murphy* supports the proposition that conduct or behavior not amounting to a felony if committed in this state could nevertheless qualify as a serious felony under section 1192.7, subdivision (c).

46. WHETHER A DEFENDANT'S POST-PLEA STATEMENT IN A PROBATION OFFICER'S REPORT CAN BE USED TO DETERMINE IF THE CONVICTION IS A SERIOUS OR VIOLENT FELONY

a. *People v. Trujillo* (2006) 40 Cal.4th 165, the California Supreme Court held that a defendant's prior conviction for inflicting corporal injury was not a strike under the Three Strikes Law despite the defendant's admission in a post-plea probation officer's report that he stabbed victim with a knife, where as part of the plea agreement, the allegation that he had personally used a deadly or dangerous weapon and second count charging him with assault with a deadly weapon were stricken. The defendant's statement in the post-plea probation officer's report does not describe the nature of the crime of which he was convicted and cannot be used to prove that the prior conviction was for a serious felony. The court can consider the statement to determine whether to withdraw its prior approval of the plea. (See *People v. Johnson* (1974) 10 Cal.3d 868, 873.) The court found that this ruling is

consistent with its ruling in *People v. Guerrero* (1988) 44 Cal.3d 343, 355, which holds that the court may look to the entire record of the conviction, but no further; therefore overruling *People v. Monreal* (1997) 52 Cal.App.4th 670, 679, and *People v. Mobley* (1999) 72 Cal.App.4th 761, 796. The prosecution may appeal from a judgment, pursuant to section 1238, subdivision (a)(10), on the grounds that the defendant's sentence is unlawful since the court allegedly erred in ruling that a prior conviction was not a strike under the Three Strikes Law.

47. THE COURT CANNOT SUBSTITUTE TWO ATTEMPTED CRIMES, BOTH WHICH CONSTITUTE STRIKES, FOR ONE COMPLETED COUNT WHERE THE COURT OF APPEAL FOUND THE EVIDENCE INSUFFICIENT TO SUPPORT THAT CONVICTION, OR IS ONLY ONE CRIME PERMITTED

a. *People v. Navarro* (2007) 40 Cal.4th 668, the California Supreme Court held that where there was insufficient evidence to support a conviction for attempted kidnaping during a carjacking (see § 209.5, subd. (a)), since there was no movement of the vehicle and therefore no completed carjacking, the appropriate remedy was not to modify the judgment by striking the original single conviction, and substituting convictions for both attempted kidnaping and attempted carjacking. Neither the provisions of sections 1181, subdivision (6), nor 1260 provide for this procedure. The Court of Appeal erred when it found that the substitution of two "strike" convictions for a single such conviction did not cause an unconstitutional increase in punishment. The Supreme Court clearly indicated that a one for one modification is fine, but that they were reluctant, and constrained from permitted a two for one switch.

48. THE ABBREVIATION "ASSLT W DWPN" DESCRIBING A SECTION 245, IS NOT AMBIGUOUS AND CONSTITUTES A SERIOUS FELONY

a. *People v. Delgado* (2008) 43 Cal.4th 1059, the California Supreme Court held that given the fact that section 245, subdivision (a)(1) punishes assault committed either by means "likely to produce great bodily injury" or by use of "a deadly weapon," and only the later constitutes a serious felony for sentencing purposes, where the sole proof of the defendant's prior serious felony conviction was an abstract of judgment describing the defendant's offense as a violation of section 245, subdivision (a)(1) and "assault with a deadly weapon," but did not indicate that the defendant had personally used a deadly weapon nor had he personally inflicted great bodily injury, this

notation was a clear, presumptively reliable official record of the defendant's prior conviction for the serious felony of assault with a deadly weapon, and not with the intent to commit great bodily injury. Absent any rebuttal by the defendant, the notation was sufficient to prove beyond a reasonable doubt that the defendant's prior conviction had occurred under the deadly weapon prong of the statute and the offense thus constituted a serious felony. The court specifically disapproved of *People v. Luna* (2003) 113 Cal.App.4th 395, and agreed with the holding in *People v. Banuelos* (2005) 130 Cal.App.4th 601.

49. THE NOTATIONS "ARMED BANK ROBBERY" AND "KIDNAPPING" ARE SUFFICIENT TO CONSTITUTE A SERIOUS FELONY OF FEDERAL BANK ROBBERY

a. *People v. Miles* (2008) 43 Cal.4th 1074, the California Supreme Court held that where, at the time of the defendant's conviction for violating 18 U.S.C. Sec. 2113(a), the statute set forth two distinct offenses, one being the taking, or attempted taking, of bank property from the person or presence of another by force, violence, or intimidation which constitutes the serious felony of bank robbery under California law, and the other being entering, or attempting to enter, a bank with felonious or larcenous intent which does not correspond to any serious felony in California, and where the prosecution presented a "Judgment and Probation/Commitment Order" signed by a federal judge which stated that the defendant had pleaded guilty to "armed bank robbery" and "kidnapping" in violation of sections 2113(a), 2113(d), and 2113(e), there was a sufficient evidentiary basis for the trial court's finding that the prior conviction at issue was for a serious felony, and in the absence of rebuttal evidence, the instant trial court was entitled to draw that inference. Here, the court agreed with, but distinguished *People v. Jones* (1999) 75 Cal.App.4th 616, and specifically disagreed with and disapproved *People v. Guerrero* (1993) 19 Cal.App.4th 401 which held that a plea to any form of section 2113 was sufficient. It upheld that notion from Jones and other cases that a court must assume a conviction only for the least adjudicated elements.

50. A JUVENILE NON-JURY ADJUDICATION IS STILL A STRIKE

a. *People v. Nguyen* (2009) 46 Cal.4th 1007, the California Supreme Court held, that a contested juvenile adjudication, even though the minor was not afforded a jury trial, it is still a prior conviction, and as a result can be used as a strike to increase appellant's sentence. The Three Strikes Law does not

violate the U.S. Constitution, or the dictates of *Apprendi* or *Cunningham*, insofar as it increases the maximum sentence for an adult felony offense upon proof that the defendant has suffered one or more qualifying "prior felony convictions," a term that specifically includes certain prior criminal adjudications sustained under the juvenile court law while the defendant was a minor, even though there was no right to a jury trial in the juvenile proceeding. The court distinguished between a right to a jury trial for a current offense, and the lack of a jury trial for a prior offense used to enhance appellant's sentence. (*People v. Cunningham* (1996) 49 Cal.App.4th 1044.)

51. A COURT MAY NOT IMPOSE A SECTION 667, SUBDIVISION (a) ENHANCEMENT WHEN THE PRIOR WAS REDUCED TO A MISDEMEANOR UNDER 17, SUBDIVISION (b)(3)

a. *People v. Park* (2013) 56 Cal.4th 782, the California Supreme Court held that when the trial court has previously reduced a wobbler, in this case an assault with a deadly weapon to a misdemeanor, under section 17, subdivision (b)(3), that offense no longer qualifies as a prior serious felony within the meaning of section 667, subdivision (a). The trial court therefore erred when it imposed the 5-year enhancement to enhance a subsequent felony sentence under Three Strikes Law. Additionally, the court specifically held that the Court of Appeals reliance on this court's ruling in *People v. Feyrer* (2010) 48 Cal.4th 426, 435-441.

52. PROPOSITION 36 THREE STRIKES MODIFICATION:

a. *People v. Johnson* (2015) 61 Cal.4th 674, the California Supreme Court held that for purposes of resentencing a three-strikes defendant under Proposition 36 (§ 1170.126, subd. (a)), the classification of an offense as a serious or violent felony is determined as of November 7, 2012, the effective date of Proposition 36, and not the date the law when the offense was committed. An inmate who was convicted of both a serious or violent felony and a felony that is neither serious nor violent is eligible for Proposition 36 resentencing with respect to the felony that is neither serious nor violent.

b. *People v. Murchado* (2015) 61 Cal.4th 674, the California Supreme Court held that for purposes of resentencing a three-strikes defendant under Proposition 36 (§ 1170.126, subd. (a)), the classification of an offense as a serious or violent felony is determined as of November 7, 2012, the effective date of Proposition 36, and not the date the law when the offense was

committed. An inmate who was convicted of both a serious or violent felony and a felony that is neither serious nor violent is eligible for Proposition 36 resentencing with respect to the felony that is neither serious nor violent.

c.

CASES DECIDED BY THE CALIFORNIA COURT OF APPEAL

1. DOUBLING SUBORDINATE COUNTS:

a. *People v. Martin* (1995) 32 Cal.App.4th 656. When the defendant has been convicted of two present offenses, the subordinate consecutive term must be doubled as well as the base term. However, the punishment for an enhancement is not doubled.

b. *People v. McKee* (1995) 36 Cal.App.4th 540. The court found that appellant's theft of multiple checks from his employers and the negotiation of them over a three week period did not come within the section 667, subdivision (c)(6) exception to mandatory consecutive sentencing in a "two strike" case as not all of the conduct either arose from the same set of operative facts nor did they take place on the same occasion. But, the case does acknowledge that section 654 is maintained within 667, subdivision (c)(6). The court also found, consistent with *People v. Martin* (1995) 32 Cal.App.4th 656, that pursuant to section 667, subdivision (e)(1), subordinate counts are doubled. The court rejected the argument that a subordinate count is an enhancement, which can not be doubled, without citing or distinguishing *People v. Lawson* (1980) 107 Cal.App.3d 748, 754. The court finds that neither the principle term nor the subordinate term is an enhancement, therefore they can be doubled. Finally, the court rejected appellant's argument that CRC 425 precludes the court from imposing consecutive terms and also from doubling them.

c. *People v. Hill* (1995) 37 Cal.App.4th 220. The Third District followed *Martin* and concluded that the provisions of section 667, subdivisions (b) through (i) are not enhancements, and as a result, subordinate terms can be doubled, albeit at one-third the mid-term. Again there was no discussion of *Lawson, supra.*

d. *People v. Dominguez* (1995) 38 Cal.App.4th 410. Second District, Division 7, concurred with the above cited cases, holding that subordinate terms are doubled. However, ENHANCEMENTS ARE NOT DOUBLED, INCLUDING CONDUCT ENHANCEMENTS. In this case, the court indicated that the section 12022.5, subdivision (a) allegation, and the section 667, subdivision (a)(1) allegations are not doubled. This is the first case which indicates that conduct as well as status enhancements are not doubled. To support this finding, the court, in footnote 9, cites to the Ballot Pamphlet

which indicates that current convictions(s) are doubled, but "any" enhancements are then added to that term.

e. *People v. Ruiz* (1996) 44 Cal.App.4th 1653. The First District Court of Appeal, relying on *McKee, supra*, found that it was mandatory, in a two strike case, to impose subordinate counts consecutive to the principle count, and also to double the subordinate count(s).

f. *People v. Lopez* DEPUBLISHED REVIEW DISMISSED; formerly at (1997) 60 Cal.App.4th 275, the Sixth Appellate District held that two separate drug transactions, by the same defendant, on two separate days, are not within the meaning of the same set of operative facts, pursuant to section 667, subdivision (c)(6). The Court of Appeal also found that 2 consecutive terms of 25 to life did not violate the prohibition against cruel and unusual punishment.

g. *People v. Riggs* (2001) 86 Cal.App.4th 1126, the Third Appellate District held, pursuant to *People v. Nguyen* (1999) 21 Cal.4th 197 and the provisions of section 1170.1, subdivision (a), that when a defendant has been sentenced to state prison on case A, and then, in the current matter, the court designates case A as the subordinate count to the "current" conviction, it is reforming the entire sentence, and therefore the 1/3 limitation provisions of section 1170.1, subdivision (a) are invoked. (*Id.*, 21 Cal.4th at p. 201-202.) The Court of Appeal rejected the prosecution's argument that section 667, subdivision (c)(8) mandated that the sentence on case A, must be served full term after the defendant served his sentence for the current offense. The Court of Appeal held that the Legislature knew how to expressly abrogate the provisions of section 1170.1, subdivision (a) (see *People v. Scott* (1993) 17 Cal.4th 1383, 1387), but did not do so in this case, and as a result, the aggregate sentencing provisions of section 1170.1 apply in this "two-strike" context. As the court explained, "Under the People's reasoning, a defendant tried and convicted on multiple offenses in a single proceeding enjoys the benefits of the sentencing limits imposed by section 1170.1, while a defendant tried and convicted in a separate proceeding does not."

h. *People v. Moody* (2002) 96 Cal.App.4th 987, the Third Appellate District held that when an enhancement pursuant to section 12022.53 is attached to a consecutive substantive count, which is imposed 1/3 the middle term pursuant to section 1170.1, subdivision (a), the enhancement is also imposed within the meaning of section 1170.1. This is in spite of the language in

12022.53, subdivision (b) which indicates, "notwithstanding any other law ... a person who personally uses a firearm shall be punished by a term of imprisonment of 10 years... ." Subsequent to the enactment of 12022.53, the legislature amended section 1170.11, (specific enhancements), and made reference to 12022.53 coming within the provisions of section 1170.1, subdivision (a).

i. *People v. Ayers* (2004) 119 Cal.App.4th 1007, the Second Appellate District, Division 7, held that the trial court's erroneous failure to either double the subordinate prison term for second-striker or strike the prior-conviction finding with respect to that count (see *People v. Nguyen* (1999) 21 Cal.4th 197, 207), resulted in an "unauthorized sentence," requiring reversal on appeal despite the lack of objection in the trial court.

j. *People v. Sok* (2010) 181 Cal.App.4th 88, reported on January 22, 2010, in 2010 Los Angeles Daily Journal 1058, the Second Appellate District, Division 7 held that the trial court erred in doubling criminal street gang and firearm-use enhancements under the second-strike provision (§ 667, subd. (e)(1)) of the Three Strikes Law since only base terms are doubled when the prosecution proves a single prior conviction for a serious or violent felony. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 424; *People v. Hardy* (1999) 73 Cal.App.4th 1429, 1433.)

2. DUAL USE IN TWO STRIKE CASES:

a. *People v. Ramirez* (1995) 33 Cal.App.4th 559. A single prior conviction in a two strike case, may be used for the dual purpose of doubling the punishment for the new offense and for the imposition of a five year enhancement pursuant to Penal Code section 667, subd. (a).

b. *People v. Jackson* (1995) 33 Cal.App.4th 1027. DEPUBLISHED. A single prior conviction in a two strike case, may be used for the dual purpose of doubling the punishment for the new offense and for the imposition of a five year enhancement pursuant to Penal Code section 667, subd. (a).

c. *People v. Anderson* (1995) 35 Cal.App.4th 587. Using a strike prior to double the base term and to add five years isn't a dual use, because doubling the current term is not an enhancement, it is a separate "parallel sentencing scheme;" nor does it violate section 654.

d. *People v. Sipe* (1995) 36 Cal.App.4th 468. *Sipe* also rejects "dual use" and section 654 arguments based on the rational of *People v. Bruno* (1987) 191 Cal.App.3d 1102, 110-1107.

e. *People v. Hill* (1995) 37 Cal.App.4th 220, once again the Third District follows the ruling in *Sipe* on the issue of "dual use."

f. *People v. Nobleton* (1995) 38 Cal.App.4th 76. In this matter Division 5 follows its own lead from *Ramirez, supra*, and finds that there is not violation of "dual use" to (1) elevate a section 12021, subdivision (a) from a misdemeanor to a felony, (2) to enhance the offense pursuant to section 667.5, subdivision (b), and (3) to bring the matter within the sentencing provisions of section 667, subdivision (e)(1) (i.e., the two-strike provision). Once again, division 5 indicated that the new sentencing provisions are not enhancements (see also *Ramirez*, *supra*, and *Anderson*, *supra*). To arrive at this conclusion, the court adopts the holding of *People v. Bruno* (1987) 191 Cal.App.3d 1102, and rejects *People v. Darwin* (1993) 12 Cal.App.4th 1101, which relied on *People v. Edwards* (1976) 18 Cal.3d 796, rejecting the notice that the prior can be used as an element of the offense and to enhance with the same prior.

g. *People v. Dominguez* (1995) 38 Cal.4th 410. Second District Division 7 concurred with the above cases, finding that the serious felony enhancement is added to the principle term, and there is no dual use violation, even when the same prior is used to find the strike prior and to enhance the term with an additional five years.

h. *People v. Coronado* (1995) 12 Cal.4th 145, the High court finally ruled in this "dual use" case. They found that it is just fine to use the same deuce conviction to elevate the misdemeanor to a felony and to add the section 667.5, subdivision (b) enhancement. The court specifically found that since not all deuce priors necessarily or commonly will result in a state prison commitment, there is no violation of dual use or section 654 in this case. They also found that a violation of a specific statute necessarily or commonly will result in a violation of a general statute when the elements are the same. Since not all deuce priors necessarily result in prison terms, the court found there was no problem to use both in this case. NOW USING THAT LOGIC, SHOULD WE NOT WIN IN STRIKE CASES WHEN THE USE OF A SECTION 667, SUBDIVISION (A) STRIKE PRIOR ACTS AS

BOTH THE STRIKE AND TO ADD THE 5 YEARS TO THE SENTENCE? Answer, no; see *People v. Dotson* (1997) 16 Cal.4th 547.

The Supremes also disapproves *People v. Hopkins* (1985) 167 Cal.App.3d 110, and adopts the rationale of *People v. Rodriguez* (1988) 206 Cal.App.3d 517, finding that section 654 does not prohibit the use of a prison prior term enhancement; they specifically limit their opinion to this particular fact pattern, indicating that section 654 applies to facts, either an act or omission, where section 666 applies only to facts, not acts, and that it relates to the status of the recidivist who engaged in criminal conduct, not the conduct itself. Therefore, because the repeat offender enhancement imposed does not implicate multiple punishment or an act or omission, section 654 is inapplicable.

i. *People v. Baird* (1995) 12 Cal.4th 126, the High court ruled that there is no violation of "dual use" to use a single felony to elevate a section 12021 (ex-con with a gun) violation to a felony and to enhance the sentence with a prison prior. HOWEVER, the court indicated that the same CONVICTION CANNOT be used for both purposes. Nonetheless, in this case, the prison time that appellant did is what triggered the enhancement, not the conviction on the current case.

j. *People v. Nelson* (1996) 42 Cal.App.4th 131, Second District, Division 4, follows the lead of all of the other cases indicating that there is no dual use problem.

k. *People v. Purata* (1996) 42 Cal.App.4th 489, Fourth District, Division 1, follows the lead of all of the other cases indicating that there is no dual use problem even though the court "must impose a consecutive five year term for each such prior conviction."

l. *People v. Cressy* (1996) 47 Cal.App.4th 981, The First District Court of Appeal, Division 3, held that the court can add a one year prison prior (§ 667.5, subd.l (b)) to a two strike case without there being a violation of dual use. The court found that there was no violation of dual use under *Jones, Baird*, or *Coronado*, given the facts of this case. Here, appellant was convicted of a non-serious felony. The court also stressed that the defendant's prior felony conviction would have brought him within the three strikes scheme whether or not defendant had been imprisoned for that

conviction. The fact of imprisonment is a distinct factor properly supporting the enhancement.

m. *People v. White Eagle* (1996) 48 Cal.App.4th 1511, the Fifth District permits the use of a prior petty theft for three separate purposes: (1) to elevate the misdemeanor to a felony, (2) to double under three strikes, and to add a one year prison prior under section 667.5, subdivision (b). The court does effectively address the *Jones/Prather* (*People v. Prather* (1990) 50 Cal.3d 428, and *People v. Jones* (1993) 5 Cal.4th 1142 [cannot impose a § 667 enhancement for the same prior as the § 667.5, subd. (b)]) (argument by indicating that the legislature laid out it clear intent that both the enhancement within the meaning of section 667.5, subdivision (b) and the elevation from a misdemeanor petty theft to a felony, should apply, thereby effectively circumventing the aforementioned arguments. Additionally, *Edwards* is distinguished given the fact that the prior prison term is not an element of the offense of section 666.

One of the real problems with this case is the fact that the court does not remand for re-sentencing; in fact, it orders the preparation of a new abstract, adding the one year, and that is to be sent to the Department of Corrections. This should be resisted at all costs. The trial court still could decide to strike the prior prison term under section 1170.1, subdivision (h), and it should be given that opportunity.

As an adjunct to that argument, the Court of Appeal held that the double jeopardy clause and the holding of *Missouri v. Hunter* (1983) 459 U.S. 359, 366 [74 L.Ed.2d 535, 103 S.Ct. 673], does not apply, given the fact that the legislature authorized multiple punishment, which is what *Hunter* expressly stated the legislature must do to be constitutionally valid. (See also *Moore v. Missouri* (1895) 159 U.S. 673, 677.)

n. *People v. Yarborough* (1996) 65 Cal.App.4th 1417, the Fifth District held that there was not a dual use violation within the meaning of *People v. Edwards* (1976) 18 Cal.3d 796. In *Edwards*, the Supreme Court stated that when a prior conviction constitutes an element of criminal conduct which otherwise would be noncriminal, the minimum sentence may not be increased because of the indispensable prior conviction. *Edwards* had a prior conviction for selling marijuana, and a new conviction for possession of a weapon by an ex-con. The possession of a weapon would otherwise be noncriminal but for the prior conviction. Here, the court states that

appellant's current conviction for failing to register, based upon the prior conviction for a sexual assault, was not noncriminal and therefore distinguished *Edwards*. However, one could argue that but for the prior sexual assault conviction, Yarborough would not have had to register, and therefore, the rule in *Edwards* should still apply. We will see if the Supreme Court grants review to clarify *Edwards*, at lease within this context.

o. *People v. Tillman* (1999) 73 Cal.App.4th 770, First Appellate District, Division 2 held that the use of a prior offense to justify an element of the offense for failing to register, and to double the current offense, may be dual use, but the intent of the legislature in enacting the three strikes legislation is a clear expression that it intended to eliminate the rule set forth in *People v. Edwards* (1976) 18 Cal.3d 796. *Edwards* had stated that a single fact cannot be used to establish an element of an offense and to enhance a sentence. The Court of Appeal goes through the history of *Edwards*, setting aside those cases such as *People v. Yarborough* (1996) 65 Cal.App.4th 1417, as finding distinction without a difference from *Edwards*. To that end, the case had some very good language, Justice Kline however comes to the same conclusion as the prior cases, that dual use is not precluded, but this time based on the intent of the legislature not to follow *Edwards.*

p. *People v. Jones* (2009) 172 Cal.App.4th 815, reported on October 29, 2009, in 2009 Los Angeles Daily Journal 15339, the Fourth Appellate District, Division 2 held that the trial court did not abuse its discretion by imposing 16-year prison term for arson, consisting of the aggravated three-year base term, doubled because it was a second strike, plus an aggravated five-year prior-arson enhancement and a five-year prior-serious-felony enhancement based on same prior conviction, where there were aggravating factors in addition to defendant's prior arson conviction. (See *People v. Purata* (1996) 42 Cal.App.4th 489, 498 [5-year prior under § 667, subd. (a), is mandatory even though the same prior is used under the three-strikes law].)

3. EX POST FACTO APPLICATION:

a. *People v. Hatcher* (1995) 33 Cal.App.4th 1526. Ex post facto principles are not violated by the enhancing use of prior convictions pre-dating the enactment of the three strikes law.

b. *People v. Tran* **DEPUBLISHED 99 LOS ANGELES DAILY JOURNAL D.A.R. 2563**; (1998) 67 Cal.App.4th 1320, the Third District also held that

there is a violation of both the federal and state ex post facto clause prohibitions when a restitution fine is imposed within the meaning of section 1202.45, if the crimes were committed before the effective date of the statute August 3, 1995 – these crimes were committed before that period, therefore a violation since a restitution fine is a form of punishment. The Court of Appeal distinguished *People v. McVickers* (1992) 4 Cal.4th 81, which held that a statute requiring an AIDS blood test for certain convictions did not violate ex post facto principles, and served a legitimate governmental interest. The *Tran* court also found that it mattered little that the restitution fine had been stayed.

4. THE MARCH 7, 1994 ARGUMENT:

a. *People v. Reed* (1995) 33 Cal.App.4th 1608. A prior conviction need not post-date the enactment of the three strikes law in order to qualify as a strike.

b. *People v. Green* (1995) 36 Cal.App.4th 280. The Second District, Division Two follows the lead of *Reed*, indicating that the intent of the legislature would be frustrated if section 667, subdivision (d)(1) were only given prospective rather than retroactive application. There is no discussion of section 3 which mandates a prospective application unless specifically expressed.

Additionally, *Green* can be interpreted to limit serious or violent felonies to those which were classified as such at the time of the prior conviction. In other words, if the conviction for the felony occurred prior to the enactment of sections 667.5 or 1192.7, then one can argue that it cannot be classified a serious or violent felony now.

c. *People v. Sipe* (1995) 36 Cal.App.4th 468. The section 667, subdivision (d)(1) challenge is again rejected; the court indicating it would frustrate the intent of the legislature to give merely prospective application to the statute.

d. *People v. Hill* (1995) 37 Cal.App.4th 220, follows their opinion in *Sipe*, rejecting the upon the date of challenge one more time. They clearly hold that the use of a **former conviction is not a direct consequence of that conviction**, and therefore a prior advisement is unnecessary. (See *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457.)

e. *Gonzales v. Superior Court* (1995) 37 Cal.App.4th 1302, follows the same train of thought as did *Reed, Green, Sipe and Hill*, wherein the courts have all uniformly rejected the argument that the legislation should apply prospectively and not retroactively. *Gonzales* summarizes the other cases, and once again comes to the conclusion that the intent of the statute would be frustrated unless it would apply immediately. They indicated that to give the statute prospective application would defeat the purpose of the urgency legislation.

f. *People v. Allen* (1995) 39 Cal.App.4th 1513, Division 4 of the Second Appellate District follows Reed, Anderson, Green and Gonzales in rejecting the March 7th argument.

g. *People v. Jones* (1995) 40 Cal.App.4th 630, First District Division Four followed the other cases and rejected the March 7th argument.

h. *People v. Ingram* (1995) 40 Cal.App.4th 1397, the Fifth Appellate District, came to the same conclusion as all their other brethren who have decided this issue. **I pronounce this issue DEAD.**

i. *People v. Kinsey* (1995) 40 Cal.App.4th 1627, in another Fred Wood's opinion, concurs with the holding in all of the aforementioned cases, rejecting the argument. **THEREFORE THIS ARGUMENT STAYS DEAD.**

5. PRIORS COMMITTED BEFORE 1982 AND/OR 1977:

a. *People v. Jones* (1995) 40 Cal.App.4th 630, First District Division Four, based on *People v. Jackson* (1985) 37 Cal.3d 826, 833, reject the contention that was raised based on the statement in *People v. Green* (1995) 36 Cal.App.4th 280, that the offense must be one that "qualified as a serious or violent offense under section 1192.7, subdivision (c) or section 667.5, subdivision (c)." (*Id.*, at p. 283.) The court merely found that *Jackson*, *supra*, precludes this argument. In essence, this court merely rejects the specific language from *Green*, and holds that no constitutional bar prevents the increased penalty based on appellant's repeat offender status.

b. *People v. Turner* (1995) 40 Cal.App.4th 733, Second District Division 5, holds similarly to *Jones*, *supra*, that a conviction for a crime that would have been a serious or violent felony had it been committed after the passage of

1192.7, or 667.5, can still be determined to be strike priors. The court reasoned that: (1) based on the rationale stated in *Gonzales v. Superior Court* (1995) 37 Cal.App.4th 1302, 1305-1311, that the "determination clause" of subdivision (d)(1) of section 667 requires the sentencing court to determine whether, as of the date of the prior conviction the prior was a felony or misdemeanor – and that it does not require a separate determination that the prior was a serious or violent felony. Why not, isn't that what the statute says? (2) that the language in *People v. Green* (1995) 36 Cal.App.4th 280, 282, that the court must look to "determine if a prior conviction was serious or violent at the time of conviction," was "obiter dictum," as the prior offense in *Green*, did not occur until 1987.

c. *People v. Moenius* (1997) 60 Cal.App.4th 820, the Second Appellate District, Division 2 held, pursuant to *Gonzales v. Superior Court* (1995) 37 Cal.App.4th 1302, 1305-1311, that a first degree burglary conviction which occurred prior to the effective date of section 1192.7, still constituted a strike. Given the fact that the burglary was pled as a residential burglary in the information, and even though it was second degree at the time of the conviction, in 1974, it qualified as a strike since the residential nature of the burglary was the primary factor, not the fact that it was a day time burglary, which in 1974, was only a second degree burglary. Given the fact that the initial sentence did not automatically convert the felony to a misdemeanor by operation of law, the matter remained a felony for all purposes, including the Three Strikes law.

d. *People v. O'Roark* (1998) 63 Cal.App.4th 872, the Second Appellate District, Division 2, held, consistent with all of the cases mentioned above, continue to hold that a felony which occurred prior to the passage of section 1192.7, or a felony which was not added to the list of felonies until after the passage of section 1192.7, still qualified as strikes given the fact that they were strikes on June 30, 1993, within the meaning of section 667, subdivision (h). **THIS ISSUE REMAINS DEAD.**

6. CREDITS

a. *People v. Brady* (1995) 34 Cal.App.4th 65. A prisoner must serve 80% of his sentence applies to the entire sentencing including enhancements.

b. *People v. Williams* (1996) 49 Cal.App.4th 1632, the Sixth Appellate District held that: (1) the 20 percent limitation on credits does apply to the enhanced

term – it relies on the rationale of *Brady*, *supra*; (2) however, the court found that the 20 percent limitation on credits does not apply to "offenses" that occurred prior to the enactment of the strikes legislation. Note specifically the language in section 677, subdivision (c)(5), which indicates that the limitation will be limited to the time for the "new offense."

c. *People v. Culpepper* (1995) 32 Cal.App.4th 237. **DEPUBLISHED**. The three strikes law does not create disparate treatment in the award of credits to similarly situated groups. The Supreme Court in *Jenkins*, *supra*, also rejected the equal protection argument pertaining to the credits issues, specifically disapproving any conflicting language in *In re Diaz* (1993) 13 Cal.App.4th 1755.

d. *People v. McCain* (1995) 36 Cal.App.4th 817. The Fourth District, Division 1, also rejects the equal protection argument pursuant to *People v. Jenkins* (1995) 10 Cal.4th 234, 243-248, which overruled *In re Diaz* (1993) 13 Cal.App.4th 1755 to the extent mentioned above. *Jenkins* held that recidivist murderers must be sentenced under the terms of the recidivist statute, section 667.7 and not under 190, and that there was not equal protection violation as a result. They find therefore, that a defendant only gets 20% credits pursuant to *Brady*, *supra*.

e. *People v. Sipe* (1995) 36 Cal.App.4th 468. *Sipe* also rejects equal protection challenges to limiting credits to 20% pursuant to *People v. Jenkins* (1995) 10 Cal.4th 234, 248, fn. 8. The same challenge, based on equal protection, is also denied in *People v. Hill*, *infra.*

f. *People v. Hill* (1995) 37 Cal.App.4th 220. The Third district held that **a defendant is entitled to presentence custody credits pursuant to sections 4019 and 2900.5**. The court rejected the Attorney General's suggestion that the court "rewrite" the section so that this provision is consistent with the intent of the legislation, to increase sentences. The court concluded that the credits provisions were in fact ambiguous, and silent on the issue of presentence credits and therefore read the ambiguity in favor of the defendant.

g. *People v. Applin* (1995) 40 Cal.App.4th 404, the Fifth District holds that the three strike law does not violate equal protection in awarding less credits to recidivists. The court rejects the contention that second strike offenders are treated less harshly; they find that they do not receive more credits than other

offenders within the meaning of section 2931, subdivision (b). As applied to three strike offenders, *Applin* notes that pre-sentence credits applied to an indeterminate term will only serve to advance the parole eligibility date, not the actual time of release. This is a partial response to the Attorney General's argument that a third striker does not get any pre-trial custody credits. (Accord, *People v. Stofle* (1996) 45 Cal.App.4th 417 [support the proposition that the credits are not given until appellant serves at a minimum of 25 years on his life sentence, but that a defendant is entitled to them once he is given a parole date]; see also *In re Sosa* (1980) 102 Cal.App.3d 1002, 1003-1006; *In re Ballard* (1981) 115 Cal.App.3d 647, 648-650.)

h. *People v. Hamilton* (1995) 40 Cal.App.4th 1615, the Second District, Division 7, in another Fred Wood's opinion, concurs with the holding in *Sipe*, *McCain* and *Jenkins*, that the defendant receiving 1/5 credit does not deny him equal protection.

i. *People v. Spears* (1995) 40 Cal.App.4th 1683, the Fifth Appellate District, concurred with the rationale of *Jenkins*, and found no equal protection violation as the defendant in this matter was being compared to a non-recidivist, thereby negating one of the primary elements of the equal protection analysis. This argument can now be put into the officially dead category.

j. *People v. Caceres* (1997) 52 Cal.App.4th 106, Second Appellate District, Division 4, rules that the three strikes credit provisions of section 667, subdivision (c)(5) do not pre-empt the provisions of section 2933.1, the 15% credit limitation for persons convicted of violent crimes within the meaning of section 667.5, subdivision (c). The 15% credits, based on the wording of section 2933.1, apply to both pre-trial and post-conviction credits. As the above cases indicate, the three strikes 20% limitation only apply to post-conviction credits.

k. *People v. Cortez* (1997) 55 Cal.App.4th 426, the Fifth Appellate District ruled that the court was not required to advise appellant before his plea that his prison credits were limited to 20% due to the three strikes provisions, and that his ability to earn conduct credits was limited by the three strikes legislation. The court rejected appellant's contentions that the plea was involuntary and not intelligently made absent the proper advisements. Appellant had relied on *People v. Tabucchi* (1976) 64 Cal.App.3d 133, wherein the Court of Appeal held that under the indeterminate sentencing provisions, appellant had pled to 5 years to life, and was not informed of the

special parole limitation at the time of his plea. This cases is now consistent with *People v. Barella* (1999) 20 Cal.4th 261.

l. *People v. Keelen* (1998) 62 Cal.App.4th 813, the Second Appellate District, Division 7 held that the provisions of section 2933.1 subdivision (c) do limit appellant's pretrial local custody credits. (See also *People v. Ramos* (1996) 50 Cal.App.4th 810, 819.)

m. *People v. Honea* (1997) 57 Cal.App.4th 842, Fourth Appellate District, Division 1, held that, on a re-sentencing, be it under section 1170, subdivision (d), after a *Romero* remand, or any other type of re-sentencing after appellant has spent any time in state prison, the trial court is to award "actual" time credits spent in state prison, in addition to any additional local time credits to be awarded, but it is not to computer the "behavior" credits; they are determined by the Department of Corrections. (See *People v. Chew* (1985) 172 Cal.App.3d 45.)

n. *People v. Henson* (1997) 57 Cal.App.4th 1380, Fourth Appellate District, Division 2, held that, the three strikes law credit limitation is applicable only to offenses which themselves carry life sentences. Therefore, unless the current crime itself, without the recidivist penalty provisions, carries a life sentence, then the 4/5 sentence limitations do not apply. Section 667.5, subdivision (c)(7), which states that a crime which carries a life sentence is subject to the 15% limitation, is inapplicable unless the crime itself carries a life sentence. The legislation did not intend to make all three strike sentences limited to the 15% limitation on presentence credits. This case is consistent with *People v. Thomas* (1999) 21 Cal.4th 1122.

o. *People v. Thornburg* (1998) 65 Cal.App.4th 1173, the Fourth District, Division 3, held that when a defendant is brought back to the trial court for a new sentencing hearing pursuant to *Romero* (e.g., this is not just limited to *Romero* remands), the trial court must recalculate the custody credits (actual time spent in custody) pursuant to 2900.5, subdivision (d), which includes the time spent in jail pending re-sentencing. (*People v. Chew* (1985) 172 Cal.App.3d 45, 50.) It is also the responsibility of the trial court to calculate the appropriate number of conduct credits pursuant to section 4019, and to amend the abstract of judgment. It is only the CDC's job to determine prison behavior and work credits. (*Ibid.*) Just remember, the trial court must be asked to compute these credits prior to raising the issue in the Court of Appeal.

p. *People v. Myers* (1999) 69 Cal.App.4th 305, the Second District, Division 4, questioned the rationale of *Thornburg*, *supra*, given the fact that a defendant stays in the constructive custody of the Department of Corrections while in local custody for the sole purpose of hearing on a motion to strike prior convictions. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1183.) The Court of Appeal found that if the trial court denies the requested relief, resentencing is not necessary, and therefore, it does not have to recalculate any of the credits. Nonetheless, this court concluded, that since the parties stipulated to the number of credits that appellant was to be awarded, the alleged error was waived on appeal.

q. *People v. Mack* (2002) 97 Cal.App.4th 1010, the Third Appellate District held that when an appellant's sentence is overturned, he is required to be put back in a place where he was prior to his conviction. As a result, an appellant is entitled to presentence section 4019 credits; these credits only to be limited by section 2933.1, where applicable to the facts of that case, and it is so applicable here where the defendant's current offense is a serious felony. The department of corrections is to determine, based on the defendant's performance in prison, the actual credits earned by the confinement. The trial court has the duty to amend the abstract of judgment to state that appellant is entitled to conduct credits for the time spent in state prison within the meaning of section 4019.

7. PENAL CODE SECTION 17(b) ISSUES:

a. *People v. Superior Court* (*Perez*) (1995) 38 Cal.App.4th 347. The sentencing court retains the authority pursuant to **Penal Code section 17 to reduce a wobbler to a misdemeanor. (See also *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968.** *Perez* also rejects the People's contention that certain felonies become irreducible once the defendant is found guilty. They hold that the specific exemption in section 667, subdivision (d)(1) (i.e., ". . . is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. . . ."), does not trigger the new statutory strikes sentencing scheme, when, at the initial sentencing for the current offense, the court determines the offense to be a misdemeanor. Finally, the court finds that the legislation is ambiguous with regards to the legislature's intent to limit section 17, subdivision (b)(3), and as a result, must be read as favorably to the defendant as reasonably possible. Section 667, subdivision (d)(1) merely

nullified the court's power to reduce the matter to a misdemeanor **after the original sentencing**.

b. *People v. Vessell* (1995) 36 Cal.App.4th 285. The court has the power to reduce a "wobbler" from a felony to a misdemeanor under section 17, subdivision (b)(3). Second District Division 2 also affirmed the court's power to give an indicated sentence as distinguished from a plea bargain; as indicated sentences are not prohibited by the three strikes ban against plea bargaining.

c. *People v. Trausch* (1995) 36 Cal.Ap.4th 1239. Division 4 of the Second Appellate District found that a second degree commercial burglary can be reduced to a misdemeanor at the time of sentencing given the fact that the nature of the conviction cannot be determined until judgment is pronounced. The nature of the conviction is left tot he discretion of the sentencing judge to be determined at the time of sentencing when the offense in which appellant was convicted was a wobbler.

d. *People v. Dent* (1995) 38 Cal.App.4th 1726. Second District Division 1, follows *Trausch, Vessell,* etc. indicating that the court retains the authority pursuant to Penal Code section 17 to reduce a wobbler to a misdemeanor. **However, it indicated that the court abused its discretion in so finding the section 17, subdivision (b) reduction merely to avoid the application of a strike sentence**. The court must look to individualized sentencing considerations in determining whether to exercise its discretion.

e. *People v. Carranza* (1996) 51 Cal.App.4th 528, the Sixth Appellate District ruled that the prosecution has the right to appeal a sentence that may be unauthorized pursuant to section 1238, subdivision (10). (See also *People v. Trausch*, *supra*, 36 Cal.App.4th 1239.) The *Carranza* court also determined that, pursuant to *People v. Scott* (1994) 9 Cal.4th 331, 345, a sentence is generally unauthorized if it could not be lawfully imposed, and any sentence which is only procedurally or factually flawed is permitted unless there is an objection – in other words, the error is waived for purposes of appeal. After resolving the procedural dispute, the court found, when the entire statute is analyzed and the legislature's intent is considered, that section 290 (failing to register) is a wobbler, and therefore, the trial court did not err in sentencing appellant to one year in county jail. Given the fact that section 17 was on the books at the time section 290 was enacted, and given the fact that subdivision (g)(3) provides for a misdemeanor sentence under certain

circumstances, the court found that the legislature was deemed aware of existing laws (e.g., § 17), when it passed the statute (e.g., § 290), and as a result there was no clear statement of intent to create a non-alternate felony. Given the fact that the court's sentence was not unauthorized, and there was no objection by the prosecution, any error is waived.

f. *People v. Glee* (2000) 82 Cal.App.4th 99, the Second Appellate District, Division Four, reversed the trial court's ruling that one of appellant's prior convictions, which previously had made him eligible as a third striker for a 25 to life sentence. Appellant had been convicted of an assault with a deadly weapon, a wobbler. When imposing sentence, the court placed appellant on summary probation. One can only receive summary probation for a misdemeanor. (See § 1203, subd. (a).) Therefore, appellant's sentence on that matter was automatically a misdemeanor. Section 667, subdivision (d)(1) provides that a prior conviction is a felony ... unless the sentence automatically, upon initial sentence, converts the felony to a misdemeanor. Additionally, when the court sentences the defendant to other than state prison, pursuant to section 17, the matter automatically becomes a misdemeanor. That is exactly what happened here, and as a result, the defendant is not a third striker, but only a two-striker, and will be resentenced as such.

g. *People v. Barkley* (2008) 166 Cal.App.4th 1590, the Sixth Appellate District held that, the defendant suffered a prior "wobbler" conviction for assault was a "strike" wherein he was placed on probation with a jail term, and all of the orders made at the sentencing hearing, including orders regarding firearms and blood and saliva samples, were consistent with felony probation and inconsistent with the imposition of a misdemeanor jail sentence. The court distinguished *People v. Glee* (2000) 82 Cal.App.4th 99, where, when imposing sentence, the court placed appellant on summary probation. One can only receive summary probation for a misdemeanor.

h. *People v. Lucas* (2013) 214 Cal.App.4th 707, the Fourth Appellate District, Division 3 held that a serious felony prior conviction, within the meaning of section 667, subdivision (a) is added to the current sentence, and is treated as a serious felony, despite the previous reduction of that offense to a misdemeanor pursuant to section 17, subdivision (b)(3). Similarly, the Court of Appeal held that the prior conviction can act as a strike within the meaning of the Three-Strike Law, since the nature or character of the offense is determined at the time of sentence, (see § 667, subd. (d); *People v.*

Franklin (1997) 57 Cal.App.4th 68, 73; see also *People v. Sipe* (1995) 36 Cal.App.4th 468, 478 [whether a prior conviction is a felony is determined on the date of the conviction, so reduction to a misdemeanor, later on is of no relevance to its classification as a felony.])

8. THREE STRIKES SENTENCING CALCULATIONS:

a. *People v. Jenkins* (1995) 10 Cal.4th 234. A defendant who qualifies under both three strikes and section 667.7, must be sentenced under three strikes, not 667.7 or an "other sentencing statute." [Isn't the death penalty an "other sentencing statute?"] The court also indicates that the prosecution must plead and prove the (b) to (i) allegations. They also interpret a similar provision to (iii), indicating **serious felony enhancements are not added onto the minimum term**. The question remains whether the precatory phase in 667, subdivision (e) "in addition to any other enhancement" is a significant distinction from the language of section 667.7 to permit the addition of a determinate term to the indeterminate term.

b. *People v. Cartwright* (1995) 39 Cal.App.4th 1123. The third District holds that in multiple count three strike sentencing calculation cases (i.e., § 667, subd. (e)(2)(A)(i-iii)), each count is calculated independently from the other. In other words, if a defendant is found guilty of three counts, and the counts are not within the provisions of section 654, nor did they occur on the same occasion, or arise out of the same operative facts, then **each count is calculated to be greater or less than 25 years**; thereby subjecting appellant to a minimum of 75 to life on the three counts. The *Cartwright* Court cites *Jenkins* and *Anderson* to support its proposition. However, *Jenkins* merely indicates that a defendant **may** receive a separate consecutive life sentence. (See *People v. Jenkins*, *supra*, 10 Cal.4th at pp. 254-256.) The *Jenkins* Court does not indicate that each count in the section 667.7 sentence must be calculated independently of each other. *Jenkins* specifically held that nothing in section 667.7 "**compels** a trial court to impose consecutive life terms when more than one felony conviction qualifies for sentencing under section 667.7 in a single proceeding." (*Id.*, at p. 245; emphasis original.)

c. *People v. Ingram* (1995) 40 Cal.App.4th 1397, the Fifth Appellate District, came to the same conclusion as their brethren in *Cartwright* and *Turner*, that the serious felony priors are added to the minimum term. This conclusion was upheld in *Dotson*, *supra*, wherein the High Court also found that the

serious felony priors are also added to the minimum term, and specifically overrules *Ingram* on this point.

d. *People v. Rucker* (1995) 41 Cal.App.4th 236. **DEPUBLISHED**. In another opinion by Justice Woods from division 7, the court finds that the serious felony priors must be added to the minimum term. The court then went on to use the "two strike" cases to justify its ruling.

e. *People v. Samuels* (1996) 42 Cal.App.4th 1022, Second District, Division 1, follows the lead of *Carter*, *infra*, and *Ingram*, finding that consecutive terms are calculated per count, and that there is no impediment to adding enhancements on top of the life term. The imposition of the serious felony enhancements on top of the life term is now a dead issue, as it has been answered in the affirmative in *Dotson*, *supra*.

f. *People v. Hayes* (1996) 44 Cal.App.4th 1238. **DEPUBLISHED**. Second District, Division 7, followed the lead of the aforementioned cases and find that the court's failure to impose the 2 section 667, subdivision (a)(1) prior serious felony convictions amounted to an unauthorized sentence; as a result, the court ordered the 10 years added onto the sentence previously imposed.

g. *People v. Ayon* (1996) 46 Cal.App.4th 385, Fourth District, Division 1 ruled that when using the (iii) formula for calculating the third strike sentence, you do not compute the sentence by aggregating the multiple counts as you would with standard section 1170.1 sentencing, rather each count is calculated separately including adding the enhancements onto the substantive counts. The opinion states that the statute does not suggest that the counts should be combined and then the calculation tabulated. However, as previously discussed, since the two strike cases such as *Ramirez*, *Anderson* and the like indicate that the subordinate counts are computed by using the one third the mid-term formula (i.e., the language in (e)(1), therefore aggregating the sentence, and the statute uses the same language in (e)(2)(A)(i) as in (e)(1), then aggregate sentencing must be used in both (e)(2)(A)(i) and (e)(1). Given the fact that it only makes sense to compare like computations, (iii) must be tabulated in the same manner, using section 1170.1 aggregated sentencing principles.

Appellant argued that if the calculation were to be made on a count by count basis, (i) and (iii) would virtually never be used, the default of (ii) would be used for each count, therefore (i) and (iii) would become a nullity, which, as

we know, violates all the rules of statutory construction. The court cites a few instances wherein the (i) sentence would exceed 25 years (e.g., §§ 215, 208, 288.5). However, I would not give up on this aspect of the argument given the limited application of this argument.

h. *People v. Randall* **REHEARING GRANTED AND THEN DISMISSED AFTER REHEARING**; (1996) 50 Cal.App.4th 144, the Sixth Appellate District held that section 667, subdivision (a), 5 year priors, must be added to each count when determining the minimum term under the three strike (iii) formula. The court distinguishes *People v. Tassell* (1984) 36 Cal.3d 77, stating that it applies to a different statutory scheme.

i. *People v. Wynder* (1996) 51 Cal.App.4th 1062, the Second Appellate District, Division 2, ruled that the serious felony allegations pursuant to section 667, subdivision (a) must be served prior to the minimum term which is calculated to the greater of the term under subdivisions (e)(2)(A) (i-iii). The court reasoned that the legislature intended that the prefatory language, "in addition to any other term" can only mean that the serious felony allegations must be added to the minimum term. They use section 669 to bolster this analysis. However, they do not take into account the fact that section 669 does not mandate a consecutive term even on a life sentence.

j. *People v. Mines* **DEPUBLISHED** (1997) 55 Cal.App.4th 698, Second Appellate District, Division 2, ruled that it was not error for the trial court to add an enhancement pursuant to Health and Safety Code section 11370.2, subdivision (a) to the minimum term of 25 to life. The court had rejected our *Jenkins* analysis. Therefore, post-*Dotson*, this issue seems dead.

k. *People v. Thomas* (1997) 56 Cal.App.4th 396, Second Appellate District, Division 7, ruled that when calculating an indeterminate life sentence, in a multiple count case, each count is individually calculated to determine if it is greater or less than 25 years to life. The court specifically rejects our argument that the language from subdivision (e)(1), of section 667, "the term otherwise provided as punishment" means that the calculation under subdivision (e)(2)(A)(i), which uses the same language must be calculated in the same "aggregate" manner. The court ruled that the above quoted phrase means that the court is to calculate the sentence using the lower, middle or upper term; it does not mean that the consecutive sentencing calculations are done pursuant to section 1170.1 terms as they are in the two strike calculations. (See *People v. Ingram* (1995) 40 Cal.App.4th 1397, 1407.) In

spite of this conclusion drawn by Justice Johnson, I would continue to raise this issue until the Supreme Court rules against us. The statutory construction argument in this opinion is somewhat weak and may be subject to Supreme Court review in the future.

l. *People v. Keelen* (1998) 62 Cal.App.4th 813, the Second Appellate District, Division 7 held that when calculating an indeterminate life sentence, under section 667, subdivision (e)(2)(A)(i), the court does not need to use the upper term to calculate the term to be tripled. Nothing in this statute preempts the use of section 1170k subdivision (b), nor did they mandate the use of the upper term. Therefore, nothing limits the court's use of the lower, middle or upper term in calculating the term under subdivision (e)(2)(A)(i). Given the fact that the trial court harbored under the belief that it had no discretion but to use the upper term, the matter must be transferred back for the court to exercise its discretion.

m. *People v. Garcia* (1997) 59 Cal.App.4th 834, the Second Appellate District, Division 2, held that a trial court has the discretion of imposing the strikes on one count, but striking them for subordinate or other counts so as to avoid an unreasonable sentence. The Court of appeal concluded that the striking of the strikes for the subordinate counts was not an unauthorized sentence and was in fact arguably permitted pursuant to *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 979.)

n. *People v. Bolden* **REVIEW GRANTED ON AN UNRELTED ISSUE**, formerly cited at (1999) 71 Cal.App.4th 730, the Second District Court of Appeal, Division 1 held that, in a three strike case, the minimum term of 25 years is tripled under subdivision (e)(2)(A)(i) of section 667, and that the provisions of subdivision (e)(2)(A)(iii) do not merely apply to indeterminate three strike sentences. The Court of Appeal finds that the use of the word "term" means the minimum term in the sentence of 25 to life, thereby distinguishing it from the "period" proscribed in section 3046. However, I believe that the "term" in a 25 to life sentence is not 25 years, but life, and as a result, life cannot be tripled.

o. *People v. Mendoza* (2000) 78 Cal.App.4th 918, the Fourth Appellate District, Division 2, held that in a three strike case, the minimum term of 25 years is tripled under subdivision (e)(2)(A)(i) of section 667, and that the provisions of subdivision (e)(2)(A)(iii) do not merely apply to indeterminate three strike sentences. The Court of Appeal finds that the use of the word

"term" means the minimum term in the sentence of 25 to life, thereby distinguishing it from the "period" proscribed in section 3046. However, I believe that the "term" in a 25 to life sentence is not 25 years, but life, and as a result, life cannot be tripled. The Court of Appeal rejected the noting that subdivision (i) uses the word "term," and not the word "period" when the court tripled the minimum term of 25 to life. The court rejected the notion that subdivision (iii) uses the word "period" in reference to a calculation of an indeterminate period, and therefore, only subdivision (iii) should be used in the calculation of the minimum period for an indeterminate sentence.

p. *People v. Dozier* **REVIEW GRANTED, AND TRANSFERRED BACK TO THE COURT OF APPEAL IN LIGHT OF ACOSTA EFFECTIVELY REVERSING DOZIER**; formerly at: (2000) 78 Cal.App.4th 1195, the Second Appellate District, Division 7, held consistently with *People v. Jefferson* (1999) 21 Cal.4th 86, 99, that an indeterminate straight life term, here for attempted premeditated first degree murder, is not calculated by tripling the 7 year term under section 3046. The *Jefferson* court stated, "We see no inconsistency between the Legislature's decision to double the parole ineligibility period set by section 3046 for 'second strike' offenders and its decision not to multiply that period for third strike offenders." The minimum term must always be a minimum of 25 years to life. They also went on to conclude that only subdivisions (ii) or (iii) can be used in determining the indeterminate minimum term for a third strike case.

q. *People v. Byrd* (2001) 89 Cal.App.4th 1373, the Third Appellate District held that the trial court was correct when it imposed, three 5-year enhancements pursuant to section 667, subdivision (a)(1), for each of the current felony counts under section 667, subdivision (e)(2)(A)(iii); the sentence on each current count was consecutive indeterminate terms. The Court of Appeal rejected the argument that the sentencing should be within the meaning of section 1170.1 and *People v. Tassell* (1984) 36 Cal.3d 77. (See *People v. Nguyen* (1999) 21 Cal.4th 197.) The Court of Appeal specifically found that the calculation is not pursuant to section 1170.1 as they are all indeterminate terms. (See *People v. Felix* (2000) 22 Cal.4th 651, 656.)

r. *People v. Coker* (2004) 120 Cal.App.4th 581, the Third Appellate District held that the trial court did not err when it calculated the defendant's sentence, who was convicted of multiple felonies that subjected him to being

sentenced consecutively under both the Three Strikes Law and section 12022.53, subdivision (b)(c) or (d) (i.e., 10, 20, 25-life) when it added to each count, the "count-specific" penalty for section 12022.53, subdivision (b)(c) or (d) and other enhancements to the indeterminate terms calculated pursuant to section 667, subdivision (e)(2)(A)(iii) to determine the minimum eligible parole date. (See *People v. Dotson* (1997) 16 Cal.4th 547, 553; *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1380-1381.) The specific enhancements are then added on top of the minimum eligible parole date calculation. The status enhancements are merely added one time to the entire sentence. (*Id.*, at p. 1380.) The court rejected appellant's contention that section 12022.53, subdivision (j) limited the court to adding the appropriate section 12022.53 provision only to the minimum eligible parole date calculation.

s. *People v. Philpot* (2004) 122 Cal.App.4th 893, the Fourth Appellate District, Division 2 held that the lower court erred in not awarding presentence credits, as the defendant with a nonviolent third strike, sentenced to an indeterminate term, may receive presentence conduct credits pursuant to section 4019. (See *People v. Thomas* (1999) 21 Cal.4th 1122, 1125-1180; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1175-1176.) *In re Cervera* (2001) 24 Cal.4th 1073 only dealt with the denial of any post-conviction credits to the defendant's indeterminate term.

t. *People v. Miranda* (2011) 192 Cal.App.4th 398, the Second Appellate District, Division 8 held that the court was correct, based on what was charged, that the indeterminate minimum eligible parole date (MEPD) was calculated by using the third alternative Option 3, which is section 667, subdivision (e)(2)(A)(iii). Given the fact that the defendant was convicted of premeditated first degree murder, that crime fell into the sentence provided by section 3046, subdivision (a)(1) (7-years), and then the trial court must consider any enhancement that would otherwise be included in determining the defendant's minimum prole eligibility period, which was a gun enhancement pursuant to section 12022.53, subdivision (e)(1) (25-L), and then a 1-year prior prison term enhancement pursuant to section 667.5, subdivision (b). The MEPD is therefore 33-years, but the sentence on count 1 is 59 year since under option 3, the enhancements are added again (25-L, + 1 year.) (See *People v Jenkins* (1995) 10 Cal.4th 234, 250-254; *People v. Jefferson* (1999) 21 Cal.4th 86, 97-100.)

u. *People v. Mason* (2014) 232 Cal.App.4th 355, the Fourth District, Division 1 held that among his many offenses, the defendant was found guilty of 3 murders that merely set an indeterminate term without a minimum term. The defendant was also subject to the three-strikes-law as a third striker. The trial court erred in tripling the defendant's sentences, under section 667, subdivision (e)(2)(A)(i), for the offenses with a term of life imprisonment without the possibility of parole since the sentence for those offenses does not have a minimum term. Consistent with *People v. Smithson* (2000) 79 Cal.App.4th 480, 503-504, and *People v. Coyle* (2009) 178 Cal.App.4th 209, 219, the court can only double or triple a minimum term of an indeterminate term, or a determinate term.

9. MANDATORY CONSECUTIVE V. CONCURRENT SENTENCES

a. *People v. Carter* (1995) 41 Cal.App.4th 683, the Second district, Division Five found that in analyzing the interplay between section 667, subdivisions (c)(6)(7) and (8) it is difficult to ascribe three separate purposes. The court finds that the same set of operative facts clause is the same as section 654. **This case is effectively overruled in light of *Deloza*, *supra*. February 22, 2011**.

b. *People v. Miles* (1996) 43 Cal.App.4th 364, the Second District, Division 5, ruled that when sentencing a defendant who has been convicted of two robberies that occurred on the same occasion, the two counts must be full term consecutive, each 25 years to life. The opinion does not take into account the "*Jenkins*" argument previously discussed, nor does it take into account the fact that count 2 could be run 1/3 the middle term, even if it is imposed separately and consecutively. Clearly, Justice Terner's analysis of section 667, subdivision (e)(2)(B) would be correct if subdivisions (c)(6) and (7) did not exit – but they do. The mandatory provision of section (e)(2)(B) is in conflict with subdivisions (c)(6) and (7). **This case is effectively overruled in light of *Deloza*, supra**.

c. *People v. Dominguez* (1996) 44 Cal.App.4th 389 **DEPUBLISHED**.

d. *People v. Davis* (1996) 48 Cal.App.4th 1105, the Fifth Appellate District, held that the terms of section 667, subdivision (c)(8), of mandatory consecutive terms, applies to an appellant who had previously been committed to CRC, was paroled, then committed a strike offense while on CRC parole. The court found that appellant was "serving a sentence" while

still on CRC parole when he committed the new offense. As a result, the court upheld the mandatory imposition of consecutive time on the new two strike sentence, consecutive to the term then imposed on the CRC matter. Given the fact that the CRC case was pre-1994 and the strikes legislation was post that date, this very well may violate ex post facto prohibitions.

e. *People v. Randall* **REHEARING GRANTED AND DECIDED WITHOUT BEING REPUBLISHED – THEREFORE CASE IS DEAD**; (1996) 50 Cal.App.4th 144, the Sixth Appellate District held that the provisions of subdivisions (c)(6) and (7), pertaining to the same occasion and same set of operative facts exception, do not apply to a situation wherein the defendant commits one burglary and then immediately jumps a fence and burglarizes another residence. The court merely indicated that when there are separate crimes, even when they occur moments apart, the temporal closeness does not qualify to place the separate conduct within the exception to subdivisions (c)(6) and (7).

f. *People v. Roberts* (1997) 55 Cal.App.4th 1073, Second Appellate District, Division 7, acknowledged the split in authority pertaining to whether section 667, subdivisions (c)(6)(7) must be equated to section 654, and its limitations to violent crimes committed on different victims, even when they arise on the same occasions and are derived from the same set of operative facts. **This case is effectively overruled in light of *Deloza*, *supra*.**

g. *People v. Newsome* (1997) 57 Cal.App.4th 902, the Third Appellate District held, after it had granted rehearing, that the trial court has discretion to impose current counts concurrently, rather than mandatorily consecutive, when they arise out of the same set of operative facts and occurred on the same occasion. This case is also cited favorably in *People v. Deloza*, *supra*. In *Newsome* appellant robbed more than one person on the same occasion. The court found that re-sentencing was necessary as the trial court did not understand that it had discretion to impose the current robbery counts concurrently, therefore, pursuant to *People v. Belmontes* (1983) 34 Cal.3d 335, 348, and fn. 8, it abused its discretion, and the defendant is entitled to be resentenced.

h. *People v. Bell* (1998) 61 Cal.App.4th 282, the Fourth Appellate District, Division One, held pursuant to *Hendrix*, *supra*, that the trial court erred when it harbored the belief that it was mandated to impose consecutive sentences after the jury found appellant had committed a robbery and an

attempted robbery on two separate individuals when the conduct occurred on the same occasion and was based on the same set of operative facts. The Court of Appeal held, consistent with *People v. Deloza*, *supra*, that a trial court has the discretion to impose the two convictions either concurrently or consecutively; and remember, if the court is going to impose consecutive time, it must state its reason for choosing that sentencing option.

i. *People v. Hall* (1998) 67 Cal.App.4th 128, the Second District, Division 4, held that, consistent with *Hendrix*, *supra* and *Deloza*, *supra*, that a court is not mandated to impose consecutive sentences where it is unclear from the facts whether the crimes were committed on the "same occasion," or arose "from the same set of operative facts." Here, defendant was convicted of receiving stolen property and conspiracy to commit robbery. It was impossible to tell from the facts when the conspiracy was completed as it pertains to when the defendant received the stolen property in question. Therefore, the matter had to be transferred back to the trial court to either impose those two counts, concurrently, or to state its reasons why it was choosing its sentencing choice to impose them consecutively. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 678 [the most fundamental duty of a sentencing court is to state reasons justifying the sentencing choices that it makes]; CRC, rule 406 (b)(5).)

j. *People v. Jones* (1998) 67 Cal.App.4th 742, the Second District, Division 4, held that, the court did not err when it imposed consecutive sentences within the meaning of *People v. Deloza* (1998) 18 Cal.4th 585, and 667, subdivisions (c)(6) and (c)(7), when it sentenced appellant consecutively for three offenses, burglary, forgery, and dissuading a witness, that occurred at different times and different places. None of the offenses were temporally or spatially proximate. The latter two offenses were "in furtherance" of the burglary, but there is no exception to the imposition of mandatory consecutive sentences when one offense is in furtherance of another.

k. *People v. Durant* (1999) 68 Cal.App.4th 1393, the Fourth District, Division 1, held that the defendant's commission of three separate burglaries, albeit from the same apartment complex, on the same night, did not constitute facts that permit the court to find that they arose on the same occasion or arose from the same set of operative facts. The court indicated that when multiple crimes are not so closely related in time and proximity as they were in *Hendrix* or *Deloza*, and when they occurred in different places, separated by more than seconds, additional factors should be considered to determine if

the offenses occurred at the same time or arose from the same set of operative facts. The Court of Appeal found that "the nature and elements of the current offense charged becomes highly relevant" in a case of this nature. For example, when a robbery is charged, its continuous nature, its elements and the facts used to support those elements are the operative facts underlying the commission of the crime, and therefore, other crimes that occur shortly thereafter, would necessarily constitute the same set of operative facts. The Court of Appeal notes that when the elements of the crime have been satisfied, any crime subsequently committed will not arise from the same set of operative facts. I believe this definition is too restrictive and should be challenged in order for the Supreme Court to define same set of operative facts, which they did not do in either *Deloza* or *Hendrix*. The court did note that intent may be a factor to consider in determining whether separate crimes should be considered a part of the same set of operative facts; but they determined that it is not a factor to be considered when reviewing separate burglary convictions merely because they occurred on the same night with the intent to steal from each of the residences. I would strongly urge that when you have a burglary and then a 2800.1, etc., or related type events, even though the burglary was completed, that the escape from the scene and the events that transpired from the escape would be considered a part of the same set of operative facts.

l. *People v. Danowski* (1999) 74 Cal.App.4th 815, the Fourth Appellate District, Division 2, held that section 654 does apply to strike cases within the meaning of *People v. Deloza* (1998) 18 Cal.4th 585, 594. This Court of Appeal held that section 654 applies on its own term, separate and apart from the consideration of whether current convictions must be consecutively imposed within the meaning of section 667, subdivisions (c)(6) and (7).

m. *People v. Mitchell* **REVIEW GRANTED ON UNRELATED ISSUE (S090791)**, formerly at (2000) 82 Cal.App.4th 55, the Second Appellate District, Division 7, held consistent with *People v. Danowski* (1999) 74 Cal.App.4th 815, that section 654 applies in the strike context, and it is separate and apart from the determination under section 667, subdivisions (c)(6) and (c)(7). Here, the Court of Appeal held that the defendant could not be sentenced for a violation of felony drunk driving and driving with more than .08 percent of blood alcohol.

n. *People v. Jeffries* (2000) 83 Cal.App.4th 15, the Third Appellate District held that, the matter must be remanded for resentencing pursuant to

People v. Deloza, *supra*, (1998) 18 Cal.4th 585, since the prosecution misled the court when it indicated that certain counts must be run consecutive to each other. The *Deloza* opinion was published 7 months after appellant was sentenced. The Court of Appeal specifically found that not all of the counts in this 288, subdivision (a) occurred on separate occasions, and some of them could be imposed concurrent with other counts.

o. *People v. Riggs* (2000) 86 Cal.App.4th 1126, the Third Appellate District held, pursuant to *People v. Nguyen* (1999) 21 Cal.4th 197 and the provisions of section 1170.1, subdivision (a), that when a defendant has been sentenced to state prison on case A, and then, in the current matter, the court designates case A as the subordinate count tot he "current" conviction, it is reforming the entire sentence, and therefore the 1/3 limitation provisions of section 1170.1, subdivision (a) are invoked. (*Id.*, 21 Cal.4th at p. 201-202.) The Court of Appeal rejected the prosecution's argument that section 667, subdivision (c)(8) mandated that the sentence on case A, must be served full term after the defendant served his sentence for the current offense. The Court of Appeal held that the Legislature knew how to expressly abrogate the provisions of section 1170.1, subdivision (a) (see *People v. Scott* (1993) 17 Cal.4th 1383, 1387), but did not do so in this case, and as a result, the aggregate sentencing provisions of section 1170.1 apply in this "two-strike" context. As the court explained, "Under the People's reasoning, a defendant tried and convicted on multiple offenses in a single proceeding enjoys the benefits of the sentencing limits imposed by section 1170.1, while a defendant tried and convicted in a separate proceeding does not."

p. *People v. Jenkins* (2001) 86 Cal.App.4th 699, the Second Appellate District, Division 5, held that th trial court did not have discretion to sentence the defendant concurrently, rather than consecutively on an assualt of one victim and an attempted murder on another victim. The majority found taht the incidents were not within the same occasion or based on the same set of operative facts. The dissent by Justice Grignon, apply points out that this was the same occasion, where the assault on the second victim took place euring the conduct that led up to the attempted murder of the other victim. This is a fact specific application of *Deloza* and *Lawrence*.

q. *People v. Coelho* (2001) 89 Cal.App.4th 861, the Sixth Appellate District held that the reviewable standard for determining a jury's verdict is beyond a reasonable doubt. (See *United States v. Dennis* (11th Cir. (1986)) 786 F.2d 1029; *U.S. v. Melvin* (1st Cir. 1994) 27 F.3d 710.) Review of the issue by the

appellate court is de novo as the sentencing court must determine, as a matter of law, which criminal act the jury used as a basis for the convictions. (See *People v. Mickey* (1991) 54 Cal.3d 612, 649.) In this case, the jury found the defendant guilty of multiple counts, on two different days, and multiple acts where shown that could constitute the counts on both days. No unanimity instruction was given, which would have been helpful, but not determinative here, as a reviewing court may reasonably conclude that in finding a defendant guilty, the jurors did not disagree about the defendant's conduct and therefore, that their verdict must have been unanimous. (See *People v. Jones* (1990) 51 Cal.3d 294, 307.) A trial court must state reasons for its sentencing choices. (Sec. 1170, subd. (c).) A consecutive sentence is a sentencing choice. (See CRC, rule 4.406; *People v. Senor* (1992) 3 Cal.4th 765, 781.) The court should also consider CRC, rules 4.421 and 4.423 pertaining to mitigation and aggravation. Multiple punishment and therefore, consecutive sentencing is proper where there are multiple acts to justify the sentence, even though the motivation for the acts may be singular, that being for sexual gratification. (See *People v. Nubla* (1999) 74 Cal.App.4th 719, 730-731.) Similarly, a defendant who commits a number of sexual acts is substantially more culpable that a defendant who commits merely one act. (See *People v. Harrison* (1989) 48 Cal.3d 321, 335-336.) Therefore, where it would be an idle act to remand for resentencing where the court's intention was clear, the Court of Appeal can affirm the sentence. (See *People v. Williams* (1996) 46 Cal.App.4th 1767, 1783.)

r. *People v. Byrd* (2011) 194 Cal.App.4th 88, the Fourth Appellate District, Division 1 held that the trial court had discretion to sentence defendant concurrently with regard to his conviction for being a felon in possession of a firearm where defendant used a gun during the simple kidnaping of victims and during the latter aggravated kidnapping and forced sodomy of one of those victims. (See *People v. Hendrix* (1997) 16 Cal.4th 508, 513-515; *People v. Deloza* (1998) 24 Cal.4th 585, 595.) However, count 1 (simple kidnaping) and count 3 (forcible sodomy), which were committed hours apart on the same victim, were not committed on the "same occasion," nor arose from the same set of operative facts, and had to be sentenced consecutively. (*People v. Lawrence* (2000) 24 Cal.4th 219, 233.)

10. PENAL CODE SECTION 1385 AND RELATED ISSUES:

a. *People v. Metcalf* (1996) 47 Cal.App.4th 248, Fourth District, Division 2, following the rationale of *People v. Fritz* (1985) 40 Cal.3d 227, indicated that the post-*Romero* re-sentencing hearing, should be remanded to the

Superior Court in order for the court to exercise its discretion without the necessity of filing a writ of habeas corpus in the Superior Court.

b. *People v. Sotomayor* (1996) 47 Cal.App.4th 382, Division 5 of the Second Appellate District, held that the correct procedure for addressing the "*Romero*" issue while the cause is still pending in the appellate courts, is to ask the Court of Appeal to remand the matter back to the Superior Court in light of *Romero*. The Court of Appeal indicated that:

> "We cannot conceive of any basis for differentiating the retroactive application of *Romero* to a defendant whose direct appellate rights have been exhausted or were never utilized from its applicability to an accused whose appeal is pending.: (*Id.*)

Additionally, the Court of Appeal implies that a remand is proper even when the issue was not raised in the trial court given the fact that the trial court has the sua spointe power to strike such an allegation. (*Id.*) However, in footnote six, the court indicates that they ware not reaching this question, and that the holding is limited to the case wherein the court expressed its misunderstanding of his or her
discretion.

Note that the Court of Appeal did not comment on whether it would have been an abuse of discretion to strike the prior, it merely cited the language from *Romero* pertaining to the boundaries of the court's discretion. Therefore, when briefing this issue, I would recommend addressing all of the facts which would support the trial court's discretion to strike the prior when requesting the remand.

c. *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, Division 2 of the Second Appellate District found that appellant who had been convicted in his two strike case, of 2 counts of robbery wherein the court imposed the high term on count 1, and count 2 consecutive thereto, imposed the 5 year section 667, subdivision (a) enhancement, and chose not to strike 2 prior prison terms, did not remand pursuant to *Romero*. The trial court indicated that "this is the type of individual the law was intended to keep off the street as long as possible." Given the trial court's clear intention, and the fact that it imposed the maximum sentence possible, no purpose would be served in remanding for consideration pursuant to *Romero*. The trial court was very clear in

setting forth its intent to1 give appellant the maximum possible; therefore, unless you have comparable facts, distinguish this case when used against you.

d. *People v. Askey* (1996) 49 Cal.App.4th 381, Division 3 of the Second Appellate District found that appellant had waived his right to raise the *Romero* issue, pursuant to *People v. Scott* (1994) 9 Cal.4th 331, 353, since counsel below had not requested that the court exercise its discretion. Additionally, the court indicated that since appellant appeared to be a budding Night Stalker, it would be an abuse of discretion and an idle act for the trial court to exercise its discretion. Clearly, it violates the rule set forth in *People v. Superior Court* (*Flores*) (1989) 214 Cal.App.3d 127, wherein the court stated that the trial court cannot grant a defense motion pursuant to section 1385. Therefore, if it cannot grant a defense motion, how can the defendant waive the issue? Next, given the fact that *Scott* was based on the Determinate Sentencing Law which had been around for years, *Scott's* waiver argument made sense in that context, but not here where the law was completely unsettled! Finally, it is clear that a right cannot be waived it is not settled law at the time the issue is raised. **MUCH TO OUR DISMAY, THE HIGH COURT'S HOLDING IN *PEOPLE v. FUHRMAN, SUPRA*, CONTROLS THIS ISSUE, AND THE ONLY AVAILABLE REMEDY IS A WRIT AND NOT A REMAND ON A SILENT RECORD CASE.**

e. *People v. Carter* (1996) 49 Cal.App.4th 567, Division 4 of the Second Appellate District found that the trial court failed to state sufficient reasons on the record for striking a strike. Pursuant to section 1385, subdivision (a), the court's reasons for using its section 1385 power, must be stated in the minutes. Furthermore, the court found that it would be an abuse of discretion for the court to strike a strike unless the reason for the dismissal would motive a reasonable judge. (Does one really need to comment on that statement?) The court, quoting from *Romero*, held that the interests of society must be taken into account the trial court determines that it is going to exercise its 1385 discretion, and not just its antipathy for the three-strikes law. Either on the initial sentencing, or on remand during the *Romero* writ proceeding, guide the court to the acceptable statement of reasons that will "get by" our "reasonable" Court of Appeal justices. Reread *Romero*, at pp. 530-531 to get the parameters of a valid statement of reasons.

f. *People v. Alvarez* (1996) 49 Cal.App.4th 679, the Fifth Appellate District refused to remand for a *Romero* finding, even though they interpreted this

matter as a **silent record** case (which is highly debatable), they still found that appellant could file his "*Romero* writ" in the trial court to gain the relief requested.

g. *People v. White Eagle* (1996) 48 Cal.App.4th 1511, the Fifth District held that in a "**silent record**" case, the appellate court cannot determine the sentencing could misunderstood its authority or direction, and since every presumption is used to uphold a judgment, and the burden is on the defendant o demonstrate error – it will not be presumed – they find no error and refuse to remand. Therefore, use the *Alvarez* result, and file the *Romero* writ in the Superior Court.

h. *People v. Cunningham* (1996) 49 Cal.App.4th 1044, the Third District held that when a defendant stipulates to a plea bargain with the prosecution, he cannot later ask the court to strike a strike per *Romero*. The court finds that the prosecution is entitled to the benefit of the bargain, and once the court agrees to take the plea, it lacks jurisdiction to alter it, unless the parties agree to a change. I believe that this is a faulty opinion. Everyone was under the impression that the court was mandated to double the term agreed to. Given the fact that the prosecution and the curt believed that the term must be doubled, the defendant should, at a minimum be able to withdraw his plea and start from scratch. That may have other negative consequences, but it should be the defendant's option.

i. *People v. DeGuzman* (1996) 49 Cal.App.4th 1049, the First District, Division One, held that it would not remand the matter back to the trial court to consider a *Romero* issue, on a **silent record** case, whee it would be an abuse of discretion to strike the prior under any circumstance. Here, appellant's record was abysmal, which included a long juvenile record from the age of nine years old. I would merely try and distinguish this one away on its facts when it is used against you.

j. *People v. Cepeda* (1996) 49 Cal.App.4th 1235, the Second District, Division Seven, held that it would remand the matter back to the trial court so that it could state for the record, and in the minute order, its reason for dismissing two strike priors. Pursuant to a plea bargain, and with the prosecutor's concurrence, the court struck two serious felonies, and then sentenced appellant as a two striker. The Court of Appeal found that appellant does not now have the right to have the trial court, on *Romero* remand, determine whether it would strike the remaining strike. The court indicated that since

appellant pled for a specified sentence, it was now precluded from asking for a further review of his sentence. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024; *People v. Panizzon* (1996) 13 Cal.4th 68, 80.) The court found that the trial court is not inclined to find error even if the court acted in excess of jurisdiction, as long as the court did not lack fundamental jurisdiction. Whether appellant would have been better off is not the issue, or even if the court will strike another strike; the issue is does the court have a right to consider striking another strike – answer yes.

k. *People v. Smith* (1997) 59 Cal.App.4th 46, First Appellate District, Division 2, held that a new sentencing hearing is required when the court believed that it had no discretion to strike a strike, even though appellant was sentenced pursuant to a plea bargain. The court's opinion can be considered contra to the holdings in *Couch, Cunningham*, and *Cepeda*, which found that an appellant was estopped from asking the court to strike a strike when the sentence was pursuant to a negotiated disposition. In the aforementioned cases, the defendant bargained for a "specified sentence," while in this matter, the plea contemplated a range of sentencing. In the aforementioned cases, the specified sentence is what the prosecution and the defendant bargained for, and as a result, to permit the court to then exercise its discretion to strike a strike would have given appellant an unfair benefit. Nonetheless, in this case, since appellant was not given a specific sentence, the court was not precluded from striking a strike. Given the fact that this was a pre-*Romero* case, where the court indicated that it did not believe that it could strike a strike, the matter was remanded for the court to make the appropriate determination.

l. *People v. Taylor* (1998) 63 Cal.App.4th, the Second Appellate District, Division 7 held that, pursuant to *People v. Fuhrman* (1997) 16 Cal.4th 980, 945, on a silent record, the proper procedure for the review of a request to strike a strike, is for the defendant to file a writ of habeas corpus, and not a remand to the Superior Court with an order for a new sentencing hearing. Here, the trial court merely denied the prior request to strike the strike without giving any reasons. The Court of appeal also indicated that appellant is not precluded from filing a writ even though a "plea bargain" of sorts had been entered into before the fiburcated trial on the enhancements and the strike priors. Appellant plead to 2 strike priors and the prosecutor struck four serious felony enhancements and prison priors, saving defendant 21 years. The Court of Appeal distinguished its own case of *People v. Cepeda* (1996) 49 Cal.App.4th 1235, which had precluded the motion to strike because a plea bargain, which struck a strike, and made *Cepeda* a

"two-striker" rather than a "three-striker," was fundamentally different than the appellant' predicament in this matter. Here, appellant was still a "three-striker," subject to a life sentence, where in *Cepeda*, the defendant was not. The court did state that if the court was included to strike 3 strikes and make the defendant a "two-striker," then the prosecution would have the option of proving the serious felony priors and the prison prior that had previously been dismissed pursuant to the bargain.

m. *People v. Allan* (1996) 49 Cal.App.4th 1507, the Second District, Division Four, held that the court cannot enter into a "plea bargain" with the defendant as it is a violation of the strike law and of *People v. Orin* (1975) 13 Cal.3d 937. Additionally, the Court of Appeal ruled that the trial court could not dismiss a strike prior, in the master calendar court, even after the people had announced ready, and indicated that they did not have the proof of the prior at that time, but they indicated that they would have it later in the day. Citing *People v. Ferguson* (1990) 218 Cal.App.3d 1173, the Court of Appeal found that the trial court abused its discretion in striking the strike prior, at that time, since the interests of society was not considered, and that a reasonable judge would not have done the same thing. Given the fact that (1) the defendant had received prior continuances, (2) that the trial on the priors is usually bifurcated, (3) that the matter had not yet been assigned to a trial court, and (4) the people would have the priors packet in time for the presentation at the trial and objected to the dismissal of the prior, the court found that there was an abuse of discretion to enter into a plea bargain and to dismiss the prior in the manner described. Just factually argue this one away. No real new big news here, just another application of an abuse of discretion.

n. *People v. Davis* (1996) 50 Cal.App.4th 168, the First District, Division Four, held that in a "**silent record**" case appellant has not met his burden of proof to establish that the court misunderstood its sentencing discretion; therefore, remand is not required. Once again *Romero's* footnote 13 does not set out this requirement as a necessity before the matter should be remanded to the trial court; the opinion merely indicates the 2 exceptions which will allow the court to deny either a remand or the granting of a hearing on the court's exercise of its discretion.

o. *People v. Smith* (1996) 50 Cal.App.4th 1194, Fourth District, Division Once, held that a court's antipathy for the strikes law is not a valid reason for striking a strike. It therefore sent the matter back to the trial court in order

for the court to state valid reasons for striking the strikes. Furthermore, the court held that *People v. Scott* (1994) 9 Cal.4th 331, did not preclude the prosecutor from raising the abuse of discretion issue for the first time on appeal. **HOWEVER, THIS CASE SHOULD BE REVIEWED IN LIGHT OF *PEOPLE v. TILLMAN* (2000) 22 Cal.4th 300.**

p. *People v. Kelley* (1997) 52 Cal.App.4th 568, Fourth Appellate District, Division 3, ruled that where the record did not indicate whether it would strike a prior to ameliorate the prison sentence, a remand is required. Since the court clearly did not indicate that it would not have exercised its discretion, then remand is proper.

q. *People v. Mosley* (1997) 53 Ca.App.4th 489, Second Appellate District, Division 5, ruled that appellant is not entitled to a *Romero* remand, as the trial court ruled on the issue 53 days after the Supreme Court issued the *Romero* decision. As a result, relying on an interpretation of *Tenorio*, the Court of appeal found that the trial court was presumed to have known the applicable law at the time of its ruling (see *Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443), and therefore, footnote 13 of *Romero* did not apply. The court did not address the issue of the Supreme Court's modifying of its opinion and its effect on the trial court's decision. The Court of Appeal did state that if, (1) it can be shown that the trial court was not aware of its decision after *Romero* was filed, or (2) the court refused to follow *Romero* after the filing of *Romero* on June 12, 1996, because the decision was not yet final, then footnote 13 would still mandate a remand for re-sentencing.

r. *In re Iveys* (1997) 54 Cal.App.4th 1288, Second Appellate District, Division 5, ruled that a defense request for the trial court to strike a strike on its own motion, prior to or at the time of the probation and sentencing hearing, is not a prerequisite to seeking habeas corpus relief under *Romero*. (See *People v. Sotomayor* (1996) 47 Cal.App.4th 382, 391.)

s. *People v. McLeod* (1997) 55 Cal.App.4th 1205, Fourth Appellate District, Division 1, ruled that, in this silent record case, the record does affirmatively show that the court would not have exercised its discretion had it understood its sentencing power. The Court of Appeal comes to this conclusion based on how the trial court did sentence appellant. It found that circumstances in aggravation outweighed those in mitigation, and the court imposed the middle term rather than the low term for the current offense. It then imposed a one year prison prior, and there was no dispute that the court knew that it

could strike the prison prior. The court did go into defendant's background after his mother's plea for leniency and on balance found that remand was not called for. The Court of Appeal did not preclude a *Romero* write, if counsel could point to facts outside the record which would justify review.

t. *People v. Bishop* (1997) 56 Cal.App.4th 1245, Second Appellate District, Division 1, the court, primarily guided by *People v. Superior Court* (*Alvarez*), *supra*, a defendant's individualized consideration and his background must be taken into consideration when it is determining if it should strike a strike. The trial court struck two strikes, and the prosecution, on appeal contended that the court erred because the reasons did not outweigh the aggravating factors. The Court of Appeal acknowledged that appellant was not "a worthy member of society," but found that the court did not abuse its discretion in striking the strikes after it considered appellant's age, the remoteness of the priors, and the pettiness of the current offense. The court conceded that all three strike appellants are generally not good persons, but the court can weigh all factors in determining to strike a strike based on individualized considerations. Additionally, the court did use the aggravating factors to sentence appellant to the upper term on the current offense. This is a very good case, along with *Alvarez*, to use to justify a remand when the court did not use the individualized sentencing factors in ruling on the strike issue.

u. *In re Saldana* (1997) 57 Cal.App.4th 620, Second Appellate District, Division 5, in one portion of the opinion that the trial court must base its decision to strike a strike on a multitude of individualized sentencing factors, and not merely on appellant's criminal record. given the fact that the trial court was not presented with all mitigation the first time, nor was it presented to the Court of Appeal, appellant was not bound by the law of the case. The Court of Appeal found that considering only a defendant's criminal history is "incompatible with the very nature of sentencing decision; the entire picture must remain exposed." This is another in a series of cases which established that individualized sentencing criteria must be used. Combine this case and the concepts of *People v. Bishop*, *supra*, 56 Cal.App.4th 1245, which indicate that all three strike defendants have bad records, but alone should not preclude the court from striking a strike based on the mitigating factors presented, *People v. Banks* (1997) 59 Cal.App.4th 20, and even *People v. Williams* (1998) 17 Cal.4th 148 to establish that the trial court must consider whether appellant's background, current felony

offense, character and other individualized considerations should be deemed inside or out of the "spirit" of the three strikes law.

v. *People v. Humphrey* (1997) 58 Cal.App.4th 809, Second Appellate District, Division 6, held that, the matter must be remanded for the court to state its reasons for striking the strike on the record. (See *People v. Orin* (1975) 13 Cal.3d 937, 944.) The Court of Appeal also held that, if the "sole" reason that the court was striking the prior was its remoteness, in this case 20 years old, and the defendant had led a "continuous life of crime in the interim," then remoteness, in and of itself, was an insufficient reason to strike the strike.

w. *People v. Banks* (1997) 59 Cal.App.4th 20, Second Appellate District, Division 7, held that, the matter must be remanded for the trial court for re-sentencing, with appellant being present and represented by counsel, given the fact that the court denied the second 1385 motion prior to the *Romero* decision. The Court of Appeal specifically stated that it would not presently rule on whether the trial court would have abused its discretion had it stricken a strike since the only statement made by the trial court when the request was first made, was that it had no power to strike a strike. The Court of Appeal declined to supplant its own view for the trial court's, and declined to prejudge the matter. Furthermore, the Court of Appeal laid out further parameters for the trial court to consider when it was making the determination on remand whether on eor more strikes should be dismissed. Those factors are as follows: (1) the circumstances of the instant offenses, (2) the absence of violence or threat of violence, (3) defendant's age, (4) the nature of appellant's previous offenses, (5) appellant's willingness to undergo psychotherapy and drug counseling, (6) appellant's computer skills, and (7) all other relevant considerations that would justify dismissal of one or more strikes.

x. *People v. Lee* (1997) **DEPUBLISHED** 59 Cal.App.4th 348, Second Appellate District, Division 4, held that, no hearing is required, nor is the defendant required to be present, following a "remand." This case was in direct conflict with *Rodriguez*, and therefore – depublication.

y. *People v. Garcia* (1997) 59 Cal.App.4th 834, the Second Appellate District, Division 2, held that a trial court has the discretion of imposing the strikes on one count, but striking them for subordinate or other counts so as to avoid an unreasonable sentence. The Court of Appeal concluded that the striking

of the strikes for the subordinate counts was not an unauthorized sentence and was in fact arguably permitted pursuant to *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 979.) See *People v. Garcia* (1999) 20 Cal.4th 490 which is the definitive word from the Supreme Court.

z. *People v. Superior Court* (*Pipkin*) (1997) 59 Cal.App.4th 1470, the Second Appellate District, Division 5, held that the trial court must state its reasons on the record for striking a strike within the meaning of section 1385. This is a mandatory obligation that is place don the trial court pursuant to the specific wording of the statute and unless you want to keep coming back for the court to do it right, if nothing else, aid the court by giving it the valid reasons to justify striking the strike so that it is not subject to an abuse of discretion reversal.

aa. *People v. Gillispie* (1997) 60 Cal.App.4th 429, the First Appellate District, Division 1, held that, even though the defendant does not have a right to make a motion to strike a prior, s/he has standing to appeal the court's ruling refusing to strike a prior within the meaning of section 1385. This is true even though the court is not required to state its reasons for denying to exercise its discretion under section 1385. As the Court of Appeal indicated, "[T]he fact that an action is taken on the court's own motion does not preclude the possibility of error appearing on the record." The Court of Appeal goes on to find that the trial court may justify its denial of the motion to strike the prior based on the defendant's record of conviction; however, this does not preclude the possibility that the court erred in its failure to exercise its discretion. The record should be carefully reviewed to determine if the court was biased against the defendant based on his or her race or national origin, violated the equal protections guarantees, or under the peculiar circumstances of the case it produced an arbitrary, capricious or patently absurd result. I would argue that *People v. Superior Court* (*Alvarez*), *supra*, 14 Cal.4th 968, *People v. Bishop, supra*, 56 Cal.App.4th 1245, *In re Saldana, supra,* 57 Cal.App.45h 602, and *People v. Banks, supra*, 59 Cal.App.4th 20, indicate that the defendant's record alone is not a sufficient basis for denying the defendant's motion to strike the prior conviction, and that the other factors cited in those cases should be considered by the court before denying the motion.

bb. *People v. Benevides* OVERRULED IN PEOPLE v. CARMONY (2004) 33 Cal.4h 367, formerly at: (1998) 64 Cal.App.4th 728, the Fifth Appellate District, held that appellant does not have a right to appellate review when

the trial court denies a motion to strike under section 1385. This court states that since the defendant does nt have a right to make the motion, there is no right to appeal when the court rules and denies the request to strike. The Court of Appeal states that appellate review is only available where a trial court mistakenly believes it lacks the discretion to strike priors or refuses to even consider it for arbitrary or capricious reasons such as the defendant's race, gender or religious beliefs. But this is clearly contra to *People v. Gillispie* (1997) 60 Cal.App.4th 429, *People v. Cline* (1998) 60 Cal.App.4th 1327 and *People v. Myers* (1999) 69 Cal.App.4th 305. Some courts are using *Benevides* for the proposition that a trial court need not state reasons when it chooses not to exercise its discretion. I would force the issue and have the court state the reasons; they may be subject to challenge on appeal; we certainly could not be in any worse shape if more courts decided to use this opinion for denying relief.

cc. *People v. Myers* (1999) 69 Cal.App.4th 305, Second District, Division 4 held that a defendant does have a right to appeal a trial court's denial of a *Romero* motion when he or she argues that the court abused its discretion in denying the request to strike the strike. The opinion mentions *Benevides* (OVERRULED IN *PEOPLE v. CARMONY, SUPRA*), tries to reconcile it based on the modification in footnote 6 of that opinion, but clearly indicates that this division will continue to rule on an appellant's challenges, on appeal, to the lower court's ruling on this issue. In this case, the court did not find that the trial court abused its discretion in denying the *Romero* motion, in that trial court indicated that it had considered the sentencing memorandum which was prepared by the defense, including the circumstances of the current offense, and that it did not involve violence. The Court of Appeal holds that the trial court is presumed to have considered all relevant factors in the absence of an affirmative record to the contrary. (*People v. Kelly* (1997) 52 Cal.App.4th 568, 582.) The fact that the court focused on the violence of appellant's prior, does not mean that those were the only factors considered.

dd. *People v. Superior Court* (*Roam*) (1999) 69 Cal.App.4th 1220, Sixth District, held that the prosecution could writ the trial court's decision to continue a sentencing in order to get a report back from a diversion release program, before it made the decision whether to strike a strike within the meaning of *Romero*. The Court of Appeal acknowledged that the trial court could strike one or all strikes and then sentence appellant within the bounds of *Romero* and *Williams* and their progeny. But the Court of Appeal held

that the court must bury its head in the sand and not wait for the report to come back from the OR release program. The defendant had been released on a supervised OR to Delancey Street rehabilitation program. The trial court wanted to get the report from the program before making its *Romero* decision. The Court of Appeal indicated that there were no valid procedures for waiting, and that once the probation report was back it had to sentence appellant and address any motion before the court. The defendant in this case did not help the situation by leaving Delancey, and was then arrested in Arkansas. He is presently in San Quentin prison. If the court wants to make an "informed decision" for *Romero* purposes, and it wants to state the appropriate reasons on the record for doing so, it should be able to continue sentencing to give the individualized sentence discussed in virtually all of the cases. This case should be challenged based on the aforementioned rationale.

ee. *People v. Barrera* (1999) 70 Cal.App.4th 541, Second District, Division 2, held that, based on *People v. Gillispie, supra*, 60 Cal.App.4th 429, 433-343, the Court of Appeal will hear the defendant's appeal of a denial of a *Romero* motion. (See footnote 7.) Additionally, the Court of Appeal held that, due to appellant's long criminal history, his failure on a probation numerous times, his inability to complete a drug program, and the fact that the trial court considered all of the proper individual criteria and sentencing objectives, it did not abuse its discretion in failing to strike a strike. (See *People v. Superior Court* (*Alvarez*)*, supra*, 14 Cal.4th 868, 977-978.)

ff. *People v. Barron* **DEPUBLISHED** (1999) 71 Cal.App.4th 1103, the Second Appellate District, Division 5 held that the trial court's failure to state reasons for striking a strike is not an unauthorized sentence. Therefore, the prosecution cannot raise it as part of a defendant's appeal. They must raise it either by way of their own direct appeal, or by way of writ of mandate. As Justice Turner points out, the trial court did err by failing to state the reasons for granting the section 1385. relief, or by failure to direct the clerk to place the reasons for striking the prior in the minute order; but that in and of itself is not an unauthorized or jurisdictionally void sentence. Here, the court did not do anything that it did not have the legal right to do. (See *People v. Scott* (1994) 9 Cal.4th 331, 354.) Note however, that Justice Turner does tell the prosecution how to remedy their problem. He invites them to file a writ of mandate, and so long as laches or prejudice is not controlling they can challenge the lower court's opinion for failing to state reasons. Additionally,

the opinion notes that if a proper notice of appeal had been filed, it was proper within section 1328, subdivision (a)(10).

gg. *People v. Gaston* (1999) 74 Cal.App.4th 310, the Second District Court of Appeal, Division 4, held that the lower court abused its discretion in striking a strike when it did not first consider the "spirit" of the Three Strikes law. The court held that a person's drug dependency, his diabetic condition, nor his age were mitigating factors that warrant justifying a strike. It also found that the defendant never tried to make any attempts to cure his drug dependency and that his history of criminal offenses was virtually continuous for many years. The court also found that there was no proof that as defendant gets older, his penchant for committing crimes decreases. The court does agree with the defendant that the length of the defendant's sentence plays a part in whether the defendant falls within the spirit of the Three Strikes law as well as the facts of the current crime, whether the new act was committed while on parole or shortly after getting off parole, and the violence in the defendant's background. Here, the Court of Appeal disagreed with the trial court and found, as a matter of law, that appellant fell within the parameters of the Three Strikes law. This is another case of the Court of Appeal supplanting its opinion for the trial courts.

hh. *People v. Stone* (1999) 75 Cal.App.4th 707, the Second Appellate District, Division 4, held that the trial court did not abuse its discretion in failing to strike one or more strikes, based on the following: (1) his current conviction for manufacturing of PCP, (2) he had served 4 prior prison terms, (3) he was on parole at the time of the current offense, (4) his performance on parole was unsatisfactory, (5) his convictions were numerous and of increasing severity, (6) his priors were violent and included voluntary manslaughter, kidnaping, and assault with a deadly weapon, and (7) his criminal history span from 1982 through 1997. The Court of Appeal therefore concluded that this defendant was not similar to Mr. Garcia (see *People v. Garcia* (1999) 20 Cal.4th 490), wherein the defendant's prior acts were committed in a single period of aberrant behavior and did not involve violence. You can use Mr. Stone as the Three Strikes poster boy in distinguishing your clients, much the same way we did with Mr. Askey of *People v. Askey* (1996) 49 Cal.App.4th 381, wherein Mr. Askey was classified as the budding Night Stalker due to the violence in his background.

ii. *People v. Taylor* **REVIEW GRANTED ON ANUNRELATED ISSUE (S088909)** August 23, 2000; formerly cited at: (2000) 80 Cal.App.4th 804,

the Second Appellate District, Division 7, held that the trial court abused its discretion in failing to strike a strike by considering inappropriate factors. Appellant was convicted of possession of .04 grams of cocaine and he was subject to a 25-to-life sentence. Discretion is abused when the trial court's decision is "irrational or arbitrary." (*People* v. *Myers* (1999) 69 Cal.App.4th 305, 309-310.) Discretion is also abused when the trial court's decision to strike or not to strike is based on an improper reason. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 531.) The Court of Appeal found that two factors were improperly considered: (1) the way the defendant handled his pro per defense, basically asking the jury for sympathy, and (2) calling a police officer a liar, and attempting to use his opening and closing statements as testimony rather than testifying. The trial court stated that appellant "cheated" throughout his trial, and now should not get any benefit, and refused to strike a strike, even though it cited reasons why it could have. The Court of Appeal held that appellant's amateurish defense should not have been considered in the trial court's rationale in striking a strike, and therefore sent the matter back for further consideration. Additionally, the Court of Appeal found, like the Court of appeal in *People v. Stone* (1999) 75 Cal.App.4th 707, 716-717; *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310; and *People v. Gillispie* (1997) 60 Cal.App.4th 429, 433-434, that a denial of a *Romero* motion under section 1385 is appealable. (Contra, *People v. Benevides* (OVERRULED IN *PEOPLE v. CARMONY, SUPRA,* formerly at: (1998) 64 Cal.App.4th 728, 734.)

jj. *People v. Aubrey* (1998) 65 Cal.App.4th 279, the Fourth Appellate District, Division 3, held that when the trial court makes the ruling that it will exercise its discretion under *Romero* and strike appellant's only serious felony strike within the meaning of section 667, subdivisions (b)-(i), for this "two strike" defendant, said ruling made him eligible for probation, even though he was subject to the provisions of section 667, subdivision (a) (i.e., the five year prior for the prior serious felony). This Court of Appeal declined to follow *People v. Winslow* (1995) 40 Cal.App.4th 680, which held that when a defendant is subject to the five year prior within the meaning of section 667, subdivision (a)(1), he was not eligible for probation, as the five year prior must be imposed. Here, this Court of Appeal found that *Winslow's* analysis was erroneously premised on the proposition that section 1385, subdivision (b)'s prohibition against striking a prior necessarily includes prohibition against a stay of the enhancement which would occur incident to the grant of probation. The court found, based on

People v. Vergara (1991) 230 Cal.App.3d 1564, 1568, that there is a fundamental difference between striking and staying an enhancement. As a result, the legislature by its language in other statutes knows how to prevent the granting of probation, but they did not use that or similar language when it enacted section 667, subdivision (a)(1), and as a result, probation is not precluded within the context of this case.

kk. *People v. Bradley* (1998) 64 Cal.App.4th 386, the Second Appellate District, Division 5 remanded the matter back to the Superior Court for re-sentencing as a result of the court's failure to either strike or impose a prior prison term within the meaning of section 667.5, subdivision (b). The Court of Appeal found that the failure to impose or to strike said enhancement was an unauthorized sentence. (See *People v. Irwin* (1991) 230 Cal.App.3d 180, 190; see also *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311.) The Court of Appeal rejected the prosecution's argument that the enhancement mus be imposed based on the rationale of *People v. Dotson* (1997) 16 Cal.4th 547. The Court of Appeal concluded that even though the legislature eliminated section 1170.1, subdivision (h), which permitted that court to strike the prison prior, there was no express legislative intent to prohibit the court from striking the section 667.5, subdivision (b) enhancement pursuant to section 1385, subdivision (a), and within the meaning of *People v. Superior Court* (*Romero*) (1997) 13 Cal.4th 497, and *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968. The statutory power to dismiss in furtherance of justice has always coexisted with statutes defining punishment and must be reconciled with the latter.

ll. *People v. Turner* (1998) 67 Cal.App.4th 1258, the Second District, Division 4, held wherein a defendant admits prior convictions within the meaning of section 667, subdivision (a)(1) and admits those same convictions as strikes, the court must impose the serious felony enhancement even if it strikes the strike based on the same prior offense. The Court of Appeal rejected appellant's application of *People v. Candelario* (1970) 3 Cal.3d 702 given the subsequent amendment to section 667 in 1986 and the abrogation of *People v. Fritz* (1985) 40 Cal.3d 227. However, this Court of Appeal did not analyze the holding in *People v. Aubrey* (1998) 65 Cal.App.4th 279, wherein that court acknowledged that a court cannot strike a serious felony enhancement, but it could stay such pursuant to *People v. Vergara* (1991) 230 Cal.App.3d 1564. The *Aubrey* Court indicated that the legislature clearly knows how to write legislation precluding the striking or staying of a

serious felony, that they did not do that in this case and therefore, the Court of Appeal could have stayed the prior.

mm. *People v. McGlothin* (1998) 67 Cal.App.4th 468, the First District, Division 3, held that the trial court abused its discretion within the meaning of *Romero* and *Williams, supra*, when it struck a strike and sentenced appellant as a "two-striker" within the meaning of section 667, subdivision (e)(1). Appellant and others committed a robbery on two elderly persons, one of whom was knocked to the ground and a death threat was made. Citing California Rules of Court, rule 4.421, the Court of Appeal set out various factors that it considered in finding that the trial court had abused its discretion. It then considered appellant's criminal history which dated back to a robbery when he was 15 years old. The trial court essentially erred when it stated as one of the reasons that it was striking a strike was as follows: "But essentially I'm doing it for – because I don't think the punishment in this case should warrant a life top sentence." The court did the ultimate wrong – it basically stated that it did not concur with the three strikes sentencing scheme and therefore, it was striking a strike. Do not let the trial court show its antipathy for the strikes law – this will, as it did here, lead to a reversal against your client.

nn. *People v. Thornton* (1999) 73 Cal.App.4th 42, the Fourth Appellate District, Division 2, held that the trial court abused its discretion in striking a strike, within the meaning of *People v. Williams* (1998) 17 Cal.3d 148 and *People v. McGlothin* (1998) 67 Cal.App.4th 468. Here the court struck two priors as both of them involved the theft of food from the residence of persons that he knew. True enough, the defendant's background did have some violence and he was "not a nice guy," but the Court of Appeal certainly does not say anything in this opinion, but, we do not like what the trial court did, and therefore we are going to reverse. They are merely substituting their own judgment for that of the trial courts. I would just try and distinguish this one on its facts.

oo. *People v. Ramos* (1996) 47 Cal.App.4th 432, Division 7 of the Second Appellate District, held that the trial court abused its discretion when it struck a strike merely because appellant pleaded guilty. However, the Court of Appeal did not express its opinion as to whether it would be an abuse of discretion to strike a strike based on any other justification.

pp. *People v. Murillo* (1995) 39 Cal.App.4th 1298, the Sixth Appellate District found that striking a prior is not a proper remedy for failing to give appellant his immigration consequences at the time the plea was taken. The court went on to say that to obtain relief from a plea where the court failed to give him the immigration consequences, a defendant must establish prejudice in that he did not actually know of the immigration consequences, and he would not have entered a plea had he known of said consequences. (See *People v. Cooper* (1992) 7 Cal.App.4th 593, 596-601.) Here, appellant had pled to another matter prior to the plea in the prior in questions, wherein he was given his immigration consequences. The court found that the previous advisement did not suggest that the court's failure to give it in the matter against him was prejudicial. (*People v. Aguilera* (1984) 162 Cal.App.3d 128, 132.)

qq. *People v. Brantley* (1995) 40 Cal.App.4th 1538. **DEPUBLISHED**.

rr. *People v. Strong* (2001) 87 Cal.App.4th 328, the Third Appellate District held that a court's decision to strike a strike is error, within the meaning of *Williams* and *Romero* unless the defendant establishes that appellant is outside the spirit and intent of the Three-Strikes law. In this matter the defendant was convicted on selling bunk (e.g., trying to pawn off something that was cocaine, but was not). The defendant had a prior strike, in 1996, for assault with a deadly weapon, for which he had served a 2 year sentence. The trial court struck the strike, over the objection of the prosecution. The court stated its multiple reasons for striking the strike on the record, and the people appealed. The trial court stated that it was striking the strikes because the defendant had never used a weapon, most of his crimes were drug related, the defendant was statistically of the age that he would not pose a risk to society (i.e., 41), and his entire long record was devoid of violence. The Court of Appeal reversed the trial court finding that along criminal record is a valid reason why the defendant comes within the spirit of the Three Strikes law, and therefore, the trial court abused its discretion in striking the strike. Fortunately, in districts where the DA has a policy like they do in Los Angeles, San Francisco or Alameda, this ruling will not have much impact, but be careful in Appellate Districts, like the Third, where this case could raise its ugly head.

ss. *People v. Cluff* (2001) 87 Cal.App.4th 991, the First Appellate District, Division 3, held that the trial court may have abused its discretion in failing to consider proper factors in its decision not to strike a strike for failure to

register. The defendant merely failed to re-register on a yearly basis. The Court of Appeal accepted the trail court's finding that it was an intentional act. However, given the very technical, non-violent nature of the current offense, the fact that the defendant had been working, the defendant's age, that being 48, the fact that the police knew where the defendant was an had no trouble finding him, there was no evidence that the defendant tried to obfuscate his true residence. The court must look to individual characteristics in making its *Romero* determinations. The Court of Appeal found, on this record that there are strong reasons why the defendant should be treated as though he fell outside of the Three-Strikes law. It also noted that California Rules of Court, rule 4.423, subdivisions (a)(1), (a)(6), (a)(7), and (b)(6) come into play and should be considered. As a result the matter was remanded for further consideration of striking the strike.

tt. *People v. Zichwic* (2001) 94 Cal.App.4th 944, the Sixth Appellate District held that the trial court did not abuse its discretion in failing to strike five prior strikes in order to reduce the matter to a two-strike sentence. The majority of the Court of Appeal held that since the court cited to *Williams* at different times in the hearing, it was aware of the proper standard used in determining this issue. They also found that he Court of Appeal cannot substitute its judgment of the relative weights of aggravation and mitigating factors properly considered by the trial court. (See *People v. Hetherington* (1984) 154 Cal.App.3d 1132, 1140-1141; *People v. Calderon* (1993) 20 Cal.App.4th 82, 87.) However, the dissent indicated that the trial court felt that it was constrained by *Williams* from striking the strikes, to which the dissent indicated that it was not, and would have remanded the matter back to the Superior Court for another hearing on the matter.

uu. *People v. Morales* (2003) 106 Cal.App.4th 445, the Second Appellate District, Division 5, held that the jury's finding that the defendant had previously been convicted of a serious or violent felony required doubling of his sentence on all counts under Three Strikes Law (see *People v. Nguyen* (1999) 21 Cal.4th 197, 203-204), even though jury finding was made only as to one count, as this falls into the category of a status enhancement, and not one that is offense specific. However, the Court of Appeal held that the matter must be remanded to the Superior Court, for it to have an opportunity to exercise its power to strike the priors as to the subordinate or other counts within the meaning of *People v. Garcia* (1999) 20 Cal.4th 490, 496-503; see also *People v. Carrillo* (2001) 87 Cal.App.4th 1416, 1419, fn. 3.

vv. *People v. Griggs* (2003) 110 Cal.App.4th 1137, the Fifth Appellate District held that the trial court did not abuse its discretion (see *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434; in failing to strike a strike when taking into account his entire prior record and current offenses.

ww. *People v. Burgos* (2004) 117 Cal.App.4th 1209, the Second Appellate District, Division 2, held that the lower court abused its discretion in denying the defendant's motion to strike one of two prior felony convictions under section 1385 where: (1) both arose from the same act, (2) an express statutory preclusion barred imposition of sentences for both, and (3) the defendant's other prior criminal history consisted of several misdemeanors and a felony conviction for sale of a substance in lieu of a controlled substance. Appellant's current offense was an assault and robbery in which defendant injured and took the shoes of another detainee in his holding cell, and as a second-strike offender defendant would still face a term as long as 20 years. The prior offenses arose from one act, wherein appellant was convicted of attempted carjacking and attempted robbery, and section 654 was applied at the time of sentence. Here, the Court of Appeal analyzes *People v. Benson* (1998) 18 Cal.4th 24 and *People v. Sanchez* (2001) 24 Cal.4th 983, 993, wherein the High Court indicated that there are certain circumstances, wherein the prior convictions are so closely related, that it would be an abuse of discretion not to strike a strike– that is the rationale that this Court of Appeal applied in this case.

xx. *People v. Philpot* (2004) 122 Cal.App.4th 893, the Fourth Appellate District, Division 2 held that where the defendant took an automobile with an attached trailer, he could be convicted of two counts within the meaning of section 10851. The Court of Appeal also found that the denial of the motion to strike "strike" priors was not an abuse of discretion where defendant had a 20-year history of committing increasingly serious crimes, including two probation violations, and committed the instant offenses shortly after his release from prison. On the other hand, the defendant had not committed a serious or violent felony for many years as they were quite remote, they all came out of one case, and he had wanted to plead at an early stage for less than 25 to life. Nonetheless the Court of Appeal found that the lower court did not abuse its discretion within the meaning of *People v. Williams* (1998) 17 Cal.4th 148, 161, or the standard set forth in *People v. Carmony* (2004) 33 Cal.4th 367, 376.

yy. *People v. Vera* (2004) 122 Cal.App.4th 970, the Sixth District Appellate District held that the defendant is estopped from contending that the trial court lacked authority under Three Strikes Law to strike the serious felony enhancements within the meaning of section 667, subdivision (a)(1), where striking the enhancements was agreed to as part of a plea bargain. As a part of the plea, the court could have stricken a strike, and imposed the two 5-year enhancements, or stricken the 5-year enhancement that appellant already admitted, or other options for imposing a determinate term instead of the life term. The Court of Appeal found that a defendant who agreed to and receives a benefit from a plea should not be allowed to improve on the bargain (see *People v. Cepada* (1996) 49 Cal.App.4th 1235, 1239), where even if the court exceeds its jurisdiction, he cannot complain of getting what he bargained for so long as the court had fundamental jurisdiction.

zz. *People v. Murphy* (2004) 124 Cal.App.4th 859, the Third Appellate District held that there is no constitutional right to have a jury, rather than a judge, within the meaning of *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531] or *Apprendi*, decide whether to dismiss "strike" allegations in the interests of justice pursuant to *Romero*. The Court of Appeal likened this issue to the decision in *People v. Garcia* (2004) 121 Cal.App.4th 271, wherein that Court of Appeal held that there is no federal or state constitutional right or state statutory right to a jury trial on the issue of whether "another person, other than an accomplice, was present in the residence" during the commission of a first degree burglary, which makes the offense a "violent felony" (see § 667.5, subd. (c)(21)) to limit conduct credits to 15% within the meaning of section 2933.1 even after *Apprendi* as the limitation on credits does not add to the defendant's maximum confinement time for the first degree burglary.

aaa. *People v. Poslof* (2005) 126 Cal.App.4th 92, the Fourth Appellate District, Division 2, held that the trial court's refusal to strike defendant's prior serious felony convictions in the interest of justice was not an abuse of discretion given the nature and circumstances of current offense, 30-year record of criminal behavior that included multiple incarcerations, and negative particulars of defendant's background, character, and prospects. (See *People v. Williams* (1998) 17 Cal.4th 148, 161.) The Court of Appeal indicated that the defendant's reliance on *People v. Cluff* (2001) 87 Cal.App.4th 991 was misplaced and factually distinguishable.

bbb. *People v. Pena* (2005) 128 Cal.App.4th 1219, the Sixth Appellate District held that the lower court did not abuse its discretion in denying his *Romero* motion. Appellant argued that his strike priors were remote (13 years earlier), and arose from one incident (*People v. Benson* (1998) 18 Cal.4th 24, 36, fn. 8 [it may be error not to strike a strike if the two strikes arose from a single event].) Here, the two strikes arose from the death of two persons in a single vehicle accident, wherein he was convicted of two counts of vehicular manslaughter, and the Court of Appeal found that that was not the type of event which the Supreme Court was referring. Furthermore, appellant's record consisted of nine felonies, and 11 misdemeanors, and that he had spent most of his life in prison, frequently returning for parole violations. Therefore, based on *People v. Barrerra* (1999) 70 Cal.App.4th 541, 555, *People v. Strong* (2001) 87 Cal.App.4th 328, and *People v. Gaston* (1999) 74 Cal.App.4th 310, the lower court did not abuse its discretion in denying the *Romero* motion.

ccc. *People v. Flores* (2005) 129 Cal.App.4th 174, the Fourth Appellate District, Division 3 held that under section 1385, the court has the power to dismiss or strike an enhancement. The failure to impose or strike the enhancement is a legally unauthorized sentence subject to correction for the first time on appeal. (*People v. Bradley* (1998) 64 Cl.App.4th 386, 391.) Striking of an enhancement is tantamount to a dismissal, and implies that it must be dismissed in the interest of justice. (See *People v. Carrillo* (2001) 87 Cal.App.4th 1416, 1421.)

ddd. *People v. Dial* (2005) 130 Cal.App.4th 657, the First Appellate District, Division 2 held that under the Three Strikes Law, section 667, subdivision (c), indicates, unless the court strikes a prior, essentially pursuant to *Romero*, then the strike sentence must be imposed. The Court of Appeal failed to rule on the issue of whether the court could have "stayed" rather than strike the prior, pursuant to *People v. Aubrey* (1998) 65 Cal.App.4th 279, 283-285), since the issue was first raised at the time of the oral argument, and the parties had not had a chance to brief the issue. (See *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356-357, fn. 6.) Additionally, it is clear that the defendant cannot be placed on probation, and be sentenced to state prison at the same time. (See *People v. Marks* (1927) 83 Cal.App. 370, 376-377.)

eee. *People v. Thimmes* (2006) 138 Cal.App.4th 1207, the Sixth Appellate District held that the court's denial of defendant's *Romero* motion, was error where it was based in part on the erroneous presumption that the defendant

was warned at time of the prior conviction, for a violation of section 422, criminal threats, in 1999, that it would constitute a "strike" if he were convicted of a future offense, when in fact the prior would not have been a strike under the law in effect at the time of the conviction. A violation of section 422 did not become a strike until 2000. As a result of counsel's failure to object, or correct the court, appellant received ineffective assistance. The matter was reversed and sent back for a new *Romero* hearing.

fff. *People v. Jenkins* (2006) 143 Cal.App.4th 369, the Third Appellate District held that the double jeopardy clauses of both the state and federal constitutions do not prohibit multiple convictions for the offense of aggravated assault resulting in great bodily injury (§ 245, subd. (a)(1)), coupled with great bodily injury enhancements within the meaning of section 12022.7, subdivision (a), and battery with serious bodily injury (§ 243, subd. (d)). (See *In re Jose H.* (2000) 77 Cal.App.4th 1090.) The Court of Appeal also indicated that the potential for increased future punishment, based on the multiple strikes for the multiple convictions for the same conduct, is limited by the Supreme Court's opinions in *People v. Pearson* (1986) 42 Cal.3d 351, and *People v. Benson* (1998) 18 Cal.4th 24; accord *People v. Sanchez* (2001) 24 Cal.4th 983, 993 [it may be an abuse of discretion to impose sentence for the conduct that is the same for both convictions.])

ggg. *People v. Shadden* **REVIEW GRANTED AND DISMISSED IN LIGHT OF BLACK**: formerly at: (2007) 150 Cal.App.4th 137, the Fifth Appellate District held that the imposition of upper term based on facts found by judge rather than jury, following *Blakley* and *Cunningham*, was not error where the court had exercised its discretion under *Romero*, to strike a strike, and not impose a 25 to life term under the Three Strikes Law, which would have been a longer term of imprisonment than the imposition of the upper term.

hhh. *People v. Lee* (2008) 161 Cal.App.4th 124, the Fifth Appellate District held that the court did not abuse its discretion by denying defendant's motion to strike his prior felony conviction pursuant to section 1385 and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 and *People v. Carmony* (2004) 33 Cal.4th 367, 375 for sentencing purposes, where the denial was based on the circumstances of the prior and instant offenses and the defendant presented no evidence as to his "background, character, and prospects" within the meaning of *People v. Williams* (1998) 17 Cal.4th 148, 161, and never asked the court to consider such evidence. The Court of

Appeal indicated that the lower court does not have an independent obligation to summon evidence of a defendant's background, character, and prospects before ruling on a motion to strike prior; the defendant must bring forth such evidence him/herself.

iii. *People v. Carrasco* (2008) 163 Cal.App.4th 978, the Second Appellate District, Division 8 held that the court did not abuse its discretion in denying defendant's *Romero* motion to dismiss his prior conviction for assault with a deadly weapon upon a peach officer since the court expressly considered the defendant's background and character before ruling. (See *People v. Williams* (1998) 17 Cal.4th 148, 161.) The Court of Appeal remanded the matter for resentencing as the court erred where it did not consider whether two counts of resisting officers arose from the same occasion and ruled that it was required to impose consecutive sentences rather than exercising discretion to impose concurrent sentences. (See *People v. Lawrence* (2000) 24 Cal.4th 219, 233.)

jjj. *People v. Wyatt* (2008) 165 Cal.App.4th 1592, the Third Appellate District held that the Court of Appeal found that the trial court did not abuse its discretion in failing to strike a strike pursuant to *People v. Carmony* (2004) 33 Cal.4th 367, 376. Here, appellant had a long record beginning in juvenile court where he was ultimately sent to CYA (now DJJ), and in his adult history there was a long list of misdemeanors and felonies, culminating one year earlier in a sentence of 26 years for crimes relating to firearms, and that the two strike convictions, arising out of the same incident (robbery and burglary), did not mandate the dismissal of one or both strikes. (*People v. Benson* (1998) 18 Cal.4th 24, 36.)

kkk. *People v. Uecker* (2009) 172 Cal.App.4th 583, the Third Appellate District held that pursuant to *People v. Gillispie* (1997) 60 Cal.App,4th 429, 434-435, the trial court did not abuse its discretion when it denied appellant's motion to strike a strike under *Romero*. This was true given the fact that several serious and violent felonies and a prior kidnap which had resulted in a 29-year prison sentence, and he was on parole when these new offenses occurred.

lll. *People v. Leavel* (2012) 203 Cal.App.823, the Fourth Appellate District, Division 1 held that, within the meaning of *People v. Carmony* (2004) 33 Cal.4th 367, 377, that the trial court did not abuse its discretion in failing to strike a strike that was quite remote. The defendant did not show that the

court's ruling on the *Romero* motion was irrational or arbitrary, nor that it did not understand its discretion to strike the strike. An appellate court is not authorized in substituting its own judgement for that of the trial court. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 978).

mmm. *People v. Finney* (2012) 204 Cal.App.4th 1034, the Second Appellate District, Division 6 held that the trial court did not err in distinguishing *People v. Benson* (1998) 18 Cal.4th 24, 35, fn. 8, and *People v. Burgos* (2004) 117 Cal.App.4th 1209, and did not strike a strike from the defendant's prior convictions and found him to be a "three striker" and sentenced him to a life term. The defendant's prior involved an attack on the victim with a skateboard, fled in the erroneous belief victim was dead, and then returned 30 minutes later, where he saw the victim was alive and kicked him in the head three times, and as a result was convicted for mayhem and assault constituted two separate strikes. Additionally, the trial court did not abuse its discretion (see *People v. Superior Court* (*Alvarez*) 14 Cal.4th 968, 977-978), in denying his *Romero* motion to strike a strike, where defendant had a history of violent crime and failed attempts at parole and probation, and therefore fell inside and not outside of the Three Strikes Law. (*People v. Carmony* (2004) 33 Cal.4th 367, 377-378; see also *People v. Williams* (1998) 17 Cal.4th 148, 161.)

nnn. *People v. Solis* REVIEW GRANTED; FORMERLY AT: (2014) 224 Cal.App.4th 549, the Second Appellate District, Division 8 held that the trial court erred in entering judgment of conviction upon a jury verdict that acquitted defendant of the charge of attempted premeditated murder but convicted him of two uncharged lesser related offenses, mayhem and assault with a deadly weapon. A defendant may not be convicted of two separate, uncharged, lesser related offenses of a single charged greater offense. (See *People v. Navarro* (2007) 40 Cal.4th 668, 680-681.) Where the defendant was improperly convicted of two offenses was not entitled to resentencing where the trial court had already stayed imposition of sentence for the crime carrying the lesser penalty, but the conviction on that count had to be stricken. The trial court did not abuse its discretion (see *People v. Williams* (1998) 17 Cal.4th 148, 161; see also *People v. Carmony* (2004) 33 Cal.4th 367, 376-378) when it failed to dismiss "strikes" suffered roughly 30 years before the current offense where the current offense was particularly violent,

the defendant had been previously sentenced to four prison terms, and the probation report identified other criminal behavior by the defendant.

ooo. *People v. Leonard* (2014) 228 Cal.App.4th 465, the Fourth Appellate District, Division 1 held that the trial court did not abuse its discretion in denying the defendant's Romero motion where the court even if the prior was remote, 2001, and the prior is qualitatively different from the current offenses. Leonard also argued that the prior should have been stricken due to his age, 46 and his physical disability. The defendant had priors going back to 1991, and had a conviction for spousal abuse. Based on *People v. Carmony* (2004) 33 Cal.4th 367, 375. Additionally, even if the evidence failed to support the two factors the defendant could not show prejudicial error since these factors were not critical to the court's decision because other considerations, sufficient in themselves, supported the court's ruling. (See *People v. Cluff* (2001) 87 Cal.App.4th 991, 998; see also *People v. Carmony, supra*, 33 Cal.4th at p. 378.)

ppp. *People v. Rusconi* (2015) 236 Cal.App.4th 273, the Fourth Appellate District, Division 1 held that, where the defendant was convicted in 1986 of two counts of vehicular manslaughter, the two convictions arose out of an incident in which the defendant was driving under the influence, and two people were killed, and then in 2005, she was convicted of driving under the influence under Vehicle Code section 23152, subdivisions (a) and (b), and the court sentenced her to 25-L, the court properly denied a petition under Penal Code section 1170.126, since her two prior felony convictions were for manslaughter. Now the defendant argues that *People v. Vargas* (2014) 59 Cal.4th 635 should strike one of the manslaughter convictions. A defendant's multiple felony convictions for injuring "multiple victims" by a single violent act are separate offenses, and strikes; as a result the court's refusal to modify the defendant's life sentence was not error.

qqq. *People v. Jones* (2016) __ Cal.App.4th __, reported on March 31, 2016, in 2016 Los Angeles Daily Journal 3113, the Third Appellate District held that as of 2015, section 1385 does not require the trial court to provide written reasons in the minutes for dismissing a strike under the Three Strikes Law. The court only has to make an oral pronouncement why the strike is being struck, unless either party requests that the reason be in the minutes. If the judgment is not yet final on appeal, the appellate court has the duty to apply the law as it exists when the appellate court renders its decision. (*People v. Thompson* (1992) 4 Cal.App.4th 481, 489.)

11. D.A.'s POWER TO STRIKE PRIOR AFTER THE ALLEGATION IS FOUND TRUE:

a. *People v. McDaniel* (1996) (**DEPUBLISHED**) 44 Cal.App.4th 1590. Relying on *McKee, supra*, found that the prosecution does not have the power to strike a prior once it is proven, pursuant to section 667, subdivision (f)(2). given the fact the prior is no longer an "allegation" once it has been proven or admitted by appellant, it cannot b e stricken. Therefore, if you are in the trial court, work this out prior to the lpea or trial on the prior(s).

12. VAGUENESS:

a. *People v. Sipe* (1995) 36 Cal.App.4th 468. Section 667, subdivisions (b) to (i) is not void for vagueness as applied to appellant. Court rejected the shotgun approach to the vagueness challenge (see *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1201) so long as the First Amendment or other constitutional rights of appellant are not implicated. Appellant must show how vague or ambiguous portions of statute prejudiced his matter; therefore, if appellant can make such a showing, a vagueness challenge may be successfully argued.

b. *People v. Hill* (1995) 37 Cal.App.4th 220. The Third District follows its opinon in *Sipe*, *supra*, to the **vagueness** challenge.

c. *People v. Hamilton* (1995) 40 Cal.App.4th 1615, Second District, Division 7, concurred in the rationale of *Sipe*, *supra*.

d. *People v. Stofle* (1996) 45 Cal.App.4th 417, held that as applied to indeterminate terms, the credits provision of subdivision (c)(5) is not vague as applied to appellant. The court notes that the Department of Corrections will ultimately award the appropriate amount of credits, of up to 20%, at the time a parole date is set for appellant. However, the case can support the proposition that the credits are not given until appellant serves at a minimum of 25 years on his life sentence, but that a defendant is entitled to them.

e. *People v. Gray* (1998) 66 Cal.App.4th 973, the First District, Division 5, held that a claim of vagueness is waived, even though raised in appellant's opening briefing, if appellant fails to provide any substantial argument or citation to authority to support these contentions. (See *People v. Hardy* (1992) 2 Cal.4th 86, 150.)

13. JUDICIAL NOTICE:

a. *People v. Hill* (1995) 37 Cal.App.4th 220. The Third District, at the defendant's request, took **Judicial Notice** of "the report of the Senate Committee on the Judiciary," but rejected the request as it pertains to newspaper articles, and a preliminary assessment of the "three-strikes" law, finding the newspaper articles not judicially noticeable (see *Mangini v. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1065), and the legislative analyst's assessment, irrelevant. They also rejected the prosecution's request for judicial notice as it pertains to the ballot pamphlet, even though ballot arguments have been considered pertaining to voter's intent (*Hill v. National Collegiate Athletic Assn*. (1994) 7 Cal.4th 1, 16), here as to the legislative enactment, the voter's intent was not an issue.

14. PLEA BARGAIN ISSUES (SEE ALSO 1385 ISSUES):

a. *People v. Gore* (1995) 37 Cal.App.4th 1009. (TRANSFERRED BACK TO THE COURT OF APPEAL AND NOT RECERTIFIED FOR PUBLICATION.) [It is unclear whether the court granted review on any issue other than the court's power to strike a prior.] Prohibits the use of **plea bargaining** to strike a serious felony prior. Here, the trial court agreed to strike a robbery prior, leaving appellant with one remaining serious felony, if appellant would plead guilty to the possession of .18 grams of a controlled substance, which he did. This is probably a violation of the prohibition against plea bargaining; but if the court had merely agreed to take the plea and indicated that it would strike a prior pursuant to section 1385, then it is arguably an "**indicated sentence**" that is not prohibited. Therefore, watch for the distinction between "plea bargaining" and "indicated sentences." (See *People v. Superior Court* (*Ramos*) (1991) 235 Cal.App.3d 1261; *People v. Vergara* (1991) 230 Cal.App.3d 1564, 1587; *People v. Arauz* (1992) 5 Cal.App.4th 663; see also *People v.Orin* (1975) 13 Cal.3d 937, 943.)

b. *People v. Williams* (1995) 40 Cal.App.4th 429, **DEPUBLISHED**. OBVIOUSLY THE SUPREME COURT AGREED WITH ME AND DEPUBLISHED THIS OPINION THAT TRIED TO DISTINGUISH *RAMOS.* The Fourth District Division 1, found that the "sentence bargain" was a violation of the "plea bargain" prohibition of section 667, subdivision (g). This falls within the dictates of *People v. Superior Court v.* (*Ramos*) (1991) 235 Cal.App.3d 1261. Appellant pleaded straight up to all of the

allegations and then, at the time of sentence, the court struck the 2-strike allegation.

c. *People v. Torres* **DEPUBLISHED** (1996) 45 Cal.App.4th 640, held that the court violated subdivision (g),prohibiting plea bargains, when it indicated that it would treat a plea to Health and Safety Code section 11377, subdivision (a) (e.g., a wobbler), as a misdemeanor, if appellant pled guilty to the charges. Appellant admitted the possession offense, but refused to admit the two serious felony priors. The court did not strike the priors, nor did the prosecution move to dismiss them in the interest of justice; they just remained unresolved as the court took the plea on the underlying offense.

The Court of Appeal found that the trial court had the right to reduce the matter to a misdemeanor, but that since pursuant to sections 1025 and 1158, the admission to the priors could be used in subsequent proceedings (see *People v. Sanchez* (1991) 230 Cal.App.3d 768, 773), the court's failure to permit the prosecution to proceed on the prior allegations, without requiring the defendant to admit those allegations, conferred a "reciprocal benefit" on the defendant to admit allegations, conferred a "reciprocal benefit" on the defendant in return for his plea, thereby making it an improper plea bargain.

The Court of Appeal did indicate that on remand, that the trial court could impose the misdemeanor sentence even if appellant chose to admit the priors or if the prosecution proved them in a separate hearing. The court also noted that the prosecution had the right to move to dismiss the priors pursuant to section 1385, subdivision (a).

d. *People v. Couch* (1996) 48 Cal.App.4th 1053, the Sixth Appellate District, held that if a defendant agrees to a specified period of time pursuant to a plea bargain, he cannot later challenge the sentence, albeit the strike portions of the sentence, given the fact that he received a benefit from the bargain. The only exception to this rule would be if appellant were to challenge the court's fundamental jurisdiction, which he was not challenging in this case. The court even reaches this conclusion without citing *People v. Panizzon* (1996) 13 Cal.4th 68.

e. *People v. Cole* (2001) 88 Cal.App.4th 850, the Second Appellate District, Dvision 5, held that a defendant who entered a negotiated plea for a maximum of 25 to life on a Three Strikes case, wherein the court agreed that it would consider striking strikes, needed a certificate of probable cause to raise the issue that he was "manifestly influenced" by the promise to

consider striking one or more strikes, and (2) that his sentence violated cruel and unusual punishment. The court did find that the defendant could raise the issue of whether the court erred in failing to strike a strike, without the issuance of a certificate of probable cause as it did not attack the validity of the plea. Finally, the court found that based on California Rules of Court 4.412(b), the defendant was precluded from challenging whether a concurrent count should have been sentenced pursuant to section 654.

f. *People v. Jones* (2009) 172 Cal.App.4th 815, the Fourth Appellate District, Division 2 held that unless there is an objection at or prior to sentencing, the defendant waived his right to be specifically advised of the direct consequences of admitting a prior conviction, including a strike. (See *People v. Wrice* (1995) 38 Cal.App.4th 767, 770-771.)

15. CRUEL AND/OR UNUSUAL ARGUMENTS:

a. *People v. Gore* formerly at (1995) 37 Cal.App.4th 1009. **THE MATTER WAS TRANSFERRED BACK TO THE COURT OF APPEAL AND NOT CERTIFIED FOR PUBLICATION THEREAFTER**. Second District Division 7, rejected the CRUEL OR UNUSUAL ARGUMENT. It references *People v. Karsai* (1982) 131 Cal.App.3d 224 and *Rummel v. Estelle* (1980) 445 U.S. 263, 284-285, which discuss the proper punishment for **recidivists**. A close reading of *Estelle* leads into the argument that punishment for recidivist conduct should only occur after appellant has been sent to state prison multiple times for separate offenses, not merely sent to the joint one time for separate offenses.

b. *People v. Campos* formerly at (1995) 38 Cal.App.4th 1669. **THE MATTER WAS TRANSFERRED BACK TO THE COURT OF APPEAL AND NOT CERTIFIED FOR PUBLICATION THEREAFTER**. Justice Wood rejected the CRUEL AND/OR UNUSUAL argument for Mr. Campos who was found to have taken a container of Clearasil and hair rollers without paying for them. **Justice Johnson notes in his dissent, that there was a violation of the California Constitution, and that the court has the power, and the duty, to refrain from imposing an unconstitutional sentence**. (See footnote 17.) Justice Johnson reaffirms the concept that it is the maximum sentence that must be reviewed for its constitutionality, citing *Lynch*. The also notes that a defendant's past offenses are certainly a relevant consideration in determining whether there is constitutional error, but finds that they do not result in a pro tanto repeal of the cruel or unusual punishment clause. Finally, of significance, Justice

Johnson notes that some 40 states have something akin to a three-strikes law, but that in only two other states, Washington and West Virginia, can the third strike be any felony. Additionally, he holds that had *Rummel v. Estelle* (1980) 445 U.S. 263, been subject to the *Lynch/Dillon* proportionality review, it too, along with the sentence in *Solem v. Helm*, would have been found unconstitutional. Given the fact that *Lynch* was not subject to proportionality review, Justice Johnson finds it easily distinguishable. Use the cases cited by Justice Johnson in his dissent now that the matter has been depublished.

c. *People v. Patton* formerly at (1995) 40 Cal.App.4th 413. **THE MATTER WAS TRANSFERRED BACK TO THE COURT OF APPEAL AND NOT CERTIFIED FOR PUBLICATION THEREAFTER**. The Fourth District, Division 1, followed *Romero*. The trial court had struck one of the priors based on the fact that it would be cruel and unusual punishment to sentence appellant, who was 23 years of age, with no violence in his background (e.g., 2 prior residential burglaries) to a three strike sentence. The prosecution objected, and the appellate court found that the trial court issued an **unauthorized sentence**, thereby imposing a sentence of 25 years to life, rather than the 2-strike sentence which had been imposed by the trial court. (See *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1197.) The court rejected the argument based on both the federal and California Constitutions.

d. *People v. Williams* (1995) 40 Cal.App.4th 446, Division 7 of the Second District Court of Appeal, found that appellant's sentence for life without the possibility of parole was not cruel and/or unusual punishment for the intentional killing of two persons. The court also found that the three strikes provisions did not eliminate the special circumstance allegations.

e. *People v. Kinsey* (1995) 40 Cal.App.4th 1627, the Second District, Division 7, in another Fred Woods opinion, concurs with the holding in *Campos* rejecting the argument.

f. *People v. Cooper* (1996) 43 Cal.App.4th 815, the Fifth District, found that the court's sentence of 25 to life was not violative of the prohibition against cruel and unusual punishment given defendant's lengthy criminal history and the rationale expressed in *Cartwright*, *Ingram*, and *Patton*.

g. *People v. Rodriguez* (1996) 44 Cal.App.4th 583. **DEPUBLISHED**.

h. *People v. McDaniel* (1996) 44 Cal.App.4th 1590. **DEPUBLISHED**.

i. *People Ayon* (1996) 46 Cal.App.4th 385, the Fourth District, Division 1, rules, consistent with the above cited cases, that the statute is does not violate the prohibition against cruel and unusual punishment this 225 year sentence based on a conviction for seven counts of robbery, two counts of attempted robbery and two counts of possession of a firearm by an ex-felon, plus use enhancements.

j. *People v. Kelley* (1997) 52 Cal.App.4th 508, Fourth Appellate District, Division 3, ruled that appellant's nine year sentence for stalking, did not violate either the state or federal prohibitions against cruel and/or unusual punishment. Additionally, the court noted that since the issue was not raised in the trial court, it is waived. (See *People v. DeJesus* (1995) 38 Cal.Appl.4th 1, 27.) I question whether a constitutional issue of this nature can be waived, but that is for another time, since they determined that even if it had, there would be no violation.

k. *People v. Lopez* **DEPUBLISHED; REVIEW DISMISSED**; formerly at (1997) 60 Cal.App.4th 275, the Sixth Appellate district held that two separate drug transactions, by the same defendant, on two separate days, are not within the meaning of the same set of operative facts, pursuant to section 667, subdivision (c)(6). The Court of Appeal also found that 2 consecutive terms of 25 to life for these two drug sales, when the defendant had three prior serious felony convictions, did not violate the prohibition against cruel and unusual punishment.

l. *People v. Metters* (1998) 61 Cal.App.4th 1489, the First Appellate District, Division 2, held that a 35 to life sentence for a defendant convicted of robbery and who had priors since the age of 17 for various drug offenses, was not "grossly disproportionate" to the crime, given appellant's recidivist status. Additionally, the sentence did not "shock the conscience or violate notions of human dignity" and therefore did not constitute a cruel and unusual sentence. (See *People v. Ayon* (1996) 46 Cal.App.4th 385, 399-400.)

m. *People v. Deloza* (1998) 18 Cal.4th 585. Justice Mosk wrote a very interesting concurring opinion indicating that a sentence of 111 years to life would constitute cruel and unusual punishment under either the United States or California constitutions. That is an opinion that we can now use to bolster our cruel and/or unusual argument claims. We should also start

thinking about having the trial attorneys, in cases wherein the trial courts indicated that they must impose consecutive sentences, or wherein they did not know that they had the discretion to impose concurrent sentences, to file writs in the Superior Court to help remedy those wrongs.

n. *United States* v. *Bajakajian* (1998) 524 U.S. 321 [141 L.Ed.2d 314, 118 S.Ct. 2028]. In ruling on an excessive fines argument, the Court also commented on whether a forfeiture was grossly disproportionate to the gravity of the crime the defendant committed. The court found, that various considerations counseled against using strict proportionality, but militated toward the adoption of the standard gross proportionality tst articulation in our Cruel and Unusual Punishment Clause precedents. (See *Solem v. Helm* (1983) 463 U.S. 277, 288 [77 L.Ed.2d 63, 103 S.Ct. 3001]; *Rummel v. Estelle* (1980) 445 U.S. 263, 271.) The court also indicated in reviewing the matter de novo, the court must compare the amount of the forfeiture to the gravity of the defendant's offense. If the amount of forfeiture is grossly disproportionate to the gravity of the offense, it is unconstitutional. Taking it out of the forfeiture context, if the sentence imposed is grossly disproportionate to the current conviction(s), then it unconstitutional. Therefore, it is apparent that the High Court has just reaffirmed *Solem*, *supra*, 463 U.S. 277, and we should start incorporating this argument into our Cruel and Unusual Punishment arguments.

o. *People v. Gray* (1998) 66 Cal.app.4th 973, the First District, Division 5, held that there was no cruel and unusual violation when the defendant was convicted of attempted carjacking and attempted kidnaping, wherein the court imposed a 25 years to life three strike sentence. The usual arguments were presented by both sides.

p. *Riggs v. California* (1999) 525 U.S. 1114 [142 L.Ed.2d 789, 119 S.Ct. 840], the High Court denied certiorari on this cruel and unusual claim, but 4 justices penned some interesting language that can possibly be used in arguments in that the sentence for stealing a bottle of vitamins was "grossly disproportionate." Justice Stevens wrote: "This *pro se* petition for certiorari raises a serious question concerning the application of California's 'three strikes' law ... to petty offenses." Justice Stevens continued, "This question is obviously substantial, particularly since California appears to be the only state in which a misdemeanor could receive such a severe sentence. (*Citation.*) While this Court has traditionally accorded to state legislatures considerable (but not unlimited) deference to determine the length of sentences 'for crimes conceitedly classified and classifiable as felonies

(*citation*), petty theft does not appear to fall into that category. Furthermore petty theft has many characteristics in common with the crime for which we invalidated a life sentence in *Solem*, uttering a 'no account' check for $100..." However, Justice Stevens indicated that he did not vote to grant the writ since neither a lower federal court, nor the California Supreme Court has yet to review the issue. Conceding that recidivists can be punished more severely, as a stiffened penalty for the current offense and not a penalty for the earlier crimes (see *Witte v. United States* (1995) 515 U.S. 389, 400 [131 L.Ed.2d 351, 115 S.Ct. 2199]), questions are raised as to how the defendant's strikes, eight in all, affects the constitutionality of his sentence, "especially when the state 'double counts' the defendant's recidivism in the court of imposing that punishment. (*Citations.*)" Use some of this language in your AOBs and petitions for review.

q. *People v. Barrera* (1999) 70 Cal.App.4tyh 541, Second District, Division 2, held that appellant's sentence of 25 to life, based on a forged check offense, was not cruel and/or unusual, even though the strike offenses occurred 14 years earlier, and had been committed at the same time. It found that the defendant's long record, his failure to stay free of crime since the time of the prior strikes, was adequate reason to justify denial of the cruel and unusual argument claim.

r. *People v. Acosta* (1999) 71 Cal.App.4th 1206, Sixth Appellate District held that the defendant who was convicted of threatening to commit a crime resulting in great bodily injury or death, and had suffered prior convictions to qualify for a three strike sentence, plus twice he had been convicted of assault with a deadly weapon and 13 misdemeanors, one for domestic violence, did not violate the cruel and unusual clause of either the state or federal constitution.

s. *People v. Martinez* (1999) 71 Cal.App.4th 1502, Sixth Appellate District held that a defendant who was convicted of Health and Safety Code section 11377, subdivision (a), drunk driving and attempting by threat to deter a police officer from carrying out his duty, who had 3 strike priors, (1) assault with a deadly weapon, (2) robbery, and (3) attempted robbery, 50 misdemeanor convictions, mostly for alcohol and drug related offenses, and some for assaultive behavior, could be sentenced to 25 to life without violating the cruel and unusual clause of either the state or federal constitutions. The court held that appellant's social history, which included both parents being alcoholics, his illiteracy, and current attempts to "clean up," were not enough to overcome his long history of assaultive behavior

and constant irritant for society. A comparison of other states is included in the discussion and concludes that even though California's Three Strike scheme is amongst the harshest in the country, its application does not violate the prohibition against cruel and/or unusual punishment.

t. *People v. Stone* (1999) 75 Cal.App.4th 707, the Second Appellate District, Division 4, held that it was not cruel and unusual punishment to sentence the defendant to 25 to life based on his current offense of manufacturing a precursor of PCP, and with a prior record which included many serious and violent offenses, and which span a 15 year period, wherein the defendant served 4 prior prison terms.

u. *Durden v. California* (2001) 531 U.S. 1184 [148 L.Ed.2d 1027, 121 S.Ct. 1183], Justice Souter, joined by Justice Breyer, dissented from the denial of certiorari, indicating that it has been 2 years since *Riggs v. California* (1999) 525 U.S. 1114 [142 L.Ed.2d 789, 119 S.Ct. 840], and neither the California Supreme Court, nor a Federal District Court has taken up the issue. Furthermore, given the fact that there is potential for disagreement over the application of the habeas corpus review standard of *Teague v. Lane* (1989) 489 U.S. 288 [103 L.Ed.2d 334, 109 S.Ct. 1060], and the Antiterrorism and Effective Death Penalty Act of 1996, and the uncontroverted representation of petitioner's counsel that some 319 California prisoners are now serving sentences for 25 years to life for what would otherwise be a misdemeanor theft under the California scheme, these justices would wait no longer to decide the issue, as the "stakes are substantial." Therefore, I would add this citation and argument to the cruel and unusual punishment arguments when citing *Riggs*.

v. *People v. Cuevas* (2001) 89 Cal.App.4th 689, the First Appellate District, Division 3, held that based on the defendant's prior history of criminal conduct, which made him a "Three-Striker," qualified him for an 85 year to life sentence, based on the three current convictions for bank robbery, where no violence was used. The court went into an extensive analysis of prong 1 of the 3-prong test set forth in *In re Lynch* (1972) 8 Cal.3d 410, finding that this 32 years old, who had been using heroin since 9 years old, and with a record beginning in 1984, without any appreciable break in his time in custody, the sentence was not disproportionate to the crimes charged as it cannot be stated that the robberies were neither nonviolent nor victimless.

w. *People v. Byrd* (2001) 89 Cal.App,4th 1373, the Third Appellate District held that a defendant who was convicted of 12 counts of robbery, mayhem,

premeditated murder, and an enhancement within the meaning of section 12022.53, subdivision (d), and who was a "three striker," wherein the trial court imposed a sentence of 115 determinate years and 444 indeterminate years to life, said sentence was not cruel and unusual even though he could never live out its term. The Court of Appeal disagreed with Justice Mosk's concurring opinion in *People v. Deloza* (1998) 18 Cal.4th 585, wherein the penned that it would be cruel and unusual punishment to sentence a defendant to a sentence that he could not serve out.

x. *Brown v. Mayle* (2002) 283 F.3d 1019, the Ninth Circuit Court of Appeal held that based on the particular facts of these cases, a sentence of 25 to life for a petty theft offense, is cruel and unusual punishment. The Court of Appeal held that the California Court of appeal did not follow clearly established United States Supreme Court laws in *Rummel v. Estelle* (1980) 415 U.S. 263; *Solem v. Helm* (1983) 463 U.S. 277; and *Harmelin v. Michigan* (1991) 501 U.S. 957 [115 L.Ed.2d 203, 106 S.Ct. 366]. The Court of Appeal found that even though defendants Brown and Bray had violent criminal priors, and Andrade did not, the cases cannot be distinguished based on the gross disproportionality to the current offense. Additionally, this court left open the question of whether the holding applies to other non-violent offenses, other than petty theft with a prior, where the "double counting" of the prior is not a significant element considered in its ruling. That question may now be answered in *Ewing v. California*, *infra*.

y. *People v. Mantanez* (2002) 98 Cal.App.4th 354, the fourth Appellate District, Division 1 held that appellant's sentence of 25 to life, plus three determinate years for possession of .25 grams of heroin, and receiving stolen property and prior prison terms, was not cruel and unusual punishment. The Court of Appeal held that primarily based its opinion on *Rummel v. Estelle* (1980) 415 U.S. 263 and *Harmelin v. Michigan* (1991) 501 U.S. 957, discounting *Solem v. Helm* (1983) 463 U.S. 277 and its holding on gross proportionality as essentially being overruled by *Harmelin*. However, the Court of Appeal never discussed *United States v. Bajakajian* (1998) 524 U.S. 321 [141 L.Ed.2d 314, 118 S.Ct. 2028] and its basic reaffirmance of the gross proportionality standard set forth in *Solem*. The Court of Appeal also went on to "respectfully" disagree with the Nine circuit Opinions in *Andrade v. California Attorney General* (2001) 270 F.3d 743, and *Brown v. Mayle* (2002) 283 F.3d 1019, and declined to follow them.

z. *People v. Romero* (2002) 99 Cal.App.4th 1418, the Fourth Appellate District, Division 2, held that the trial court did not abuse its discretion in

failing to strike a strike, or in failing to follow *Andrade v. California Attorney General* (2001) 270 F.3d 743, and *Brown v. Mayle* (2002) 283 F.3d 1019, in sentencing the defendant to 25 to life, for the theft of a $3.00 magazine, and the possession of a smoking device. The jury hung on the charge of possession of a controlled substance. The court found that based on the defendant's recidivism, which included two prior strikes, ranging back to age 19, and his numerous parole violations, that he fell within the intent of the three-strikes law, and that a sentence of 25 to life, is not per se cruel and unusual punishment for a conviction for petty theft under current United States Supreme Court precedent.

aa. *People v. Meeks* (2004) 117 Cal.App.4th 891, the Third Appellate District held, over a strong dissent, that the Three Strike sentence of 25 yeas to life for failing to register after change of address did not constitute cruel and/or unusual punishment under the U.S. Constitution of California Constitution given the seriousness of the crime and the defendant's prior criminal history. (*Ewing v. California* (2003) 538 U.S. 11 [155 L.Ed.2d 108, 123 S.Ct. 1179].) The dissent points out that appellant had led a crime free life for 9 years, that most of his "sexual history" occurred 23 years prior, and it is "pathetic" to sentence appellant to life for failing to register on his birthday when he is undisputedly dying of AIDS.

bb. *People v. Poslof* (2005) 126 Cal.App.4th 92, the Fourth Appellate District, Division 2, held that the sentence of 27 years to life in prison for failure to register did not constitute cruel and unusual punishment in view of defendant's criminal history as a recidivist and child sex offender, nor did the lower court err in denying appellant's *Romero* motion pursuant to *People v. Williams* (1998) 17 Cal.4th 148, 161.

cc. *People v. Carmony* (2005) 127 Cal.App.4th 1066, the Third Appellate District held that a violation of section 290, for the failure to "update" sex offender registration within five working days of offender's birthday, where defendant had registered his correct address one month before his birthday and the parole agent knew that the defendant continued to reside at that address, was an offense so minor that there would be a violation of the prohibition against cruel and/or unusual punishment provisions of the United States and California constitutions, if a three-strike sentence was imposed. The majority of the court, in this 2-1 opinion, does an extensive analysis of the intrajurisdictional and interjurisdictional comparisons for both the state and federal standard, and the majority found that the sentence is clearly

disproportionate by any measure. (Cf. *People v. Cluff* (2001) 87 Cal.App.4th 991, 1004.)

dd. *People v. Haller* (2009) 174 Cal.App.4th 1080, the third Appellate District held that appellant's sentence of 78 years to life in prison on multiple counts of criminal threats, stalking, and assault with a deadly weapon, in this Three-Strike sentence, did not constitute cruel and/or unusual punishment under state and federal constitutions where the defendant caused serious emotional distress to multiple victims, was on probation for similar conduct at the time of the crimes, and had prior convictions for four felonies and a large number of misdemeanors, and the sentence was not disproportionate to those imposed on violent recidivists in other jurisdictions. Here, the defendant will not be eligible for parole until he is 119 years old. Additionally, the defendant is not entitled to custody credits against his indeterminate Three-Strike sentence. (*In re Cervera* (2001) 24 Cal.4th 1073.)

ee. *In re Coley* (2012) 55 Cal.4th 524, the California Supreme Court held that the trial court did not abuse its discretion when it sentenced appellant to a term of 25 years to life, as a third strike offender for intentionally failing to update his sex offender registration within five working days of his birthday, and as a result, did not constitute cruel and unusual punishment. The court characterized the offense not simply as a minor or technical oversight by a defendant who had made a good faith effort to comply with the sex offender registration law, but indicated that the defendant had never registered as a sex offender at his current address, and had knowingly and intentionally refused to comply with his obligations under the sex offender registration law.

16. URGENCY LEGISLATION ARGUMENTS:

a. *People v. Cartwright* (1995) 39 Cal.App.4th 1123, the Third District Court of Appeal, rejected the urgency legislation argument, and indicated that the primary duty of the district attorney has not changed, and as a result, the urgency legislation argument fails.

b. *People v. Cargill* (1995) 38 Cal.App.4th 1551. The court determined that the urgency legislation went into effect on the day the Governor signed the legislation, March 7, 1994, and not the following day, as appellant contended. Appellant committed his offense a few hours after the signing of the bill and was therefore subject to its provisions.

c. *People v. Kinsey* (1995) 40 Cal.App.4th 1627, the Second District, Division 7, in another Fred Wood's opinion, concurs with the holding in *Cartwright*, that the statute does not violate the provisions pertaining to urgency legislation.

d. *People v. Spears* (1995) 40 Cal.App.4th 1683, the Fifth Appellate District, concurred with the rationale of *Cartwright*, that the statute does not violate the provisions pertaining to urgency legislation. This issue is pronounced dead.

e. *People v. Williams* (1996) 49 Cal.App.4th 1632, the Sixth Appellate District held that the statute does not violate the urgency legislation provisions.

17. PROVING PRIORS AT PRELIMINARY HEARING:

a. *Miranda v. Superior Court* (1995) 38 Cal.App.4th 902. In this matter, Second District Division 2, found that the prosecution did not have to prove the priors at the time of the preliminary hearing. The court makes the distinction between sentencing enhancing statutes where the prior must be proven at the preliminary hearing, and sentencing factor statutes where the prior does not have to be proven before being filed in the Superior Court. The court found that there is nothing in the statue which indicates "when" the prosecution had to prove the strike prior. Where does it say in any other statute, such as the ones analyzed in *People v. Superior Court* (*Mendella*) (1983) 33 Cal.3d 754, 757, or *Ghent v. Superior Court* (1979) 90 Cal.App.3d 944, that the statute has to say when the prior must be prove; they don't.

b. *People v. Superior Court* (*Arevalos*) (1996) 41 Cal.App.4th 908, Fourth District Division One, reaffirms *Miranda v. Superior Court, supra*, 38 Cal.App.4th 902, that the people do not have to prove the priors at the preliminary hearing.

c. *Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, the Second Appellate District, Division 3, held that a strike prior does not have to be proven at the preliminary hearing (see *Miranda v. Superior Court* (1995) 38 Cal.App.4th 902; *People v. Superior Court* (*Arevalos*) (1996) 41 Cal.App.4th 908), and that *Apprendi v. New Jersey* (2000) 530 U.S. 466, does not change that result since prior convictions are exempted from the rule that the elements of an offense must be proven beyond a reasonable doubt, even at a preliminary hearing. (See § 871.) The Court of Appeal also

found that public policy would not be furthered by requiring proof of the priors at the preliminary hearing, or that the failure to prove the strike priors before trial denied appellant equal protection. Appellant had argued that since the prosecution must prove prior convictions to elevate a misdemeanor to a felony (e.g., §§ 666 and 314), then they must prove the strikes to get the increased penalty in the Superior Court.

18. BROUGHT AND TRIED SEPARATELY/RECIDIVIST ARGUMENTS:

a. *People v. Allison* (1995) 41 Cal.App.4th 841, First District, Division One found that since the statute does not specifically provide that where priors are "brought and tried together," as it does in section 667, subdivision (a), then the legislature did not intend for the provisions to apply. They indicate that if they so intended they would have said so.

b. *People v. Superior Court* (*Arevalos*) (1996) 41 Cal.App.4th 908, Fourth District Division One, held (1) that the section 667, subdivisions (b) to (I) is without ambiguity, (2) contains no provision that prior convictions must be brought and tried separately, (3) that section 667, subdivision (d) (which merely defines what type of felony that qualifies as a prior, and not how many priors qualify), somehow defeats the contention and (4) that subdivision (c)(6), pertaining to "current convictions" (and not the priors in question), defeats the trial court's ruling that the charges must be brought and tried separately for the defendant to be subject to more than one strike. The court, without specifically addressing our harmonizing argument or other specific arguments advanced in the current briefing, find that the use of multiple priors from a single charging document will insure longer sentences, and as a result, that is what the legislature must have meant to do. Remember, *People v. Baker* (1985) 169 Cal.App.3d 58 (which indicated that "brought and tried separately" is not applicable to § 667.6 [recidivist statute for violent sex crimes]) is distinguishable as that section is (1) another separate statutory scheme, it was not engrafted onto section 667, as was the "strike" legislation, and (2) its (e.g., § 667.6) purpose was only to punish repeat sex offenders.

c. *People v. Dominguez* (1996) 44 Cal.App.4th 389, **DEPUBLISHED**. This case had rejected the "brought and tried separately" argument based on the same rationale as *Allison* and *Arevalos*, that the "brought and tried" provisions do not apply to the three strikes legislation.

19. OUT OF STATE PRIORS AND STRIKES AFTER THE INITIATIVE:

a. *People v. Purata* (1996) 42 Cal.App.4th 489, Second District, Division 4, found that the "least adjudicated elements" test is used to determine whether an out of state prior is one which qualifies as a serious felony and a strike in California. However, as in *People v. Myers* (1993) 5 Cal.4th 1193, 1195, the court can look beyond the least adjudicated elements test and consider the evidence found within the entire record of the foreign conviction, if not precluded by the rules of evidence or other statutory limitations.

b. *People v. Hunt* (1999) 74 Cal.App.4th 939, the Third Appellate District held that, for purposes of the violent sexual predator statute, the phrase "a conviction in another state" did not encompass a military court martial in Germany for a violation of section 288, subdivision (a). If a conviction in another "jurisdiction" other than another state is presented by the prosecution to establish a prior serious or violent felony, I would use this case to refute that allegation.

c. *People v. Stewart* (2000) 77 Cal.App.4th 785, **NOT PUBLISHED ON THIS ISSUE, BUT THE RATIONALE STILL APPLIES**. The Fourth Appellate District, Division 1, held that one Florida conviction was properly admitted for strike purposes and that the guilty plea could be shown by the use of the preliminary hearing, and the averments in the charging document, which alleged that the defendant used a weapon in the commission of the offense. However, the Court of Appeal did hold that certain statements in an affidavit which formed the basis for probable cause to bind over the defendant for trial on another prior were improperly admitted within the meaning of *People v. Reed* (1996) 13 Cal.4th 217, 224.) The document contained multiple hearsay and should not have been admitted.

d. *People v. Zangari* (2001) 89 Cal.App.4th 1436, the First Appellate District, Division 4 held that a defendant's prior convictions for burglary in Oregon are strikes in California, based on the information, the plea of guilty, the amended judgment and order. The Court of Appeal analyzed the least adjudicated elements of the Oregon statute, which has different intent elements, and found, contra to *People v. Marquez* (1993) 16 Cal.App.4th 115, 123, that the subject purpose to deprive the owner of their property was sufficiently similar as to constitute a strike in California.

e. *People v. Morgan* (2001) 91 Cal.App.4th 1324 **DEPUBLISHED**, the Third Appellate District held that counsel provided ineffective assistance when he

failed to research an Arkansas statute to determine if the elements of that statute at least met the least adjudicated elements test. (See *People v. Guerrero* (1988) 44 Cal.3d 343; *People v. Myers* (1993) 5 Cal.4th 1193, 1200.) In this case, the least adjudicated elements test was applicable in the absence of an underlying record, where, had the record existed, the entire record of conviction is used to determine the substance of the foreign conviction. Here, appellant had been found guilty of kidnaping in Arkansas some thirty years ago. The court relied on "some cryptic" probation report that cited no provisions of the Arkansas code. Defendant admitted as strikes, two convictions of an Arkansas Criminal Code that were not even in existence at the time of his convictions. The foreign statute applicable is the one in existence at the time of the offense. The Arkansas statute that was compared lacked the asportation and intent requirements and defined what could be considered an aggravated false imprisonment. The Court of Appeal concluded by stating, "But when, as here, 'the knowledge necessary to an informed tactical or strategic decision is absent because of counsel's ineptitute or lack of industry, no such ground of justification is possible.'" (*In re Williams* (1969) 1 Cal.3d 168, 177.) Finding that counsel did not investigate the critical facts of the priors to advise his client whether to admit the priors undermined the confidence in the outcome of the plea bargain, and as a result, the judgment and sentence were vacated. AS A RESULT, THIS IS THE WARNING TO REVIEW ALL PRIORS BEFORE ADVISING THE CLIENT HOW TO PROCEED WITH THEM.

f. *People v. Fox* (2001) 93 Cal.App.4th 394, the Fifth Appellate District held, consistent with *People v. Murphy* (2001) 25 Cal.4th 136, that a conviction in Oregon, for having sex with a minor under 14, qualifies as a strike, since the conduct qualifies as a lewd and lascivious act on a child under 14, which is a serious felony within the meaning of section 1192.7, subdivision (c)(6). *Murphy* held that to qualify as a serious felony within subdivision (c)(6), the act need not contain a specific intent, and that the Oregon statute does not mandate a specific sexual intent; therefore, the Oregon prior qualifies as a strike.

g. *People v. Mumm* (2002) 98 Cal.App.4th 812, the Fourth Appellate District, Division 1, held that, within the ruling in *People v. Avery* (2002) 27 Cal.4th 49, wherein a Texas conviction for burglary with the intent to commit theft, was held to come within the California statute, when the High Court modified the intent to steal requirement, by holding that: the intent requirement is satisfied when the defendant intends to deprive the owner of property only temporarily, but for so extended a period of time as to deprive

the owner of a major portion of its value or enjoyment. (*Id.*, at p. 56.) As a result of the foregoing, the Court of Appeal found that the intent requirements were then satisfied, even though they were the same but different. Got that.

h. *People v. Rodriguez* (2004) 122 Cal.App.4th 121, the Second Appellate District, Division 5, held that there was insufficient evidence that the defendant was convicted of a "robbery" under Texas law as the elements did not match those in California and did not establish that offense was a serious or violent felony for purposes of Three Strikes Law, since Texas law did not require either asportation or the taking of property from the person or his or her immediate presence, both of which are elements of robbery. Additionally, the prior conviction for "burglary of a habitation" under Texas law did not qualify as a "strike" in light of a subsequent Texas decision holding that the structure need not be occupied or currently used as a dwelling, an element of first degree burglary in California, for it to be a "habitation." Where the trial court erred in holding that evidence was sufficient to establish that the Texas convictions were "strikes," the prosecution is entitled to present additional evidence on remand pursuant to *People v. Monge* (1997) 16 Cal.4th 826, 845.

i. *People v. Jefferson* (2007) 154 Cal.App.4th 1381, the Third Appellate District held that the court's finding that the defendant's sister-state prior conviction for attempted murder qualified as a serious felony under the Three-Strikes Law, did not violate the defendant's federal constitutional right to a jury trial. (See *People v. Kelii* (1999) 21 Cal.4th 452.) The court indicated that *Cunningham* and *Blakely* still recognize *Alendarez-Torres*, and therefore, *Kelii* has not yet been abrogated.

j. *People v. Skiles* (2011) 51 Cal.4th 1178, the California Supreme Court held that the Alabama manslaughter conviction was proved to be a strike by sufficient evidence, within the meaning of the Secondary Evidence Rule (Evid. Code §§ 1152-1523). This evidentiary rule does not excuse compliance with Evidence Code section 1401 requiring authentication. A writing can be authenticated by circumstantial evidence and its contents. (See *People v. Gibson* (2001) 90 Cal.App.4th 371, 383.) A faxed copy of the indictment page alone would have been insufficient, but when it was coupled with certified copies of booking documents and fingerprints, in addition to a certified copy of a relevant minute order, and plea agreement, in addition to the copy of the original certified copy of the indictment, all combined established sufficient authentication for the admission of the faxed copies.

k. *People v. Sample* (2011) 200 Cal.App.4th 1253, the Fourth Appellate District, Division 1 held that the defendant's simultaneous possession of multiple child pornography materials was properly chargeable as two offenses where police officers found the pornography at two different times and in two separate locations. Additionally, there was no error in finding sufficient evidence supported the trial court's finding that the defendant's prior Florida burglary conviction qualified as a prior strike conviction under California law where the factual basis supplied for the defendant's plea in the Florida case indicated that the defendant had entered a person's home without permission and taken that person's wallet. A defendant would normally and reasonably be expected to object to or respond to the prosecution's factual recital if the factual recital did not accurately reflect the circumstances of the offense to which the defendant was pleading guilty or no contest. (See *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1120 [a prosecutor's comments occurring immediately before a court accepts a defendant's plea are part of the record of conviction]; see also *In re Richardson* (2011) 196 Cal.App.4th 647, 667 [factual basis for the defendant's plea supplied by the prosecutor and not objected to by the defendant is part of the record of the proceedings for purposes of determining whether a prior conviction qualifies as a strike].)

l. *People v. Washington* (2012) 210 Cal.App.4th 1042, the Fourth Appellate District, Division 1 held that where the defendant was convicted in Illinois of battery with great bodily harm, qualified as a serious felony within the meaning of section 1192.7, subdivision (c)(8), which involves personal infliction of great bodily injury. The Court of Appeal found that great bodily harm, under the Illinois law, was synonymous with great bodily injury under the California law. Because the Illinois law requires physical injuries more severe than lacerations, bruises, or abrasions, to sustain a finding of great bodily harm, it would be sufficient for a finding of great bodily injury under California law, therefore it qualifies as a serious felony and a strike under California law.

m. *People v. Ledbetter* (2014) 222 Cal.App.4th 896, the Second Appellate District, Division 6 held that the prosecution failed to prove that the Tennessee prior conviction for aggravated assault was a "strike" under the Three-Strikes Law, (§ 667, subds. (b)-(i)), where the indictment underlying the previous conviction alleged that defendant and codefendant, rather than defendant specifically, inflicted serious bodily injury. In this state, aggravated assault only qualifies as a violent felony if the defendant

personally inflicts great bodily injury. (See *People v. Delgado* (2008) 43 Cal.4th 1059, 1067 [must prove the defendant personally committed GBI or used a firearm or deadly weapon.]) On the other hand, the prosecution did prove that appellant's prior conviction for the Tennessee robbery was a strike, based on allegations in underlying indictment, because a defendant who pleads guilty impliedly admits the allegations contained within the indictment. The matter is remanded to the trial court for either retrial, or for resentencing, since retrial of the prior is permissible where the strike is fails for insufficiency of the evidence. (See *People v. Barragan* (2004) 32 Cal.4th 236, 239.)

20. DUE PROCESS/EQUAL PROTECTION AND ASCENDING/DESCENDING RECIDIVISM:

a. *People v. Kilborn* (1996) 41 Cal.App.4th 1325, Second District, Division 4, held wherein a defendant commits a non-serious felony after committing a serious felony, does not violate either the provisions of the due process or equal protection clauses, even though appellant would not be subject to the provisions of section 667, subdivision (e), if the acts had been committed in reverse order. The court found that the legislative purpose – to punish recidivist criminals who have committed serious or violent crimes more severely – was a proper goal – even if the subsequent felony was not serious or violent. Finding a rationale basis for the statute, the court upheld it against the due process challenge. As against the equal protection challenge, the court found that recidivists who commit serious or violent crimes are not in the same category as other criminals and therefore, they can be treated differently.

b. *People v. Nguyen* (1997) 54 Cal.App.4th 705, the Sixth Appellate District, ruled that the qual protection clause is not violated when a defendant, who has suffered at least one prior theft offense and who is sentenced under section 667, subdivisions (b)-(I), and not section 666, even though a person with two prior felony convictions, which do not include any theft related convictions, is subject only to misdemeanor punishment for the petty theft. The court, as it must, even though somewhat illogically, indicated that the two defendants are not similarly situated, and as a result, they may be treated in an unequal manner.

c. *People v. Andrews* (1998) 65 Cal.App.4th 1098, the Fourth Appellate District, Division 1, held that there was not a violation of the equal protection clause due to the disparity of the charging policies of the three-

strikes law by different counties. Appellant argued that he would not have been prosecuted in San Francisco county, as a third-strike defendant, had he been charged with the same possession offense, which now finds him serving a 25 to life sentence, after he was convicted of the possession charge in San Diego. The Court of Appeal indicated that "there can be vast differences in the manner of enforcement of this draconian sentencing law." The Court of Appeal added that the disparities in the laws enforcement was a "source of concern," but it did not amount to a violation of equal protection, at least on the record that was presented in this matter. The Court of Appeal indicated that there is no requirement for intercounty proportionality review. (See *People v. Arias* (1996) 13 Cal.4th 92, 192-193; *People v Kirkpatrick* (1994) 7 Cal.4th 988, 1023.) In the end, the Court of Appeal called out for the Legislature to cure these vast discrepancies in sentence, due to the mere fact that the offense was committed in one location rather than another.

d. *People v. Edwards* (2002) 97 Cal.App.4th 161, the Fourth Appellate District, Division 3, reaffirmed the analysis of *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1328-1332, and *People v. Cooper* (1996) 43 Cal.App.4th 815, pertaining to defendant's contention that depending on the order of the felony convictions a defendant suffers, he can either be a "two-striker," subject to a determinate term, or a "three-striker" subject to a minimum of 25 to life. The Court of Appeal once again stated that the order in which the felonies are committed make the defendant's different and therefore does not violate equal protection. The Court of Appeal reasoned, that an individual with two prior serious or violent felonies who nonetheless commits another felony, has demonstrated an imperviousness to deterrence which it would be folly to ignore. A person whose record includes only one strike conviction has not demonstrated such intransigence. And that really applies to a defendant who commits two non-violent burglaries 20 years ago, and never went to the joint.

21. SEPARATION OF POWERS – THE LEGISLATURE USURPING THE D.A.'S POWER:

a. *People v. Kilborn* (1996) 41 Cal.App.4th 1325, Second District, Division 4, held that Government Code section 26528 indicates that the prosecutor shall initiate all prosecutions for public offenses, and that in other contexts the legislature has required the prosecution to act, thereby restricting its discretionary authority. One of the problems with the holding is that Government Code section 26528 is not at issue here. The fact that the Legislature has from time to time enacted laws which would have the same

effect of usurping the prosecution's traditional charging discretion does not lead to the conclusion that similar laws are impervious to a constitutional challenge that the Legislature has usurped the executive function of charging decisions. Furthermore, the court indicated that since the prosecution can either, as the court, dismiss in the interest of justice or for insufficiency, the legislation has not changed the primary function of the district attorney's office. Nonetheless, this does not ameliorate the removal of the discretion as to whether the charge should be brought in the first place, as there is no certainty the court will act at the will of the prosecutor. The court did not discuss *People v. Mikhail* (1993) 13 Cal.App.4th 846, 854, which was based on article 3, section 3 of the California Constitution, which held that the charging function is within the sole province of the executive branch, which includes district attorneys. (See also *Way v. Superior Court* (1977) 74 Cal.App.3d 165, 174; *People v. Arauz* (1992) 5 Cal.App.4th 663, 668 [charging decisions cannot be mandated by the Legislature.]

22. EXPUNGED PRIORS ARE STILL STRIKES:

a. *People v. Diaz* (1996) 41 Cal.App.4th 1424, Second District, Division 7 held that even though a conviction is expunged pursuant to section 1203.4, per the specific language of the statute, the conviction can be pled and proven and have the same effect as a prior.

b. *People v. Daniels* (1996) 51 Cal.App.4th 520, the Fifth District held that he expungement of a honorable discharge from the California Youth Authority still qualified as a strike. The Court of Appeal found that the change in the decisional law after appellant had been discharged did not preclude the use of the prior serious felony conviction within the meaning of the strikes law. (See also *People v. Pride* (1992) 3 Cal.4th 195; *People v. Navarro* (1972) 7 Cal.3d 248, 277; *People v. Jacob* (1985) 174 Cal.App.3d 1166; *People v. Shields* (1991) 228 Cal.App.3d 1239; accord, *People v. Diaz*, *supra*.)

c. *People v. Franklin* (1997) 57 Cal.App.4th 68, Fifth Appellate District, the court held, similarly to *Daniels, supra*, that a prior felony conviction constitutes a strike despite the post-sentence reduction to a misdemeanor.

d. *People v. Lucas* (2013) 214 Cal.App.4th 707, the Fourth Appellate District, Division 3 held that the prior conviction can act as a strike within the meaning of the Three-Strike Law, since the nature or character of the offense is determined at the time of sentence, (see § 667, subd. (d); *People v. Franklin* (1997) 57 Cal.App.4th 68, 73; see also *People v. Sipe* (1995) 36

Cal.App.4th 468, 478 [whether a prior conviction is a felony is determined on the date of the conviction, so reduction to a misdemeanor, later on is of no relevance to its classification as a felony.])

23. A JUDGE CAN BE DISQUALIFIED FROM RULING ON PRIORS:

a. *Sincavage v. Superior Court* (1996) 42 Cal.App.4th 224, held that if a trial court's involvement as a deputy district attorney is significant enough in the prosecution of the defendant's priors, the judge is subject to disqualification pursuant to CCP section 170.1, subdivision (a)(6)(c).

24. THREE STRIKES SENTENCE APPLIES OVER OTHER SENTENCING SCHEMES:

a. *People v. Ruiz* (1996) 44 Cal.App.4th 1653, the Fifth District held that pursuant to *People v. Jenkins* (1995) 10 Cal.4th 234, that the legislature can amend an initiative, and in so doing, the three strikes sentencing scheme applies over "section 667.7 'or some other sentencing statute.'" Therefore, the court rejected defendant's claim that he should have been sentenced under section 190 rather than the three strikes law for his murder with a strike prior.

b. *People v. Espinoza* (1997) 58 Cal.App.4th 248, Second Appellate District, Division 4, held that the three strikes law supercedes the specific provisions in section 664. The court rejected appellant's contention that the court retained the discretion to sentence under section 664, and not the three strikes law, as section 664 was the "special" statute, which controlled over the "general" 3-strikes statute. The "special over general" rule applies when each element of the general statute corresponds to an element of the special statute, or when a violation of the special statute will necessarily result in a violation of the general. (See *People v. Coronado* (1995) 12 Cal.4th 145, 154.) Here, the elements do not correspond, and neither *Romero* nor *Alvarez* mandate a different result. When a prior serious felony is properly pled and proven the three strike law must be given effect if it would result in a more severe sentence. (*People v. Ervin* (1996) 50 Cal.App.4th 259.) A defendant is not entitled to the benefit of a shorter sentence under some other sentencing scheme. (*People v. Fuhrman* (1997) 16 Cal.4th 930.)

25. DOUBLE JEOPARDY ISSUES:

a. *People v. Torres* (1996) 45 Cal.App.4th 640, the Fourth District, Division Two, held that there is no double jeopardy violation when an enhancement is not (1) submitted to the court for determination of its truth, nor (2) when the prosecution is not given the opportunity to prove the enhancements, nor (3) when the defendant is not mandated to either admit or face charges on enhancements that have not be dismissed on the motion of either the court or the prosecution. The Court of Appeal distinguished the line of cases that found that a court's failure to make a finding on the prior conviction allegation operates as an acquittal (see *People v. Eppinger* (1895) 109 Cal. 294, 298; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1440; *People v. Garcia* (1970) 4 Cal.App.3d 904, 907, fn. 2), given the fact that the cause of the prior was never submitted to the court for decision. The court analogized to the Supreme Court's holding in *People v. Sanders* (1993) 5 Cal.4th 580, 595, where they found that double jeopardy did not bar a retrial after the jury had been dismissed without the priors trial going forward. (See also *People v. Bryant* (1992) 10 Cal.App.4th 1584, 1597; *People v. Superior Court* (*Jurado*) (1992) 4 Cal.App.4th 1217, 1235-1236.)

b. *People v. Walker* (1996) 45 Cal.App.4th 1326, the First District, Division Five held, that pursuant to the rationale of *Burks v. United States* (1978) 437 U.S. 1, 11 [57 L.Ed.2d 1, 98 S.Ct. 2141], retrial on a prior conviction enhancement, wherein the court found the proof to be insufficient, could not be retried. Given the fact that there was insufficient proof of recidivism, the matter is precluded from being retried based on a similar rationale as stated by Justice Kaus in *People v. Bonner* (1979) 97 Cal.App.3d 573, 575.) **IS THIS CASE CHANGED BY *MONGE v. CALIFORNIA* (1998) 524 U.S. 721 [141 L.ED 2d 615, 118 S.Ct. 2246]**?

26. WHAT DOCUMENTS OR RECORDS CAN BE USED TO DETERMINE WHETHER A PRIOR IS A SERIOUS FELONY OR STRIKE PRIOR:

a. *People v. Lewis* (1996) 44 Cal.App.4th 845, one panel of Fourth District, Division One has held that the trial court erred when it relied on a document prepared after judgment, which, by definition is not "part of the record leading to imposition of judgment." (See *People v. Myers* (1993) 5 Cal.4th 1193, 1195.) Any document relied upon to support a prior conviction, must be "a part of the record of conviction." (*Ibid.*) A document leading to the imposition of judgment can be used to determine whether a prior is a serious felony within the meaning of section 1192.7, subdivision (c).

Additionally, hearsay is not admissible to prove a prior serious felony. A defendant's statement in a probation report is admissible as it falls within a hearsay exception. But a statement in a probation report made by other persons is hearsay and not admissible. Even though a document appears to be a public record, the facts contained therein are hearsay and no exception applies, especially where there is no information continued in the report to establish the document's trustworthiness or reliability.

Charging documents and clerk's minute orders are admissible (see *People v. Smith* (1988) 206 Cal.App.4th 340, 345), they do not necessarily tend to show appellant committed the act within section 1192.7.

b. *People v. Shoal* (1997) 53 Cal.App.4th 911, Third Appellate District ruled that a reporter's transcript of a plea is part of the "record of conviction." As a result, the court could look to the transcript to determine whether any fact established a person's use of a deadly weapon or whether the assault was committed only "by means of force likely to produce great bodily injury," which would not qualify as a serious felony. Also not that the prosecution has the burden of proving each element of the prior.

c. *People v. Best* (1997) 56 Cal.App.4th 41, Third Appellate District, ruled that the transcript from a Proposition 115 preliminary hearing cannot be used to prove a prior conviction is a serious felony when a hearsay objection is made before its introduction. The Court of Appeal found that the prosecution established that the defendant was convicted of an assault with a deadly weapon based on the information, the change of plea form, and the sentencing transcript, but the nature of the assault, the personal use of the deadly weapon could not be shown by the preliminary hearing transcript as no exception to the hearsay rule would allow its admission. The officer who testified never personally knew that the defendant used the weapon in the course of the assault, the officer's testimony at the preliminary hearing was based solely upon the statement of the victim who did not testify at any hearing.

d. *People v. Houck* (1998) 66 Cal.App.45h 350, the Fourth District, Division 1, held that a preliminary hearing transcript cannot be used to prove that the prior conviction was a serious felony, when the conviction resulted from a trial and not a plea following the preliminary hearing. The Court of Appeal finds that the preliminary hearing transcript is not part of the "record of conviction," (see *People v. Woodell* (1998) 17 Cal.4th 448, 454; *People v.*

Reed (1996) 13 Cal.4th 217, 223), even though the "entire record" may be used to determine if the prior qualifies as a serious felony. (See *People v. Myers* (1993) 5 Cal.4th 1193, 1195.) *People v. Bartow* (1996) 46 Cal.App.4th 1573, has taken the opposite position and held that the preliminary hearing transcript is part of the record of conviction. *Reed*, *supra*, stated, within the context of a plea, that the preliminary hearing transcript was part of the record of conviction when determining if an assault with a deadly weapon was a serious felony prior. However, when there was a trial on the alleged charges, the jury finding is the reliable evidence the trier of fact must consider in determining if the prior is a serious felony and not the preliminary hearing transcript. This is the application of the "reliable reflection" test from *Reed*. But retrial is not barred pursuant to *Monge v. California* (1998) 524 U.S. 721 [141 L.Ed.2d 615, 118 S.Ct. 2246].

e. *People v. Ruiz* (1999) 69 Cal.App.4th 1085, the Second District, Division 6, held that an abstract of judgment which showed that the defendant was convicted of an assault with a deadly weapon, and ambiguously, do to an illegible portion of the abstract, with a great bodily injury enhancement within the meaning of section 12022.7, was sufficient to find that the defendant had a prior serious felony, when the ambiguous portion was corroborated with a notation on the section 969b packet. The section 969b packet included a fingerprint card from the assault case that had a hand written note on it that indicated a 245...W/GBI ([§]) 12022.7. The Court of Appeal found that the note supports the finding of great bodily injury and therefore, a serious felony prior. The Court of Appeal specifically indicated that if the abstract of judgment had not had the illegible portion pertaining to the gbi enhancement on it, then the note on the fingerprint card would not have been a document that could have been used to support the imposition of the enhancement. (See *People v. Williams* (1996) 50 Cal.App.4th 1405, 1411.) Here, the notation was not used to provide independent information about the prior, but only to determine the content of the now-illegible portion of the abstract.

f. *People v. Mackey* (1999) 74 Cal.App.4th 921, the Fifth appellate District, held that the prosecution can prove the validity of appellant's prior conviction based on official documents relating to the prior conviction. In *People v. Dunlap* (1993) 18 Cal.App.4th 1468, this same court held that it was permissible to use CLETS printouts to prove a prior conviction. Now see *People v. Martinez* (2000) 22 Cal.4th 106 for the definitive ruling from the Supreme Court.

g. *People v. Gonzales* (2005) 131 Cal.App.4th 767, the Fourth Appellate District, Division 2, held that the admission of the transcript of preliminary hearing transcript in prior case, for purpose of determining whether the offense to which the defendant pled guilty, and whether it was a serious or violent felony under Three Strikes Law, did not violate defendant's rights under Confrontation Clause under *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177, 124 S.Ct. 1354], or *Shepard v. United States* (2005) 544 U.S. 13 [125 S.Ct. 1254, 161 L.Ed. 205] [the fact finding to determine whether a guilty plea admitted the elements of a violent offense, is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and the defendant in which the factual basis for the plea was confirmed or some comparable judicial record of this information], as the Court of Appeal found that neither opinion applied. Additionally, the Court of Appeal held that the retrial of the prior was not barred by double jeopardy pursuant to *People v. Barragan* (2004) 32 Cal.4th 236.

27. GROSSLY NEGLIGENT DISCHARGE OF A FIREARM QUALIFIES AS A STRIKE IF THERE IS PERSONAL USE OF THE WEAPON:

a. *People v. Leslie* (1996) 47 Cal.App.4th 198, the Second District, Division Two, held that, pursuant to *People v. Equarte* (1986) 42 Cal.3d 456, that grossly negligent discharge of a firearm is a serious felony under section 1192.7, subdivision (c)(8). However, I would still consider challenging this ruling, contending that the legislature intended that the personal use be against a particular person and not the mere random shooting into the air without an intended victim.

b. *People v. Golde* (2008) 163 Cal.App.4th 101, the Third Appellate District held that the evidence was lacking in to establish that appellant had suffered a prior conviction for discharge of a firearm with gross negligence. (§ 246.3.) The court found that appellant had pled guilty to that offense, but the plea did not indicate that he personally discharged the weapon, therefore, it could not be found to be a strike. (See § 1192.7, subd. (c)(8)(23); see also *People v. Bautista* (2005) 125 Cal.App.4th 646, 654, 655 [the jury should have determined if appellant personally shot a firearm]; *People v. Bautista* (2004) 125 Cal.App.4th 646, 654-655 [must be proof that appellant personally shot the firearm]; *People v. Leslie* (1996) 47 Cal.App.4th, 198, 201-205 [appellant admitted, during the plea for the section 246.3 offense, that he personally shot the firearm.])

28. WHEN THE PRIOR WAS NOT ADMITTED OR PROVEN TO BE A SERIOUS FELONY WHEN THE LEA WAS ENTERED, THE PROSECUTION IS NOT PRECLUDED FROM RAISING THE ISSUE ON APPELLANT'S SUBSEQUENT CONVICTION:

a. *People v. Leslie* (1996) 47 Cal.App.4th 198, held that even though the serious felony allegation had been alleged in the prior offense but the court rendered no finding, in essence the serious felony was dismissed; however, the court in the current matter must impose the enhancement given the fact that the prosecution has the discretion to file the allegation, and the imposition of the enhancement becomes mandatory when it is pled and proven in the current matter. The court noted that "the failure of the court to adhere to section 969f would only have prejudiced appellant if the dismissal of the serious felony allegation was part to the plea bargain in the prior case.

b. *People v. Milosavljevic* (1997) 56 Cal.App.4th 811, Fourth Appellate District, Division 2, the court imposed an enhancement for an offense that the prior court had stayed in the original sentencing. The *Milosavljevic* court, relying on *People v. Shirley* (1993) 18 Cal.App.4th 40, held that even when the court imposes no sentence the validity of the prior conviction stands for purposes of enhancement statutes. For purposes of a prior conviction statute, defendant suffers such a conviction when he pleads guilty. (*Id.*, at pp. 45-57.) Therefore, even if the original sentencing court had struck the enhancement for GBI at the time of the original sentencing, the court in the current case, can look to that case and still impose the enhancement for the serious felony prior based on the conviction in the original matter.

c. *People v. Thompson* **DEPUBLISHED**; formerly at (1997) 59 Cal.App.4th 1271, Second Appellate District, Division 7, held that, by the fact that appellant pled guilty to 3 prior robberies in 1992, but had not admitted that they were serious felonies within the meaning of section 1192.7, subdivision (c)(19), the priors are still strikes which can be alleged in the current case, and which must be pled to or proven in the current matter. The Court of Appeal reversed the lower court's ruling that had dismissed the strike allegations based on the belief that the defendant had to have admitted they were serious felonies at the time of the prior pleas to the prior offenses.

29. PRIOR CONVICTION FOR CAR JACKING "WITH A PERSONAL FIREARM USE" QUALIFIES AS A STRIKE (AND AFTER PROP. 21 MAYBE EVEN WITHOUT THE USE OF THE FIREARM):

a. *People v. Nava* (1996) 47 Cal.App.4th 1732, the Fifth Appellate District, held that, even though section 215 (CAR JACKING) did not exist, on June 30, 1993 (see § 667, subd. (h); § 1170.125 of the initiative, but not found in the statute), that it can still be classified as a strike for sentencing purposes if the conduct involved also alleges great bodily injury or personal use of a firearm. (See §§ 1192.7, subd. (c)(8), 667.5, subd. (c)(8).) If the CAR JACKING did not have the enhanced conduct alleged and proven, then the CAR JACKING would not qualify as a strike. If a CAR JACKING is alleged as a prior, make sure that there is also the firearm use, or the GBI enhancement proven, or it does not qualify as a strike prior.

b. **CAUTION AND NOTE: Since the passage of Proposition 21, March 8, 2000, since it was passed by the voters, allr eferences to existing statutes in sections 667, subdivision (c)-(g), and section 1170.12, are statutes as they existed on March 8, 2000. (See §§ 667.1 and 1170.125.) Under these sections *People v. Nava, supra,* would not be applicable for any crime committed on or after March 8, 2000.**

30. DOES THE COURT OR THE JURY MAKE THE DETERMINATION WHETHER THE SUBSTANTIVE OFFENSE IS A FELONY OR A MISDEMEANOR? AND IS THE OFFENSE A FELONY OR A MISDEMEANOR?

a. *People v. Haywood* (1996) 39 Cal.App.4th 907, the Fourth District, Division Two held that the determination of whether a substantive offense is a felony or a misdemeanor is a question of law for the court to decide and need not be presented to the jury. the court, on direction from th Supreme Court, discussed the implication of *People v. Kobrin* (1995) 1 Cal.4th 416 [in a mixed question of law and fact, the jury be instructed on each element of the offense, including materiality of the statement used in the perjury prosecution under section 118]). However, the court, in coming to its conclusion that the petty theft, with a prior qualifying theft constituted a felony and not a misdemeanor, failed to consider *In re Boatwright* (1932) 216 Cal. 677, 683. *Boatwright* had qualifying priors and a current petty theft which qualified him for a life term. The Supreme Court found that the petty theft was a misdemeanor despite the possibility of felony punishment due to the prior convictions. Because petty theft remains analytically a

misdemeanor, the general recidivist statute by its own terms did not apply to new petty theft convictions. Section 666 did not make a petty theft a felony. Rather, it is a sentencing scheme (see *People v. Bouzas* (1991) 53 Cal.3d 467, 479), which applies to certain persons who have committed misdemeanor petty theft. The language of the three strikes law is ambiguous and does not clearly provide that it applies to persons who commit misdemeanor petty theft.

b. *People v. Terry* (1996) 47 Cal.App.4th 329, the First District, Division Five, held that a petty theft with a prior, even though the conviction is only for a misdemeanor, indicates that the penalty provisions determine if the offense is classified as a felony or a misdemeanor, and given the fact that they petty with a prior is a "wobbler," the court, in its discretion can make it a felony by sentencing appellant to state prison. The court rejected the rationale from *In re Boatwright*, *supra*, which stated that a petty theft is not a felony, but interprets the *Boatwright* language to mean that the misdemeanor "becomes such" when the priors are present.

c. *People v. Stevens* (1996) 48 Cal.App.4th 982, the First District, Division Three, held that a petty theft with a prior, is a felony when the felony punishment is selected by the court. Division 3 rejects the *Boatwright* argument, indicating that statutory changes since *Boatwright* have made its rational no longer viable. Based on the decisions in *Haywood*, *Terry* and *Stevens*, it seems as this train has come to a screeching halt.

d. *People v. Bury* (1996) 50 Cal.App.4th 1873, Fourth District, Division 2, held that the current conviction for petty theft with a prior qualifies as a felony due to the prior robbery conviction, as the offense becomes a felony when the court sentences the defendant to state prison and rejects imposing time as a misdemeanor under section 17, subdivision (b). Therefore, either under this theory or that expressed in *Haywood*, *Terry* or *Stevens*, this theory is pronounced dead.

e. *People v. Nguyen* (1997) 54 Cal.App.4th 705, the Sixth Appellate District, ruled that petty theft, even though a misdemeanor when there is not a prior theft offense, has the "potential punishment" as a felony if convicted of the act, and as a result, the court finds that a violation of section 666 is a felony that will trigger the strike statute.

The court also rejected the argument that the Supreme Court expressly rejected in *Coronado*, that section 666 is the "special statute" that controls

over the "general statute" of section 667, subdivisions (b)-(i). This court does an analysis of the Supreme Court's rationale of the specific v. general statute exceptions.

31. CAN A SERIOUS FELONY PRIOR (§ 667, SUBD. (a)) BE IMPOSED EVEN IF NOT PLED, WHEN SECTION 667, SUBDIVISION (b)-(I) ALLEGATIONS ARE PLED AND PROVEN:

a. *People v. Tavernetti* **DEPUBLISHED**; formerly at (1996) 48 Cal.App.4th 1621. The Third Appellate District held that even though the district attorney did not plead the serious felony prior under section 667, subdivision (a), but it did allege and prove both the section 667, subdivision (b)-(i) allegations, and the section 667.5, subdivision (b) allegation, that defendant was placed on notice that he would be subject to the 5 year serious felony enhancement.

b. *People v. Harris* **REVIEW GRANTED ON AN UNRELATED NON-STRIKE ISSUE (S080326)**; formerly at (1999) 72 Cal.App.4th 711, the Second Appellate District, Division One, held that where the defendant waived his rights as it pertains to the strike allegations, but neither the court nor the prosecution asked the defendant to admit the 5-year prior within the meaning of section 667, subdivision (a)(1), said prior cannot be imposed, and in this case it was stricken. Note further that even though the clerk's transcript indicated that the defendant expressly admitted the strike prior, which he did not, the reporter's transcript takes precedent over the clerk's transcript. (See *People v. Smith* (1983) 33 Cal.3d 596, 599.)

32. THE COURT NEED NOT GIVE JURY NULLIFICATION INSTRUCTIONS:

a. *People v. Baca* (1996) 48 Cal.App.4th 1703, the Second Appellate District, Division 4, held that even though the jury has the undisputed power to nullify on their own, they are not entitled to be instructed that they have that right. The court refuses to follow the ruling in *U.S. v. Datcher* (1993) 830 F.Supp. 411, indicating that they will not be the first court in California to do so. However, do note Justice Kaus's dissenting opinion in *People v. Dillon* (1983) 34 Cal.3d 441, 491, wherein he, and he alone, does favor a nullification instruction. In *Baca*, the jury was told that this was a three-strikes case, but that it could not consider penalty. At least, keep trying to argue this theory, when the jury learns that a co-defendant has received a

lesser sentence than appellant is subject to, when they were charged with the same offense(s).

b. *People v. Alvarez* (1996) 49 Cal.App.4th 679, the Fifth Appellate District held that the jury could not be told the reason why defendant recanted his confession – it was because he realized that it would subject him to the three strikes provisions. Given the fact that raised the issue of penalty, the court would only instruct the jury with CALJIC 17.42.

c. *People v. Nichols* (1997) 54 Cal.App.4th 21, the First Appellate District, Division 3, ruled that, the trial court is not required to instruct on nullification even if the jury asks for instruction on the issue, even though the jury has the "undisputed power" to ignore the evidence and the law and to acquit if that is what it chooses to do. (See *People v. Fernandez* (1994) 26 Cal.App.4th 710, 714.) The court rejected the language from Justice Kaus's concurring opinion in *Dillon* pertaining to the court's duty to instruct the jury on nullification if the jury asks about its power to nullify.

33. WHEN IS A PRIOR A PRIOR?:

a. *People v. Williams* (1996) 49 Cal.App.4th 1632, the Sixth Appellate District held that the "prior" burglary, which was committed before the current offense, but was pleaded and sentenced after the current offense was committed, was a prior for three strikes purposes. The court used the rationale of *People v. Rhoads* (1990) 221 Cal.App.3d 56, 60, and rejected the more expansive argument presented by the defense that the prior should not be a conviction until the defendant has been sentenced on the prior. (See *People v. Vessell* (1995) 36 Cal.App.4th 285, 291.) Unfortunately, the court is probably correct in its ruling.

b. *People v. Milosavljevic* (1997) 56 Cal.App.4th 811, Fourth Appellate District, Division 2, the court imposed an enhancement for an offense that the prior court had stayed in the original sentencing. The *Milosavljevic* court, relying on *People v. Shirley* (1993) 18 Cal.App.4th 40, held that even when the court imposes no sentence the validity of the prior conviction stands for purposes of enhancement statutes. For purposes of a prior conviction statute, defendant suffers such a conviction when he pleads guilty. (*Id.*, at pp. 45-47.) Therefore, even if the original sentencing court had struck the enhancement for gbi at the time of the original sentencing, the court in the current case, can look to that case and still impose the

enhancement for the serious felony prior based on the conviction in the original matter.

c. *People v. Castello* (1998) 65 Cal.App.4th 1242, Fourth Appellate District, Division 1, held that a defendant suffers a prior conviction at the time he or she is found guilty by the trier of fact, or pleads to a given charge. (See *People v. Rosbury* (1997) 15 Cal.4th 206, 210; see also *People v. Rhoads* (1990) 221 Cal.App.3d 56, 60.) The Court of Appeal found that it was irrelevant that the Florida court, where the convictions occurred, had yet to determine when a conviction actually became a prior offense, as we are guided by the interpretation of conviction under California and not Florida law. Remember, a prior conviction qualifies as a prior only when the conviction for that offense was entered before the commission of the new offense. (See *People v. Balderas* (1985) 41 Cal.3d 144; *People v. Malone* (1988) 47 Cal.3d 1; *People v. Rojas* (1988) 206 Cal.App.3d 795.) Here the conviction was entered at the time of the plea.

d. *People v. Flood* (2003) 108 Cal.App.4th 504, the Third Appellate District held that an offense for which the defendant was convicted between the commission and conviction dates of the offense for which the defendant is presently being sentenced is not a "strike" under the Three-Strikes law. However, in this case, since the defendant entered into a plea bargain, wherein an attempted premeditated murder and various enhancements were dismissed, and counsel for defendant stipulated that there was a factual basis for the current offense, the Court of Appeal held that even though the prior was not a "prior," but occurred subsequent to the current offense, and therefore not technically a strike, "where defendants have pleaded guilty in return for a specified sentence, appellate courts are not inclined to find error even though the trial court acts in excess of jurisdiction..., as long as the court does not lack fundamental jurisdiction." The Court of Appeal held that a defendant receiving a bargain should not be allowed to "trifle with the courts" by attempting to better the bargain through the appellate process. (See *People v. Cepeda* (1996) 49 Cal.App.4th 1235, 1239; see also *People v. Nguyen* (1993) 13 Cal.App.4th 114, 122-123; *People v. Beebe* (1989) 216 Cal.App.3d 932-933, 935.)

e. *People v. Medina* (2005) 132 Cal.App.4th 149, the Second Appellate District, Division 2, held that a defendant has been "convicted" of a prior offense for purposes of Three Strikes Law after a jury's guilty verdict is read in open court even if the jury poll or sentencing is pending. This is consistent with *People v. Williams* (1996) 49 Cal.App.4th 1632 [convicted

has no set meaning] and *People v. Mendoza* (2003) 106 Cal.App.4th 1030, 1033 [for sentence, conviction only means ascertainment of guilt]. (See also *People v. Hendrix* (1987) 43 Cal.3d 584, 597; *People v. Bento* (1998) 65 Cal.App.4th 179, 188 [a verdict is generally complete if it has been read and received by the clerk, acknowledged by the jury and recorded].)

f. *People v. Queen* (2006) 141 Cal.App.4th 838, the Third Appellate District held that where the defendant was convicted of three wobbler offenses for which he had not yet been sentenced when he committed a new felony, and was subsequently sentenced as a felon for the earlier offenses, the court did not err when it determined that those offenses were prior serious and violent felonies and sentenced the defendant under Three Strikes Law for the new offense. The Court of Appeal rejected the dicta from *People v. Williams* (1996) 49 Cal.App.4th 1632, wherein *Williams* indicated that when a prior offense is a wobbler, the phrase "prior convictions must include pronouncement of sentence because only then can it be determined whether three strikes applies." This court found that since the prosecution charged the wobblers as felonies, they maintain that distinction immediately on conviction, and that classification is the factor to be used in deciding when a prior is a prior felony conviction.

34. SECTION 667.61 (THE ONE STRIKE LAW) AND THE THREE STRIKES LAW, BOTH ARE APPLIED WHEN IMPOSING SENTENCE:

a. *People v. Ervin* (1996) 50 Cal.App.4th 259, Second District, Division 1, held that the provisions of the one strike law for certain repeat sex offenders (e.g., in this case 15 to life) which was established after the advent of the three strikes law, is the principle punishment, which is then subject to the provisions of the three or two strike provisions of section 667, subdivision (e). The court rejected appellant's contention, based on *People v. Jenkins* (1995) 10 Cal.4th 234, that only the three strikes provisions should apply and not the ne strike provision. Not only did the court reject that concept and only apply the one strike provision, it applied the worst of both statutory schemes to maximize appellant's sentence. However, remember, *Romero* indicates that the strikes law is a separate sentencing scheme and is not an enhancement. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 527.) As a result, only one of the two sentencing schemes should be applied, but not both. Once can also argue that to impose sentence under both sentencing schemes is a violation of section 654. Furthermore, section 667.61 does not create an exception to section 654 by its silence. (See *People v. Siko* (1988) 45 Cal.3d 820, 824.)

b. *People v. McQueen* (2008) 160 Cal.App.4th 27, the First Appellate District, Division 3 held that where the defendant was convicted of violent sexual offenses for which he was subject to sentencing under both the one-strike law (§ 667.61) and the habitual sex offender law (§ 667.71), enhanced in each instance by the Three Strikes Law, the court correctly imposed the habitual sex offender penalties and stayed, and did not strike, the one-strike sentence. The courts are aplit over whether the one strike law should be stayed or stricken, *People v. Snow* (2003) 105 Cal.App.4th 271, indicates stricken, whereas *People v. Lopez* (2004) 119 Cal.App.4th 355, indicates that it should be stayed; this court obviously sides with *Lopez*. But, it is clear that the Three Strikes Law acts to increase sentence on each count.

35. INDETERMINATE TERM CALCULATION IN A TWO STRIKE CASE:

a. *People v. Ruiz* (1996) 44 Cal.app.4th 1653, the Fifth District held that it is perfectly fine to double the 15 to life term for second degree murder in a two strike case. They found that the specific minimum term of 15 years is being doubled to 30 so that you are not actually serving two life terms based on one act. This issue is now governed by *People v. Jefferson* (1999) 21 Cal.4th 86.

b. *People v. Ervin* (1996) 50 Cal.App.4th 259, Second District, Division 1, held that he provisions of the one strike law for certain repeat sex offenders (e.g., in this case 15 to life), which was established after the advent of the three strikes law, is the principle punishment, which is then subject to the provisions of the three or two strike provisions of section 667, subdivision (e).

c. *People v. Tran* **DEPUBLISHED**; formerly at (1998) 67 Cal.App.4th 1320, the third District held that it would be "absurd" to sentence the defendant to a term of double life without the possibility of parole, merely because the literal application of a two strike sentence within the meaning of section 667, subdivision (e)(1), would call for such a sentence. It is clear that a statute should not be given a literal meaning when it will lead to absurd results. Here the Court of Appeal specifically stated, "Defendant has but one life to give to the Department of Corrections." the Court of Appeal struck the double life sentence, and lowered it to a single life sentence.

d. *People v. Hardy* (1999) 73 Cal.App.4th 1429, the Second District court of Appeal, Division 2, held that a person sentenced to a term of LWOP, can

have that sentenced doubled if he or she falls into the two strike category. The court disagreed with appellant's contention that doubling LWPO would be absurd, as there is a remote but real possibility that the Governor might commute one or more of the sentences. (*People v. Garnica* (1994) 29 Cal.App.4th 1558, 1564.)

e. *People v. Smithson* (2000) 79 Cal.App.4th 480, the Third Appellate District held that, by the terms of section 667, subdivision (e)(1), LWOP sentences are not doubled.

f. *People v. Coyle* (2009) 178 Cal.App.4th 209, the Third Appellate District held that the trial court erred in "tripling" defendant's life-without-possibility-of parole sentence on the basis of the plan language of section 667, subdivision (e)(1). (*People v. Smithson* (2000) 79 Cal.App.4th 480 [can only triple a determinate count].)

36. THE PROSECUTION CAN APPEAL AN UNAUTHORIZED SENTENCE, BUT (IN SOME DIVISIONS) NOT A GRANT OF PROBATION:

a. *People v. Carranza* (1996) 51 Cal.App.4th 528, the Sixth Appellate District ruled that the prosecution has the right to appeal a sentence that may be unauthorized pursuant to section 1238, subdivision (10). (See also *People v. Trausch*, *supra*, 36 Cal.App.4th 1239.) The *Carranza* court also determined that, pursuant ot *People v. Scott* (1994) 9 Cal.4th 331, 345, a sentence is generally unauthorized if it could not be lawfully imposed, and any sentence which is only procedurally or factually flawed is permitted unless there is an objection – in other words, the error is waived for purposes of appeal.

b. *People v. Robles* (1997) 52 Cal.App.4th 157, the Second Appellate District, Division 6, ruled that the prosecution does not have the right to appeal a grant of probation, but they do have a right to file a writ of mandate within 60 days from the date probation was granted. (See § 1238, subd. (d).) The prosecution's failure to file the writ mandated the dismissal of this appeal. (See *People v. Bailey* (1996) 45 Cal.App.4th 926, 930.) The *Robles* court acknowledges *Carranza*, *supra*, and then establishes that it did not take into account section 1238, subdivision (d).

c. *People v. Walker* (2001) 88 Cal.App.4th 1022, the Fourth Appellate District, Division 1, held that pursuant to section 1238, subdivision (10), the prosecution can appeal an "unlawful sentence." Here, the Court of Appeal found that the trial court used an incorrect burden of proof when deciding a

prior conviction when they failed to follow the procedures set forth in *People v. Sumstine* (1984) 36 Cal.3d 909 and *People v. Allen* (1999) 21 Cal.4th 424. The prosecution si not required to prove the constitutionality of the plea. The defendant has the burden to establish that the prior violated *Boykin-Tahl*. That determination was made by the trial court on its own without complying with the *Sumstine/Allen* procedures, and therefore, a new trial was ordered on the prior conviction. A retrial was permitted as the trial court did not actually make a not true finding, but set aside the prior on constitutional grounds.

37. THERE IS NO RIGHT TO VOIR DIRE ABOUT THREE STRIKES:

a. *People v. Cardenas* (1997) 53 Cal.App.4th 240, the Fifth Appellate District ruled that, at least when the defendant requests, and the court grants a bifurcated hearing on the priors, the court is not required, nor compelled within its duty to ask questions with regard to bias (see *People v. Chapman* (1993) 15 Cal.App.4th 136, 141), anything regarding three strikes. The court made particular note of the fact that punishment is not within the jury's province, and it was specifically removed when the bifurcated trial on the priors was granted.

38. ENHANCEMENTS ARE NOT ADDED AT 1/3 THE MIDDLE TERM IN THREE STRIKE CASES (INDETERMINATE SENTENCING CASES):

a. *People v. Harrison* **DEPUBLISHED**; formerly at (1997) 60 Cal.App.4th 107, the Fourth Appellate District, Division One, ruled, after rehearing, that, even in a three strikes case, the imposition of multiple gun use enhancements (e.g., § 12022.5, subd. (a), is calculated at one third the middle term pursuant to section 1170, within the meaning of section 1170.1, subdivision (a), and by the terms of section 669. The Court of Appeal rejected an argument raised by the Attorney General based on *People v. Jackson* (1993) 14 Cal.App.4th 1818. The majority of the Court of Appeal specifically found that even though the substantive counts must be run full term consecutively within the meaning of section 667, subdivision (c)(2), the enhancements are determinate terms, and are governed by the terms of sections 1170, and 669.

b. *People v. Lyons* (1999) 72 Cal.App.4th 1224, the fifth Appellate District held that use enhancements are added to the indeterminate term at full term rather than 1/3 the middle term even though the enhancement itself is a determinate term. In a holding directly opposite to *Harrison*, *supra*, this

court finds, based on the rationale of *Jackson*, *supra*, that 1170 does not apply to indeterminate terms and therefore enhancements that attach to the substantive count, runs full term. I would still try and argue, that the rationale of *Harrison*, *supra*, is the more logical, but I would not hold my breath for any great results.

39. CAN THE CRIMINAL STREET GANG ENHANCEMENT, PURSUANT TO SECTION 186.22 SUBDIVISION (b)(1), BE ADDED TO MORE THAN ONE COUNT IN A SINGLE INFORMATION?

a. *People v. Akins* (1997) 56 Cal.App.4th 331, Fourth Appellate District, Division 2, acknowledged the split in authority pertaining to whether section 654 applies to enhancements. *People v. Dobson* (1988) 205 Cal.App.3d 496, 501 and *People v. Moringlane* (1982) 127 Cal.App.3d 811, 817, prohibit the imposition of two enhancements on one victim for separate crimes. The opposite view, and the one adopted by this court is that section 654 does not apply to enhancements and follows *Peple v. Rodriguez* (1988) 206 Cal.App.3d 517, 519. The court also justifies its ruling in applying the same gang enhancement two times given the fact that there were two distinct victims in two separate robberies. (*People v. Champion* (1995) 9 Cal.4th 879, 934-935 [acts of violence against separate victims may be punished separately].) However, the street gang enhancement is not a conduct enhancement such as a violation of section 12022.5, 12022 or 12022.7, which can be committed separately against an individual victim. The gang statute is similar to a status enhancement which is only applied one time per complaint. (See *People v. Tassell* (1984) 36 Cal.3d 77; *People v. Smith* (1992) 10 Cal.app.4th 176.) Therefore, when the situation arises, use the *Dobson/Moringlane* and *Tassell* line of cases to justify the fact that the enhancements, at least of this kind, should not be applied more than one time per informatin, despite the number of victims.

40. LAW OF THE CASE ISSUES:

a. *In re Saldana* (1997) 57 Cal.App.4th 620, Second Appellate District, Division 5, held that an intervening or contemporaneous change in the law, between the time the Court of Appeal has initially ruled, and the new trial court ruling, does not bind the trial court to the Court of Appeal's initial decision. Here, the Court of Appeal initially ruled that it would be an abuse of discretion to strike a strike; then *Romero* and *People v. Superior Court* v. (*Alvarez*) were decided. This Court of Appeal found that those decision were intervening changes in the law, and as a result, the trial court was not

precluded from striking a strike when the *Romero* writ was filed in the trial court. The court reasoned that the trial court must base its decision to strike a strike on a multitude of individualized sentencing factors, and not merely on appellant's criminal record. Given the fact that the trial court was not presented with all mitigation the first time, nor was it presented to the Court of Appeal, appellant was not bound by the law of the case. The Court of Appeal found that considering only a defendant's criminal history is "incompatible with the very nature of sentencing decision; the entire picture must remain exposed." This is another in a series of cases which established that individualized sentencing criteria must be used. Combine this case and the concepts of *People v. Bishop*, *supra*, 56 Cal.App.4th 1245, which indicate that all three strike defendants have bad records, but alone should not preclude the court from striking a strike base don the mitigating factors presented.

b. *People v. Mitchell* (2000) 81 Cal.App.4th 132, the Fourth Appellate District, Division 1, held that when either party fully litigates a matter, and the Supreme Court denies review on the ground ruled upon by the lower court, such decision of the Court of Appeal becomes law of the case. (See *In re Saldana* (1997) 57 Cal.App.4th 620, 625.) Law of the case extends to appellate court's statements in its opinion on appeal of a rule of law necessary to its decision, and to appellate court opinions of an appellate court in original proceedings, and both the prosecution and the defense are bound. with regard to legal sufficiency of evidence, the general rule is that where the sufficiency of the evidence to sustain the judgment depends on the probative value or effect of the evidence itself, and there is no substantial difference in the evidence in the retrial, the former decision is law of the case. The primary purpose for application of the doctrine of law of the case is one of judicial economy, and it prevents the parties from seeking appellate reconsideration of an already decided issue in the same case absent some significant change in circumstances (*People v. Whitt* (1990) 51 Cal.3d 620, 638), intervening or contemporaneous changes in the law, or the establishment of a new precedent by controlling authority have been recognized as significant changes which provide grounds for ignoring law of the case. (*In re Saldana*, *supra*, 57 Cal.App.4th 625, 626.)

c. *People v. Scott* (2000) 85 Cal.App.4th 905, the Second Appellate District, Division 3, held, contra to the holding in *People v. Mitchell* (2000) 81 Cal.App.4th 132, that neither res judicata nor colalteral estoppel preclude a retrial on a prior conviction when the matter is reversed on appeal for insufficiency of the evidence. They base their holding on a narrow reading

of *People v. Monge* (1997) 16 Cal.4th 826 and some other related cases. This court goes out of its way to distinguish *Mitchell* on both its facts and the law that that court applied. This is a necessary read in contravention to *Mitchell*.

d. *Cherry v. Superior Court* (2001) 86 Cal.App.4th 1296, the Second Appellate District, Division 4, held that the defendant can be retried on the prior conviction allegations, which were found to be insufficiently proven in the first appeal, pursuant to *People v. Monge* (1997) 16 Cal.4th 826. The defendant filed the writ based on *People v. Mitchell* (2000) 81 Cal.App.4th 132, and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348]. The Court of Appeal denied the writ, finding that the holding of *Monge* did not bar the retrial of an enhancement in noncapital sentencing. while the Court of Appeal discusses at great length the *Apprendi* decision, it fails to take into account the argument made by the defendant, which is that the opinion by Justice Thomas, wherein he has now disavowed his vote in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, which held that a sentence enhancement statute need not be alleged in an indictment as it is only a sentencing factor, not a criminal offense. Justice Thomas wrote that "It is arguable that *Almendarez-Torres* was incorrectly decided and that a logical application of our reasoning today should apply if the recidivist issue were contested...." with that 5th vote, the *Monge* opinion is called into question along with *Almendarez-Torres* and numerous other cases. The Court of Appeal did not address this issue. As a result, I believe that the Supreme Court will grant review of this issue.

e. *In re Taylor* (2001) 88 Cal.App.4th 1100, modified at 89 Cal.App.4th 406, the Fifth Appellate District, held that the right to determine the fact of a prior conviction derives solely from California Statutory law, and that *Apprendi v. New Jersey* (2000) 530 U.S. 466, does not apply to a sentence under the Three Strikes law. Here, the trial court filed to take a jury waiver before the court determined that he sustained a prior serious felony for purposes of the Three Strikes law. Nonetheless, the Court of Appeal recognized the California Supreme Court's ruling in *People v. Epps* (2001) 25 Cal.4th 19, wherein the High Court stated that they are not deciding whether *Apprendi* would apply to a situation wherein some factual determination needed to be determined, such as the residential nature of a burglary.

f. *People v. Sotello* (2002) 94 Cal.App.4th 1349, the Fifth Appellate District, held, consistent with *People v. Scott* (2000) 85 Cal.App.4th 905, and *Cherry v. Superior Court* (2001) 86 Cal.App.4th 1296, and contra to the

holding in *People v. Mitchell* (2000) 81 Cal.App.4th 132, that neither res judicata nor collateral estoppel preclude a retrial on a prior conviction when the matter is reversed on appeal for insufficiency of the evidence. The court simply finds that all felons who have similar priors, should be treated similarly, and therefore, they should be able to be retired within the meaning of *Monge.*

g. *People v. Gonzales* (2005) 131 Cal.App.4th 767, the Fourth Appellate District, Division 2, held that the retrial of the prior was not barred by double jeopardy pursuant to *People v. Barragan* (2004) 32 Cal.4th 236.

41. MUST A DEFENDANT BE PRESENT AND REPRESENTED BY COUNSEL AT A RE-SENTENCING HEARING:

a. *People v. Vong* (1997) 58 Cal.App.4th 1063, Second Appellate District, Division 7, held that, where the Court of Appeal "remands" a matter back to the trial court for "re-sentencing," in order for the trial court to exercise its discretion to strike a strike, appellant must be represented by counsel and appellant must be present for the hearing. This ruling is consistent with the holdings in *In re Cortez* (1971) 6 Cal.3d 78 and *People v. Tenorio* (1970) 3 Cal.3d 89. The issue has now been decided in *People v. Rodriguez*, *supra*, (1998) 17 Cal.4th 253. As a result, this matter will likely be transferred back to the Court of Appeal in light of *Rodriguez*.

b. *In re Barfoot* (1998) 61 Cal.App.4th 923, the Second Appellate District, Division 4, held that, a defendant who was sentenced prior to *Romero*, and who files a writ in the Superior Court based on the fact that the trial court did not believe that it had discretion to strike a strike, has a right to be present and be represented by counsel. As long as the defendant has made a prima facie case for relief in the writ of habeas corpus, s/he is entitled to a re-sentencing hearing. In this situation a prima facie showing for relief requires, at a minimum, a verified allegation that the trial court indicated its belief that it lacked discretion to strike the prior conviction. The Court of Appeal indicated that the better practice would be to file, as an exhibit to the writ, a copy of transcript to establish the prima facie case.

42. A JUVENILE SUSTAINED PETITION FOR RESIDENTIAL BURGLARY OR ROBBERY MAY QUALIFY AS A STRIKE EVEN THOUGH A RESIDENTIAL BURGLARY IS NOT A WELFARE AND INSTITUTIONS CODE SECTION 707, SUBDIVISION (b) OFFENSE DEPENDING ON WHICH DISTRICT YOU ARE IN, AND EVEN IF THE PROSECUTION DID NOT PROVE THE MINOR WAS PERSONALLY ARMED WITH A FIREARM DURING THE COURSE OF THE ROBBERY:

a. *People v. Griggs* (1997) 59 Cal.App.4th 557, the Fifth Appellate District held that, even though a petition was sustained for an non-section 707, subdivision (b) offense, and therefore, was not within the meaning of section 667, subdivision (d)(3)(B), it still qualified as a strike. The court indicated that we cannot read statutes so literally, and declined to follow the plain meaning of the statute. **THIS CASE IS EXPRESSLY OVERRULED IN *PEOPLE v. GARCIA* (1999) 21 Cal.4th 1, modified at 21 Cal.4th 85**.

b. *People v. Moreno* (1999) 65 Cal.App.4th 1198, the Fourth District, Division Three held that appellant's prior juvenile sustained petition could be used as a strike even though it was not proven that appellant was personally armed during the robbery. (See Welf. & Inst. Code section 707, subd. (b)(3).) The Court of Appeal found that a 707, subdivision (b) offense can be found where a principal other than the minor is armed (*In re Christopher R.* (1993) 6 Cal.4th 86, 93-95), then the prior constituted a strike.

c. *People v. Lewis* **DEPUBLISHED**; formerly at (1999) 72 Cal.App.4th 945, the Second Appellate District, Division 4 held that if a prior juvenile adjudication does not qualify as a strike within the meaning of Welfare and Institutions Code section 707, subdivision (b), even if it does qualify as a strike within the meaning of section 1192.7, subdivision (c), then it cannot qualify as a strike. Here, appellant had a previously sustained petition for robbery, but that robbery was not with a dangerous or deadly weapon. Only a robbery with a dangerous or deadly weapon, not just a robbery, is a crime within the meaning of Welfare and Institutions Code section 707, subdivision (b). This Court of Appeal found that because subdivisions (d)(3)(B) and (d)(3)(D) of section 667 have different functions, and are not coextensive the prior robbery without the use of a dangerous or deadly weapon cannot act as a strike. Requirement (D) identifies the offenses by which an individual becomes eligible for treatment as a strike offender, while requirement (B) identifies the offenses that count as strikes for that offender. The Court of Appeal stated that the Legislature and the voters

intended the list of potential strikes to be broader than the list of threshold offenses for treatment as a strike offender.

d. *People v. Diller* **DEPUBLISHED**; formerly at (1999) 72 Cal.App.4th 1165, the Third Appellate District held that if a prior juvenile adjudication does not qualify as a strike within the meaning of Welfare and Institutions Code section 707, subdivision (b), even if it does qualify as a trike within the meaning of section 1192.7, subdivision (c) or 667.5, subdivision (c), then it cannot qualify as a strike. The case discusses the fact that juvenile adjudications are not convictions (see Welf. & Inst. Code § 203), and for all of the favorable legislative intent reasons, the Court of Appeal holds that a prior sustained petition for burglary cannot be used as a strike.

e. *In re Jensen* (2001) 92 Cal.App.4th 262, the Fourth Appellate District, Division 1 held that a sustained juvenile court petition for voluntary manslaughter would not qualify as a strike given the fact that voluntary manslaughter was not a Welfare and Institutions Code section 707, subdivision (b) offense at the time of the commission of the current offense in 1995. (See *People v. Garcia* (1999) 21 Cal.4th 1.) A prior juvenile adjudication cannot be used as a strike unless all four conditions of subdivision (d)(3)(A)-(D) of section 667 are satisfied. Voluntary manslaughter was not added to the list of Welfare and Institutions Code section 707, subdivision (b) offenses until after the passage of Proposition 21, March 8, 2000. Therefore, it did not qualify as a strike in this case.

43. DEFENDANT DOES NOT HAVE A RIGHT TO A UNITARY TRIAL ON THE CURRENT OFFENSES AND THE STRIKE ALLEGATIONS:

a. *People v. Cline* (1998) 60 Cal.App.4th 1327, the Fourth Appellate District, Division Two, held that even though the defendant requested that the prosecution prove its strike allegations in its case-in-chief, especially when counsel informs the court that the defendant will not testify, the prosecution still has a right to bifurcate the proceedings. The Court of Appeal bought the prosecution's argument that the defendant was merely trying to argue jury nullification. The Court of Appeal upheld the prosecution's right to base on *People v. Calderon* (1994) 9 Cal.4th 69, 79. The trial court has the right to control the conduct of the proceedings pursuant to section 1044, and therefore, this court concluded that, to prevent any question of jury nullification, it could bifurcate the strike priors at the request of the prosecution based on the Supreme Court's holding in *Calderon*. Here, the defendant had twelve prior convictions, which the court felt would be

prejudicial; the issue was to whom. Why would that be prejudicial to the prosecution? It could only be to the defendant, and he chose to put that information before the jury in the prosecution's case in chief. A + B does not equal C in this case.

44. WHEN THE SUPERIOR COURT DENIES A *ROMERO* WRIT AFTER GRANTING AN OSC, THE RULING IS APPEALABLE AND NOT MERELY WRITABLE – IN SOME DISTRICTS:

a. *Lewis v. Superior Court* **DEBUBLISHED**; formerly at (1998) 60 Cal.App.4th 913, the Second Appellate District, Division 2, held that, if the Superior Court finds the *Romero* writ of habeas corpus sufficient to order an order to show cause, but ultimately does not grant the writ, petitioner has the right to appeal from that ruling rather than merely filing another writ in the appellate court. On the other hand, if the Superior Court denies the *Romero* writ without granting an order to show cause, then petitioner's only remedy is to file a writ in the Court of Appeal. **However, we can still rely on *People v. Wax* (1972) 24 Cal.App.3d 302, 204, to obtain the same result**.

b. *People v. Garrett* (1998) 67 Cal.App.4th 1419, the Second District, Division 5, held that when a *Romero* writ is denied in the Superior Court, the matter is not appealable, but writable. The Court of Appeal found that the holding in *People v. Wax* (1972) 24 Cal.App.3d 302, did not provide any rationale for its holding, and therefore, it did not have to be followed. This court did proceed to review the matter as a writ of habeas corpus in the interest of judicial economy. (See *Olson v. Cory* (1983) 35 Cal.3d 390, 401.)

c. *People v. Gallardo* (2000) 77 Cal.App.4th 971, a denial of a writ of habeas corpus is writable only and is not appealable. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.) The court declines to follow *People v. Wax* (1972) 24 Cal.App.3d 302.

45. A JUVENILE IS NOT ENTITLED TO A JURY TRIAL IN JUVENILE COURT EVEN THOUGH A SUSTAINED PETITION FOR A SERIOUS OR VIOLENT FELONY WOULD QUALIFY AS A STRIKE:

a. *Myresheia W. v. Superior Court* (1998) 61 Cal.App.4th 734, the Second Appellate District, Division 5, held that, a juvenile is not entitled to a jury trial in the juvenile court since there are still theoretical different purposes between juvenile and adult proceedings. As we know, in reality, this is a fallacy that exists when the court wants to deny a juvenile any further

protections. Amendments to Welfare and Institutions Code section 202 have added as a purpose "protection of the public" and provides for "punishment" that is consistent with the rehabilitative objectives of the juvenile court in order to proceed more punitively. Use this case in an attempt to persuade a trial court that wants to incarcerate your client without an attempt to rehabilitate first.

b. *People v. Moreno* (1999) 65 Cal.App.4th 1198, the Fourth District, Division Three, found that appellant's prior juvenile adjudication did constitute a strike even though he was not given a jury trial on the prior since there is no constitutional right to have jury determine the facts giving rise to an enhancement, including prior convictions. (See *People v. Wiley* (1995) 9 Cal.4th 580, 589.)

c. *People v. Fowler* (1999) 72 Cal.App.4th 581, the Fifth Appellate District held that a prior sustained petition can be used as a prior strike under the Three Strikes law since the law only acts to increase punishment for a recidivist, and does not state an element of an offense or constitute a new offense. (See *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [140 L.Ed.2d, 118 S.Ct. 1219]; *Parke v. Raley* (1999) 506 U.S. 20, 27 [121 L.Ed.2d 391, 113 S.Ct. 517].)

d. *People v. Cervantes* (1999) 75 Cal.App.4th 28, the Fourth Appellate District, Division 3 held that the defendant's prior juvenile adjudication for armed robbery could be considered as strikes (see *People v. Garcia* (1999) 21 Cal.4th 1), even though sustained petition occurred prior to the strike statute being enacted and even though the court sustained the petition without a jury trial or waiver of same. (See *People v. Fowler* (1999) 72 Cal.App.4th 581.)

e. *People v. Bowden* (2002) 102 Cal.App.4th 387, the Second Appellate District, Division 4 held that, a prior juvenile conviction for simple robbery, without a jury trial, qualifies as a strike under the "Three Strikes" law if the present offense was committed after March 7, 2000 when Proposition 21 amended Welfare and Institutions Code section 707, subdivision (b)(3) by replacing "robbery while armed with a dangerous or deadly weapon" with simple robbery as an offense constituting a strike. The court disagrees with the holding of *United States v. Tighe* (2001) 266 F.3d 1187, and its application of *Apprendi*. The Court of Appeal followed the rationale of *People v. Fowler* (1999) 72 Cal.App.4th 581, wherein the Court of Appeal found that the juvenile did not have a right to a jury trial, and therefore *Apprendi* has no direct application to this case.

f. *People v. Smith* (2003) 110 Cal.App.4th 1072, the Second Appellate District, Division 7 held that a juvenile adjudication may be used under Three Strikes law to enhance adult offender's sentence notwithstanding absence of right to jury trial in delinquency proceedings. (See *People v. Bowden* (2002) 102 Cal.App.4th 387, rejecting the *Tighe* and *Apprendi* argument, *supra*.) Also called into question by the dissent was whether the trial court abused its discretion in failing to strike one of the juvenile court strikes, so as not to impose a life sentence.

g. *People v. Superior Court* (*Andrades*) (2003) 113 Cal.App.4th 817, the Sixth Appellate District held that a prior juvenile adjudication for robbery constitutes a strike offense in cases where the current offense was committed after the passage of Proposition 21 on March 7, 2000, even if the prior adjudication occurred before that date. However, you should look at *People v. Garcia* (1999) 21 Cal.4th 1, for an argument that counters this Court's interpretation of the statute. Additionally, the Court of Appeal held that a prior juvenile adjudication may constitutionally be used as a strike even though there is no right to a jury trial in juvenile proceedings. (See *People v. Lee* (2003) 111 Cal.App.4th 1310.)

h. *People v. Beck* (2005) 126 Cal.App.4th 518, the Fifth Appellate District held that the defendant's juvenile priors could be used as strikes, pursuant to section 667, subdivision (d)(3). (See *People v. Superior Court* (*Andrades*) (2003) 113 Cal.App.4th 817, 833-834.)

i. *People v. Buchanan* (2006) 143 Cal.App.4th 139, the Fifth Appellate District rejected the argument from *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187, that the juvenile strikes, suffered by appellant as a minor, should not be strikes since he did not have a jury trial as part of those proceedings, and therefore, he is subject to the 25 to life sentence for this current offense.

j. *People v. Pacheco* (2011) 194 Cal.App.4th 343, the Sixth Appellate District held that a juvenile adjudication for a serious or violent felony is a "strike" for purposes of the Three-Strikes Law, even without a jury trial pursuant to *People v. Nguyen* (2009) 46 Cal.4th 1007 and Court of Appeal is bound by this decision pursuant to *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. A juvenile adjudication is not a "conviction" (see Welf. & Inst. Code, § 203; *People v. West* (1984) 154 Cal.App.3d 100, 106; see also *People v. Westbrook* (2002) 100 Cal.App.4th 378, 382, 385), so the provision of section 4019 denying increased conduct credits to inmates

previously convicted of a serious or violent felony does not apply, and the defendant is awarded the additional credits.

46. THE RECORD OF CONVICTION THAT DOES NOT INCLUDE SPECIFIC FACTS OF THE OFFENSE, SUCH AS SHOWING THAT THE DEFENDANT PERSONALLY USED A WEAPON, OR AS AN ACCOMPLICE WHO DID NOT USE A WEAPON, IS NOT A STRIKE: AND IF THE FACTS SHOW THAT THE DEFENDANT USED A WEAPON, EVEN A STRICKEN ENHANCEMENT CAN BECOME A STRIKE; BUT A PLEA BARGAIN CAN ESTABLISH THAT A PRIOR IS NOT A STRIKE:

a. *People v. Encinas* (1998) 62 Cal.App.4th 489, the Second Appellate District, Division 7 held that, given the fact that there are two distinct ways in which to prove an assault with a deadly weapon, (1) by using a deadly weapon or instrument, or (2) by means likely to produce great bodily harm, and the prosecution failed to set forth the manner in which the enhancement was committed, the Court of Appeal reversed the conviction based on *People v. Rodriguez* (1998) 17 Cal.4th 253, 262. In such a circumstance we must presume that the prior conviction was for the lest offense punishable under the law.

b. *People v. Blackburn* (1999) 72 Cal.App.4th 1520, the Fourth Appellate District, Division 2, held that, a prior conviction for a violation of section 246, shooting into an occupied motor vehicle, is not in and of itself a strike; however, it can become one if the facts of the record of conviction, here the preliminary hearing testimony, established that the defendant personally used a weapon in the course of that offense. In this case, the facts clearly established the use. Furthermore, the Court of Appeal found it irrelevant that the use enhancement was stricken as part of a plea bargain; they found that if the facts establish that the defendant personally used the weapon, it will count as a strike in any subsequent prosecution, and that the striking of the use enhancement merely barred any time on the enhancement, not that it could not be used in the future to establish a strike. In order to avoid this result, I would try and work out a negotiated disposition, that is on the record, that establishing that if the use is stricken, it cannot be used for any purpose in any subsequent prosecution; if that deal cannot be forged, then the defendant must be told that any facts showing his personal use, can be used against him in a future prosecution to make this conviction a strike.

c. *People v. Cortez* (1999) 73 Cal.App.4th 276, the Second Appellate District, Division 3 held that, even though appellant admitted a prior conviction for

section 12034, subdivision (c), (discharge of a firearm from a motor vehicle at another person), the prior is not a strike unless the prosecution proves that the defendant either personally used a weapon within the meaning of section 667, subdivision (c)(8) or a dangerous weapon within the meaning of section 667, subdivision (c)(23). The facts of the predicate offense were not shown; therefore, the court can only presume the predicate offense was for the least adjudicated elements. (See *People v. Rodriguez* (1998) 17 Cal.3d 253, 262.) Given the fact that the defendant could have committed the offense as an accomplice who did not use a weapon, there is insufficient evidence that the offense is a strike. This case is wonderful from the standpoint that it reiterates what *Rodriguez* says, in a different context, and it is contra to *People v. Guerrero* (1993) 19 Cal.App.4th 401, which holds that a guilty plea is conclusive of the fact that the defendant admitted every element of the charged crime, which includes the personal use. Remember, *People v. Delgado* (2008) 43 Cal.4th 1059, disapproved *Rodriguez* in this context.

d. *People v. Jones* (1999) 75 Cal.App.4th 616, the Second Appellate District, Division 4, held that the evidence was insufficient to find that appellant committed a serous felony within the meaning of the Three Strikes law, based on a plea of guilty to federal bank robbery, as the robbery can be committed in more than one way, some of which would not qualify as a strike. The federal bank robbery statute can be violated in two distinct ways; (1) felony taking by force or fear, and (2) entering with the intent to commit a felony or larceny therein. Defendant had pled to the bank robbery and the prosecution argued that the plea constituted an admission to each element of the offense. This argument was essentially adopted in *People v. Guerrero* (1993) 19 Cal.App.4th 401. This court finds that *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262 implicitly disapproved *Guerrero*, in that *Rodriguez* held that when the defendant pled to an assault, which can be committed in two different ways, and the record of conviction (see *People v. Woodell)* (1998) 17 Cal.4th 448), did not specifically prove either of the two distinct manners in which the statute could be violated, held that the prior was not sufficiently proven as a matter of law. This court follows the rationale of *People v. Cortez* (1999) 73 Cal.App.4th 276, that the above cited *Guerrero* opinion was implicitly rejected by the Supreme Court in *Rodriguez*. Remand for a retrial on the prior is not precluded by double jeopardy principle pursuant to *People v. Monge* (1997) 16 Cal.4th 826; *Monge v. California* (1998) 524 U.S. 721. I am not going to predict the shelf life of this case, since a similar ruling by the Fourth Appellate District in *People v. Mitchell*, formerly at (1999) 68 Cal.App.4th 1489, was depublished. Remember, *People v. Delgado* (2008) 43 Cal.4th 1059, disapproved *Guerrero* in this

context. Further that *People v. Miles* (2008) 43 Cal.4th 1074, reaffirms that bank robbery can be accomplished in multiple ways, and the proper notations must be present for it to be a serious felony.

e. *In re Cruse* (2003) 110 Cal.App.4th 1495, the Second Appellate District, Division 5 held that the preliminary hearing testimony of the victim was admissible to prove the defendant's prior crime was a felony. The issue became, did the defendant commit great bodily injury on the victim in the prior matter. The Court of Appeal found that the defendant was not found nor did he admit guilt for great bodily injury was irrelevant to whether it was committed on the victim. Relying on *People v. Reed* (1996) 13 Cal.4th 217, the court considered the preliminary hearing transcript and determined that appellant had committed great bodily injury on the victim. Appellant should have been able to establish that great bodily injury was not committed on the victim, separate and apart from the preliminary hearing transcript. The opinion does not acknowledge the fact that the Supreme Court in *Reed*, only dealt with the question of how the prosecution could prove the prior. The *Reed* court specifically stated: "We express no opinion as to whether a defendant would be entitled to call live witnesses to dispute the circumstances of the prior offense." (*Id.*, at p. 229.) Additionally, the Ninth Circuit held in *Gill v. Ayers* (9th Cir. 2008) 322 F.3d 678, 684), that a defendant's 14th Amendment right to due process was violated when the trial court denied the defendant the opportunity to testify in his own defense as to whether his prior conviction, for assault within the meaning of section 245, subdivision (a)(1), qualified as a serious felony. The Court of Appeal found that the defendant has the constitutional right to a fair trial and to present all relevant evidence of significant value to his defense. Appellant had tried to submit medical records and have the court look at the subpoenaed medical records which indicated that she did not suffer a broken jaw as she had testified to at the preliminary hearing.

f. *People v. Watts* (2005) 131 Cal.App.4th 589, the Fifth Appellate District held that in a challenge to the prior, wherein the defendant had previously pleaded guilty to the prior offense, the court within the meaning of *People v. Cortez* (1999) 73 Cal.App.4th 276 and *People v. Rodriguez* (1998) 17 Cal.3d 253, held that on an appeal to challenge a finding that prior conviction was a strike, where the prior conviction is for an offense which can be committed in more than one way, one or more of which would not qualify as a strike, and "if it cannot be determined from the record that the offense was committed in a way that would make it a strike, a reviewing court must presume the offense was not a strike." Here the prior offense was for a

violation of section 12031, subdivision (a)(2)(C), and for it to be a strike, it must be on the basis that the offense as committed constituted a felony violation of section 186.22, pursuant to *People v. Robles* (2000) 23 Cal.4th 1106, section 12031, subdivision (a)(2)(c).

g. *People v. Maestas* (2006) 143 Cal.App.4th 247, the Third Appellate District held that where the defendant pled to two second degree burglaries in 1992, after the court had made a determination, in that case that the structure burglarized was residential, was not determinative. The plea agreement meant that the defendant did not admit that he burgled a residence, and the People abandoned their effort to prove, at trial, that the building burgled was a residence. The plea in effect proved that the structure was not a residence. The court may look beyond the fact of the conviction pursuant to *People v. Guerrero* (1988) 44 Cal.3d 343, 354-355, but "not beyond logic and reason." The Court of Appeal distinguished *People v. Gom ez* (1994) 24 Cal.App..4th 22, and *People v. Blackburn* (1999) 72 Cal.App.4th 1520.

h. *People v. Bueno* (2006) 143 Cal.App4th 1503, the First Appellate District, Division 5 held that where an information alleged that the defendant committed a battery with serious bodily injury and that said offense was a serious felony, within the meaning of section 1192.7, but did not specifically allege that the defendant personally inflicted great bodily injury or used a firearm, and he had entered a plea of no contest and did not admit that the offense was a serious felony, said information and plea did not constitute substantial evidence, for purposes of three-strikes sentencing in subsequent case, that the battery constituted a serious felony. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 261 [a record of the prior conviction establishes only the least adjudicated elements].) Here, the defendant had admitted that he committed a battery with serious bodily injury (§ 243, subd. (D)), but the record did not establish that he personally inflicted GBI, and was not an aider and abettor, or tha the used a firearm in the commission of the offense, therefore the record failed to prove that it qualified as a strike, since a violation of section 243, subdivision (d) alone is not a serious felony within the meaning of section 1192.7, subdivision (c).

47. WAIVER

a. *People v. Gray* (1998) 66 Cal.App.4th 973, the First District, Division 5, held that a claim of vagueness is waived, even though raised in appellant's opening briefing, if appellant fails to provide any substantial argument or citation to authority to support these contentions. (See *People v. Hardy*

(1992) 2 Cal.4th 86, 150.) Counsel cannot merely mention vagueness or any other constitutional principal for the purpose of exhaustion, without citing some specific working in the statute and case law to support the theory.

48. GRAND THEFT "INVOLVING" A FIREARM IS A SERIOUS FELONY INCLUDES GRAND THEFT OF A FIREARM, THEREBY MAKING IT A STRIKE:

a. *People v. Rodola* (1998) 66 Cal.App.4th 1505, the Second District, Division 4, held that a conviction for grand theft of a firearm came within the provisions of section 1192.7, subdivision (c)(26), that the offense "involved" a firearm. Therefore, the offense constitutes a serious felony and a strike. The court found that based on the legislative history of section 1192.7, that the Legislature intended that theft of a firearm be included within the meaning of the serious felony statute.

49. A PLEA TO A FEDERAL BANK ROBBERY CONVICTION, WHERE THERE ARE TWO DISTINCT WAYS IN WHICH THE STATUTE CAN BE VIOLATED, AND IF PROVEN CONSTITUTE A SERIOUS FELONY, AND A STRIKE, IS INSUFFICIENT AS A MATTER OF LAW UNLESS THE EVIDENCE PRESENTED PROVES ONE OR BOTH OF THE TWO DISTINCT WAYS THE STATUTE CAN BE VIOLATED:

a. *People v. Mitchell* **DEPUBLISHED** (1999) 68 Cal.App.4th 1489, the Fourth District, Division 1, held that the federal bank robbery statute can be violated in two distinct ways: (1) felony taking by force or fear, and (2) entering with the intent to commit a felony or larceny therein. Defendant had pled to the bank robbery and the prosecution argued that the plea constituted an admission to each element of the offense. This argument was essentially adopted in *People v. Guerrero* (1993) 19 Cal.App.4th 401. This court finds that *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262 implicitly disapproved *Guerrero*, in that *Rodriguez* held that when the defendant pled to an assault, which can be committed in two different ways, and the record of conviction (see *People v. Woodell* (1998) 17 Cal.4th 448), did not specifically prove either of the two distinct manners in which the statute could be violated, held that the prior was not sufficiently proven as a matter of law. That rationale was similarly followed by the Court of Appeal in this matter. The court reverses based on ineffective assistance of appellate counsel for failing to raise the issue on the first appeal.

b. *People v. Jones* (1999) 75 Cal.App.4th 616, the Second Appellate District, Division 4, held that the evidence was insufficient to find that appellant committed a serious felony within the meaning of the Three Strikes law, based on a plea of guilty to federal bank robbery, as the robbery can be committed in more than one way, some of which would not qualify as a strike. The federal bank robbery statute can be violated in two distinct ways: (1) felony taking by force or fear, and (2) entering with the intent to commit a felony or larceny therein. Defendant had pled to the bank robbery and the prosecution argued that the plea constituted an admission to each element of the offense. This argument was essentially adopted in *People v. Guerrero* (1993) 19 Cal.App.4th 401. This court finds that *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262 implicitly disapproved *Guerrero*, in that *Rodriguez* held that when the defendant pled to an assault, which can be committed in two different ways, and the record of conviction (see *People v. Woodell* (1998) 17 Cal.4th 448), did not specifically prove either of the two distinct manners in which the statute could be violated, held that the prior was not sufficiently proven as a matter of law. this court follows the rationale of *People v. Cortez* (1999) 73 Cal.App.4th 276, that the above cited *Guerrero* opinion was implicitly rejected by the Supreme Court in *Rodriguez*. Remand for a retrial in the prior is not precluded by double jeopardy principle pursuant to *People v. Monge* (1997) 16 Cal.4th 826; *Monge v. California* (1998) 524 U.S. 721. Remember, *People v. Delgado* (2008) 43 Cal.4th 1059, disapproved *Guerrero* in this context. Further that *People v. Miles* (2008) 43 Cal.4th 1074, reaffirms that bank robbery can be accomplished in multiple ways, and the proper notations must be present for it to be a serious felony.

50. INSTRUCTION EQUATING PROXIMATE CAUSE WITH PERSONALLY INFLICTING GREAT BODILY INJURY WAS ERROR IN DETERMINING WHETHER AN OFFENSE IS A STRIKE:

a. *People v. Rodriguez* (1999) 69 Cal.App.4th 341, the First District, Division 2, held that the trial court erred when it instructed the jury that proximate cause equated to personally inflicting great bodily injury. Appellant had previously been convicted of resisting arrest which caused great bodily injury. (See § 148.10.) An officer was injured when he fell trying to catch appellant as appellant ran from the scene. To become a strike, the prosecution had to prove that appellant committed great bodily injury, given the fat that section 148.10 is not a strike within the meaning of section 1192.7, subdivision (c). The Court of Appeal held that the facts of this case do not establish that appellant personally caused the officer's injury even

though his conduct may have been the proximate cause of the injury. (See *People v. Cole* (1982) 31 Cal.3d 568.) As a result, the trial court's finding that this prior was a strike, was erroneous.

51. DOES THE TRIAL COURT, AS A MATTER OF LAW, DETERMINE IF AN OUT OF STATE PRIOR CONVICTION IS A SERIOUS OR VIOLENT FELONY:

a. *People v. Tobias* (1999) 77 Cal.App.4th 38; formerly at 71 Cal.App.4th 704, the Sixth Appellate District, held that pursuant to *People v. Kilii* (1999) 21 Cal.4th 452, appellant did have a right to a jury trial on his priors; however, given the fact it is a statutory right, and not a constitutional right (see *People v. Vera* (1997) 15 Cal.4th 580), it was harmless error to deny appellant his jury trial right. REMEMBER, THE ISSUE OF WHETHER THIS TYPE OF ERROR IS STRUCTURAL OR NOT WAS DECIDED IN *People v. Epps* (2001) 25 Cal.4th 19.

b. *People v. Jefferson* (2007) 154 Cal.App.4th 1381, the Third Appellate District held that the court indicated that *Cunningham* and *Blakely* still recognize *Almendarez-Torres*, and therefore, *Kelii*, which holds that the court makes the determination whether the defendant's prior is a strike, has not yet been abrogated. Where the court agreed that the elderly victim enhancement within the meaning of section 667.9 should not be imposed because the defendant did not physically harm the victim, did not brandish or use the knife he had in his possession, and was motivated largely by his need for drugs, and because second-strike sentence would constitute sufficient punishment, enhancement should have been stricken rather than stayed (*People v. Luckett* (1996) 48 Cal.4th 1214), and there is no reason to remand to the trial court for further proceedings.

52. A PRIOR JUVENILE ADJUDICATION THAT IS NEITHER A SERIOUS NOR VIOLENT FELONY, BUT IS A 707, SUBDIVISION (b) OFFENSE, IS NOT A STRIKE:

a. *People v. Leng* (1999) 71 Cal.App.4th 1, the Fifth Appellate District held that an offense that is listed as a Welfare & Institutions Code, section 707, subdivision (b) offense, but is not a serious or violent felony, cannot be a strike prior, as it would violate the defendant's right to equal protection. The intent of the legislature in enacting the Three Strikes law was to ensure longer sentences for those persons who have previously committed serious or violent felonies. (See § 667, subd. (b).) As the Court of Appeal stated, if

all of the offenses listed in Welf. & Inst. Code, section 707, subdivision (b) were considered strikes, it would expand the list beyond serious or violent felonies. An adult offender, who as a juvenile, committed a 707, subdivision (b) offense that was not serious or violent would be treated more harshly than the adult offender who had committed the same prior offense as an adult. The court can look behind the record to determine if the crime charged was a strike.

53. THE PROSECUTION AND NOT THE DEFENDANT HAS THE BURDEN OF PROVING THAT THE DEFENDANT PERSONALLY INFLICTED GREAT BODILY INJURY TO A PERSON, "OTHER THAN AN ACCOMPLICE" WITHIN THE MEANING OF SECTION 1192.7, SUBDIVISION (C)(8):

a. *People v. Henley* (1999) 72 Cal.App.4th 555, the Fifth Appellate District held that in priors trial for evading a police officer within the meaning of section 2800.3, which is not a serious felony within the meaning of 1192.7, subdivision (c), the prosecution has the burden of establishing that the defendant personally inflicted great bodily injury to a person "other than to an accomplice," within the meaning of section 1192.7, subdivision (c)(8), in order for the prior to qualify as a strike. The court analyzes a number of cases that discuss the difference between the prosecution's burden of proving each element of an allegation and those cases which place the burden on the defendant to prove an affirmative defense. (See *People v. Fuentes* (1990) 224 Cal.App.3d 1041.) In the end, the Court of Appeal concluded that, regardless of whether it was the prosecution's burden or the defendant's, the defendant was not given notice in the prior case that he had to prove the injured party was an accomplice in order to avoid his conviction being later used as a serious felony enhancement. As a result there was a violation of due process. The prosecution can retry the matter pursuant to *Monge*.

54. STRIKING A USE ENHANCEMENT AS PART OF A PREVIOUS PLEA BARGAIN DOES NOT PREVENT THE FACTS OF THAT CASE TO SHOW THAT THE DEFENDANT "PERSONALLY USED A FIREARM" WITHIN THE MEANING OF SECTION 1192.7, SUBDIVISION (C)(8); BUT A PLEA TO A SECOND DEGREE BURGLARY, IN SPITE OF A COURT'S DETERMINATION OF THE RESIDENTIAL NATURE OF THE BUILDING, PRIOR TO THE PLEA, IS STILL NOT A PRIOR STRIKE:

a. *People v. Blackburn* (1999) 72 Cal.App.4th 1520, the Fourth Appellate District, Division 2, held that, a prior conviction for a violation of section 246, shooting into an occupied motor vehicle, is not in and of itself a strike; however, it can become one if the facts of the record of conviction, here the preliminary hearing testimony, established that the defendant personally used a weapon in the course of that offense. In this case, the facts clearly established the use. Furthermore, the Court of Appeal found it irrelevant that the use enhancement was stricken as part of the plea bargain; they found that if the facts establish that the defendant personally used the weapon, it will count as a strike in any subsequent prosecution, and that the striking of the use enhancement merely barred the imposition of time on the current offense, and not that it could not be used in the future to establish a strike. In order to avoid this result, I would try and work out a negotiated disposition, that is on the record, that establishing that if the use is stricken, it cannot be forged, then the defendant must be told that any facts showing his personal use, can be used against him in a future prosecution to make this conviction a strike.

b. *People v. Maestas* (2006) 143 Cal.App.4th 247, the Third Appellate District held that where the defendant pled to two second degree burglaries in 1992, after the court had made a determination, in that case that the structure burglarized was residential, was not determinative. The plea agreement meant that the defendant did not admit that he burgled a residence, and the People abandoned their effort to prove, at trial, that the building burgled was a residence. The plea in effect proved that the structure was not a residence. The court may look beyond the fact of the conviction pursuant to *People v. Guerrero* (1988) 44 Cal.3d 343, 354-355, but "not beyond logic and reason." The Court of Appeal distinguished *People v. Gomez* (1994) 24 Cal.App.4th 22, and *People v. Blackburn* (1999) 72 Cal.App.4th 1520.

55. RAPE IN CONCERT QUALIFIES AS A STRIKE EVEN THOUGH IT WAS NOT LISTED IN SECTION 1192.7 UNTIL AFTER JUNE 30, 1993:

a. *People v. Davis* **DEPUBLISHED**; formerly at (1999) 76 Cal.App.4th 1347, the Fourth Appellate District, Division 1, held that even though rape in concert was not added to the list of enumerated serious felonies under section 1192.7, subdivision (c) until 1998, well after the date that the Three-Strikes legislation indicates which felonies qualify as prior strikes, it is the criminal "conduct" that is called into question and not the specific penal code section. The Court of Appeal's rationalization is that since rape was listed as serious felony at the time of the strikes legislation, then the conduct of rape in concert, a more serious crime, must also be included. Therefore, since appellant was convicted of rape and rape in concert during the same event, they both qualified as strikes, subjecting appellant to a 25 to life sentence.

56. A DEFENDANT'S PRIOR CONVICTION FOR SECTION 288, SUBDIVISION (a), :CONSTITUTES A PRIOR STRIKE

a. *People v. Tobias* (1999) 77 Cal.App.4th 38, the Sixth Appellate District, held that a defendant who was previously convicted of a lewd act "upon and with the body" of a child, satisfied the requirements of section 1192.7, subdivision (c) and 667.5, subdivision (c), which indicated that the lewd act is "on a child" under the age of 14 years of age.

57. FAILURE TO OBTAIN A CERTIFICATE OF PROBABLE CAUSE TO CHALLENGE THE MAXIMUM SENTENCE IMPOSED BASED ON PLEA AGREEMENT PRECLUDES A CONSTITUTIONAL CHALLENGE TO THE SENTENCE:

a. *People v. Young* (2000) 77 Cal.App.4th 827, the Third Appellate District held that, within the meaning of *People v. Panizzon* (1996) 13 Cal.4th 68, appellant's appeal must be dismissed for failure to obtain a certificate of probable cause as the challenge was to the validity of the plea itself. Even though appellant's plea did not call for a particular sentence, and gave him the ability to seek a reduction in the sentence within the meaning of *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, the Court of Appeal held that the challenge was to the plea itself and was dissimilar to the permitted challenge of *People v. Lloyd* (1998) 17 Cal.4th 658. In *Lloyd, supra,* the defendant had entered a plea without a plea bargain, and the court held that he was not challenging the plea itself, therefore, a certificate of

probable cause was not needed, and reinstated the appeal. Here, the Court of Appeal held that the case more closely resembled *Panizzon* and not *Lloyd*, in that, even though the challenge was based on"post-plea" events, the attack went to the heart of the agreement. The Court of Appeal found that reserving the right to challenge the sentence under *Romero*, was not similar to reserving the right to challenge the maximum sentence.

58. A VIOLATION OF SECTION 243, SUBDIVISION (D) IS NOT A STRIKE AS IT CAN BE COMMITTED WITHOUT FORCE "LIKELY" TO PRODUCE GREAT BODILY INJURY:

a. *People v. Fountain* (2000) 82 Cal.App.4th 61, the Third Appellate District held, following a rehearing on the issue, that a violation of section 243, subdivision (d) when committed by a juvenile, is not a strike as it is not a crime within the meaning of Welfare and Institutions Code section 707, subdivision (b). Serious bodily injury has been held to be the equivalent of great bodily injury. (*People v. Burroughs* (1984) 35 Cal.3d 824, 831.) However, a violation of 243, subdivision (d) can be committed without force "likely" to cause serious injury; only the end result that great bodily injury actually occurred matters. But, there is a catch-all within Welfare and Institutions Code section 707, subdivision (b)(14) applies to any assault by means "likely" to produce great bodily injury. However, given the fact that an act of simply pushing the victim, which causes him or her to fall, and as a result suffers serious injury, is not force "likely" to cause great bodily injury, the offense does not qualify as a strike. The Court of Appeal specifically found that *Griggs* was overruled by *People v. Garcia* (1999) 21 Cal.4th 1, and supplied no basis for the attorney general's argument. The Court of Appeal does imply that the court can look behind the record to determine if the crime charged is a strike in a delinquency case. (See *People v. Leng* (1999) 71 Cal.App.4th 1, 9.)

b. *People v. Taylor* (2004) 118 Cal.App.4th 11, the Fourth Appellate District, Division 1, held that the willful infliction of corporal injury on a cohabitant (§ 243.5), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), and battery with serious bodily injury (§ 243, subd. (d)), are not serious felonies and therefore the section 667, subdivision (a)(1) enhancement cannot be imposed, absent a finding that the victim suffered great bodily injury (§ 12022.7, subd. (a)), which the jury found not true in this case. This Court of Appeal set forth the differences between great bodily injury and serious bodily injury, and acknowledged that other cases have equated the two concepts, even though they are not exactly the same.

(See *People v. Burroughs* (1984) 35 Cal.3d 824, 831; *People v. Hawkins* (1993) 15 Cal.App.4th 1373, 1375.) The jury's findings of a bone fracture qualified as serious bodily injury, and not great bodily injury, as the injury was determined to be a moderate injury within CALJIC 17.20.

59. A THREE STRIKE DEFENDANT IS NOT PROHIBITED FROM ENTERING A DEFERRED ENTRY OF JUDGMENT PROGRAM

a. *People v. Davis* (2000) 79 Cal.App.4th 251, the Second Appellate District, Division 3, held that a three-strikes defendant is not ineligible for the deferred entry of judgment program due to the fact that he is not "convicted" of a current offense, unless and until (s)he fails to perform satisfactorily in the program. The plea of guilty by a defendant who enters into the deferred entry of judgment program does not constitute a conviction, and the mere allegation of one or two prior strikes, does not preclude the defendant from entering the program. Finally, the court held that the consequences of the deferred entry of judgment program are more sever than the old diversion programs, and therefore, they are not prohibited pursuant to the Three-Strikes Law.

60. RETRIAL ON A PRIOR CAN BE BARRED POST-*MONGE* IF BASED ON DUE PROCESS AND/OR EQUAL PROTECTIONS, RES JUDICATA OR LAW OF THE CASE GROUNDS:

a. *People v. Mitchell* (2000) 81 Cal.App.4th 132, the Fourth Appellate District, Division 1, held that in a prior appellate opinion involving the same issues, the court determined that as a matter of law the evidence presented was insufficient to show that the prior federal bank robbery conviction qualified as a serious felony in California. Filling in the blanks left open by the United States Supreme Court's ruling in *Monge v. California* (1998) 524 U.S. 721, and *People v. Monge* (1997) 16 Cal.4th 826, where the state has a full and fair opportunity to present its case unhampered by evidentiary error or other impediment, fundamental fairness requires application of equitable principles or res judicata and law of the case to preclude the relitigation of defendant's prior serious felony conviction allegations for purpose of the 5 year prior as well as the Three Strikes law. The court does an extensive analysis of the principles of collateral estoppel and res judicata and the policy reasoning behind each of them. The Court of Appeal also notes that even though the doctrine of res judicata is a component of double jeopardy, it has been recognized as a separate equitable doctrine that may bar relitigation of prior final determinations or issues. Given the fact that this

Court of Appeal in *Mitchell II*, held as a matter of law that the evidence presented by the prosecution was insufficient, they impliedly determined that the original trial court had erroneously entered true findings for those allegations. Had the trial court entered the appropriate "not true" finding (§ 1158), the mater would have ended at the conclusion of the first trial on the priors since the People do not have the right to appeal those determinations (§ 1138).

61. A VIOLATIO0N OF SECTION 243, SUBDIVISION (D) IS NOT A STRIKE AS IT CAN BE COMMITTED WITHOUT FORCE "LIKELY" TO PRODUCE GREAT BODILY INJURY:

a. *People v. Mitchell* **REVIEW GRANTED ON UNRELATED ISSUE** (S090791); formerly at (2000) 82 Cal.App.4th 55, the Second Appellate District, Division 7, held consistent with the ultimate holding in *People v. Benson* (1998) 18 Cal.App.4th 24, that the trial court did not err when it found 2 strike priors, which arose out of the same occasion, could form the basis for the strike priors in order to impose the 25 to life term. Appellant was convicted, in 1983 of arson, within the meaning of section 451, subdivision (a), and of arson of a structure, within the meaning of section 451, subdivision (c), both arising out of the same act. The Supreme Court left open the question whether it would be an abuse of discretion for the trial court not to dismiss such a strike prior, where, the prior felonies are so closely related, that being, when multiple convictions arise out of a single act as distinguished from multiple act committed in an indivisible course of conduct. (See footnote 8.) The Court of Appeal, in this matter, did not discuss this issue. I believe that this issue is screaming out for its resolution in this case or a case very similar. A petition for rehearing is being done in this matter, and if that is unsuccessful, a petition for review will be filed. I encourage anyone with a similar issue to do the same thing.

b. *People v. Ortega* (2000) 83 Cal.App.4th 659, the First Appellate District, Division 2, held that the trial court did not abuse its discretion in failing to dismiss a count of assault, which was unquestionably the part of a single transaction wherein the defendant was convicted of attempted voluntary manslaughter; they relied in large part on the dissent in *People v. Benson* (1998) 18 Cal.App.4th 24. The Court of Appeal agreed with the trial court, that the issue of dismissing the count should be resolved in the future, if the defendant commits another act that would subject him to an indeterminate life sentence under the Three Strikes law. The Court of Appeal flatly refused to resolve the matter left open by the *Benson* Court in footnote 8.

c. *People v. Scott* (2009) 179 Cal.App.4th 902, the Third Appellate District held that the "same act" and circumstances posed by the defendant's "prior" robbery and carjacking convictions provided "a factor" for trial court to consider, but did not mandate striking a "strike." Trial court did not abuse its discretion in finding the defendant's violent record justified treating those two strikes, arising from the same act, as one. This seemingly flies in the fact of the strict language set forth in *People v. Benson* (1998) 18 Cal.4h 24, 35, fn. 8.)

62. A HIT AND RUN ACCIDENT DOES NOT QUALIFY AS A SERIOUS FELONY OR A STRIKE UNLESS THE "RUNNING" ASPECT OF THE CRIME CAUSES THE GREAT BODILY INJURY:

a. *People v. Wood* (2000) 83 Cal.App.4th 862, the fourth Appellate District, Division 1, held, consistent with *People v. Braz* (1998) 65 Cal.App.4th 425, that the gravamen of a hit and run (Vehicle Code § 20001, subd. (a)), is not the initial injury to the victim, but leaving the scene without presenting identification or rendering aid. Therefore, unless the defendant's failure to stop and present identification and render aid causes permanent, serious injury to the victim, it is not a serious felony, and therefore not a strike, within the meaning of either sections 1192.7, subdivision (c)(8) or 667, subdivisions (b)-(i). This finding is further bolstered by the fact that section 1192.8, wherein the Legislature sought to clarify which crimes involved vehicles constitute serious felonies, did not list Vehicle Code section 20001.

63. A DEFENDANT MAY NOT CHALLENGE HIS PLEA WHEN A SUBSEQUENT CASE FOUND THAT A PRIOR WAS NOT A STRIKE, THEREBY LOWERING THE MAXIMUM PENALTY FOR THE CURRENT OFFENSE:

a. *People v. Johnson* **DEPUBLISHED** (2000) 84 Cal.App.4th 20, the Second Appellate District, Division 6, held that a defendant who pleads guilty and admits an enhancement is not entitled to withdraw his plea and admission because a subsequent judicial decision has reduced the maximum penalty for the charged offense and enhancement. (See *Brady v. United States* (1970) 397 U.S. 742, 757 [25 L.Ed.2d 747, 90 S.Ct. 1463]; *People v. Camenisch* (1985) 166 Cal.App.3d 594, 607.) Here, appellant accepted a plea bargain for a "2-strike" sentence within the meaning of section 667, subdivision (e)(1). Subsequent to the plea, the Supreme Court ruled in *People v. Garcia* (1999) 21 Cal.4th 1, that a residential burglary, committed while the

defendant was a minor, was not a strike. However, the prosecution agreed to strike both questionable prior juvenile burglary sustained petitions which had qualified him for a "three-strike" sentence of 25 to life. Therefore, even if the defendant had not accepted the deal, and had waited until the High Court decided *Garcia*, he would not have been better off than he was with the deal that he entered into. Therefore, there was not IAC, and he should not now be in a better position than he was at the time he entered the plea.

64. THE COURT CANNOT CONDITIONALLY DISMISS STRIKES:

a. *People v. Carrillo* (2001) 87 Cal.App.4th 1416, the Sixth Appellate District ruled that the trial court could not "conditionally" dismiss strikes in order to circumvent the Three-Strikes law and place appellant in the California Rehabilitation Center (CRC). The Court of Appeal found that this was in contravention to section 667, subdivision (c)(4). The Court of Appeal essentially finds that there is no mechanism for reviving strikes once they are dismissed. The court must choose either to dismiss the strikes or keep the defendant within the Three Strike statute. (See also *People v. Superior Court* (*Roam*) (1999) 69 Cal.App.4th 1220.)

65. WHAT CAN THE DEFENDANT RAISE ON A LIMITED REMAND:

a. *People v. Murphy* (2001) 88 Cal.App.4th 392, the Fifth Appellate District held that the defendant in this matter, could not raise an issue on the limited remand that was not raised in the first appeal. The Court of Appeal, citing *People v. Rodriguez* (1998) 17 Cal.4th 253, 260, found that since the court determined that it would not strike a strike, it was not "resentencing" the defendant, but merely reimposing the sentence which had been previously imposed. The court did note that, though California law prohibits a direct attack upon a conviction in a second appeal after a limited remand for resentencing or other post trial procedures, we are not aware of any statutory or decisional authority barring a defendant from raising a new substantive issue which, though technically encompassed in the appellate court's remand order, could have been raised in the previous appeal. (*People v. Senior* (1995) 33 Cal.App.4th 531, 535.) The scope of the resentencing is limited by the remand order (*People v. Deere* (1991) 53 Cal.3d 705, 713.) Therefore, since the court chose not to "resentence" appellant, he could not raise the dual use issue in that proceeding as he could have had the court determined that it was going to strike a strike and "resentence" the defendant to a different term.

66. A PRIOR CONVICTION IS A SERIOUS FELONY BASED ON WHETHER IT WAS A SERIOUS FELONY ON OR AFTER THE EFFECTIVE DATE OF PROPOSITION 21:

a. *People v. James* (2001) 91 Cal.App.4th 1147, the Second Appellate District, Division 2, held, based on the application of sections 667.1 and 1170.125, which indicate that all offenses listed in section 1192.7 END on the effective date of Proposition 21, March 8, 2000, are strikes, and there is no ex post facto violation as the trial court held. (See *People v. Hatcher* (1995) 33 Cal.App.4th 1526, 1527-1528.) Therefore, the Court of Appeal reinstated the two prior strikes that the trial court had stricken.

67. ABATEMENT DOES NOT APPLY TO THE LOS ANGELES DISTRICT ATTORNEY'S POLICY ON CHARGING STRIKE CASES:

a. *People v. Roman* (2001) 92 Cal.App.4th 141, the Second Appellate District, Division 5, held that the concept of abatement, as set forth in *In re Estrada* (1965) 63 Cal.2d 740; *People v. Rossi* (1976) 18 Cal.3d 295; *In re Pedro T.* (1994) 8 Cal.4th 1041 and *People v. Trippet* (1997) 56 Cal.App.4th 1532, only applies to Legislative enactments and not to a change in a District Attorney's policy pertaining to the filing of strike cases. The Los Angeles District Attorney's Office changed policy under newly elected District Attorney James Cooley. The directive essentially instructed that non-violent felonies would not trigger a "third" strike. While on appeal, appellant, who was given a life sentence as a "third-striker," argued that he should be given the benefit of the new policy. The Court of Appeal rejected appellant's argument that he would not have been charged as a "third-striker" had his case initially been filed when the policy was in effect. The Court of Appeal held that the prosecutor must file all strikes within the meaning of section 1170.12, subdivision (d)(1). The Court of Appeal is just wrong when it says that appellant would have been charged as a "third-striker," and then the prosecution would have moved the court to strike strikes in order for him to be sentenced as a "two-striker." While it is true that the policy to a degree flies in the face of the Three Strikes law, the policy indicates that the case will not be prosecuted as a third strike case. While the ruling may be technically correct, it flies in the fact of the charging discretion of the prosecution.

68. A JUVENILE ADJUDICATION MAY NOT QUALIFY AS A STRIKE SINCE APPELLANT WAS NOT AFFORDED A JURY TRIAL:

a. *United States v. Tighe* (2001) 266 F.3d 1187, the Ninth circuit Court of Appeal held that since appellant was not afforded a jury trial in a juvenile adjudication, which was determined to be a prior conviction, similar to a prior strike, it does not fall within the *Apprendi*'s narrow prior conviction exception. For a prior to be considered a prior conviction, and therefore a fact that does not have to be decided by the jury, the prior must have been found by a jury and beyond a reasonable doubt. Appellant's sentence would have been a maximum of 10 years had this "juvenile prior" not been considered as a prior. However, since the district court did consider it along with the two other priors, the current felony offense, and three qualifying priors set a minimum sentence of 15 years; therefore, the punishment was increased beyond that statutory maximum without a jury making the proper factual findings, which is a violation of *Apprendi*.

b. *People v. Bowden* (2002) 102 Cal.App.4th 387, the Second Appellate District, Divison 4 held that, a prior juvenile conviction for simple robbery, without a jury trial, qualifies as a strike under the "Three Strikes" law if the present offense was committed after March 7, 2000 when Proposition 21 amended Welfare and Institutions Code Sec. 707, subdivision (b)(3) by replacing "robbery while armed with a dangerous or deadly weapon" with simple robbery as an offense constituting a strike. The court disagrees with the holding of *United States v. Tighe* (2001) 266 F.3d 11787, and its application of *Apprendi*. The Court of Appeal followed the rationale of *People v. Fowler* (1999) 72 Cal.App.4th 581, wherein the Court of Appeal found that the juvenile did not have a right to a jury trial, and therefore *Apprendi* has not direct application to this case.

c. *People v. Lee* (2003) 111 Cal.App.4th 1310, the Sixth Appellate District held that the use of a prior juvenile adjudication, wherein the minor did not have right to trial by jury, still constitutes a "strike," in spite of the decisions in *Tighe* and *Apprendi*, and does not violate the defendant's constitutional right to trial by jury. There is a good dissent, similar to Justice Johnson's, out of the Second District, Division 7, by Justice Rushing, indicating that the prior juvenile adjudication violates the dictates of *Apprendi*.

d. *People v. Superior Court* (*Andrades*) (2003 113 Cal.App.4th 817, the Sixth Appellate District held that a prior juvenile adjudication for robbery constitutes a strike offense in cases where the current offense was committed

after the passage of Proposition 21 on March 7, 2000, even if the prior adjudication occurred before that date. However, you should look at *People v. Garcia* (1999) 21 Cal.4th 1, for an argument that counters this Court's interpretation of the statute. Additionally, the Court of Appeal held that a prior juvenile adjudication may constitutionally be used as a strike even though there is no right to a jury in juvenile proceedings. (See *People v. Lee* (2003) 111 Cal.App.4th 1310.)

e. *People v. Del Rio* (2008) 165 Cal.App.4th 439, the Second Appellate District, Division 7 held that the use of the defendant's prior juvenile adjudication as a strike to enhance his sentence, notwithstanding the absence of a right to a jury trial in delinquency proceedings, was constitutional. Now see *People v. Nguyen* (2009) 46 Cal.4th 1007.

69. NOT ALL SECTION 245'S ARE SERIOUS FELONIES POST PROPOSITION 21:

a. *Williams v. Superior Court* (2001) 92 Cal.App.4th 612, the Second Appellate District, Division 2, held that not all assault with a deadly weapons convictions, within the meaning of section 1192.7, subdivision (c), as amended by Proposition 21, March 8, 2000, are serious felonies, and therefore, they are not strikes. The court found that an assault, where the facts establish that it was only with intent to commit great bodily injury, and not with a deadly weapon, firearm, machine gun, assault weapon, or semiautomatic firearm, or assault on a peach officer or firefighter, is not a serious felony.

b. *People v. Winters* (2001) 93 Cal.App.4th 273, the Fourth Appellate District, Division 1, held that not all assault with a deadly weapons convictions, within the meaning of section 1192.7, subdivision (c), as amended by Proposition 21, March 8, 2000, are not serious felonies, and therefore, they are not strikes. After a long analysis of legislative intent, the Court of Appeal ultimately agreed with the Second Appellate District, Division 2, in *Williams v. Superior Court* (2001) 92 Cal.App.4th 612, that an assault, where the facts establish that it was only with intent to commit great bodily injury, and not with a deadly weapon, firearm, machine gun, assault weapon, or semiautomatic firearm, or assault on a peach officer or firefighter, is not a serious felony.

c. *People v. Haykel* (2002) 96 Cal.App.4th 146, the Fourth Appellate District, Division 3, held similarly to *Williams v. Superior Court* (2001) 92

Cal.App.4th 612, and *People v. Winters* (2001) 93 Cal.App.4th 273, that not all assault with a deadly weapons conviction, within the meaning of section 1192.7, subdivision (c), as amended by Proposition 21, March 8, 2000, are serious felonies, and therefore, they are not strikes, where the facts establish that it was only with intent to commit great bodily injury, and not with a deadly weapon, firearm, machine gun, assault weapon, or semiautomatic firearm, or assault on a peach officer or firefighter.

70. PRIOR CONVICTIONS FOR SECOND DEGREE RESIDENTIAL BURGLARY ARE SERIOUS FELONIES POST PROPOSITION 21:

a. *People v. Garrett* (2001) 92 Cal.App.4th 1417, the Sixth Appellate District held that, based on a legislative intent analysis of Proposition 21, the change in the wording in section 1192.7, subdivision (c)(18), from burglary of an inhabited dwelling house (i.e., pre-proposition 21), to first degree burglary (post-proposition 21) does not inure to the benefit of the defendant, and as a result, if the prosecution can establish the prior conviction for burglary was of a residence, any prior conviction for said crime will suffice. The Court of Appeal rejected appellant's contention that the legislature amended the section to define burglary in terms of "offense" rather than in terms of "conduct."

71. ATTEMPTED ROBBERIES ARE NOT VIOLENT FELONIES POST-PROPOSITION 21:

a. *People v. Belmudes* (2001) 112 Cal.Rptr.2d 499. The Second Appellate District, Division 5, held that attempted robberies are not violent felonies within the meaning of section 667.5, subdivision (c) even though they are serious felonies within the meaning of section 1192.7, subdivisions (c)(19)(39). Unless an attempt to commit a specified crime is listed, other enhancing statutes based on the commission of enumerated felonies, do not apply if the offense is not completed; therefore it would qualify as a serious but not a violent felony as specifically stated in 1192.7 and not 667.5. (See *People v. Finley* (1994) 26 Cal.App.4th 454, 458-459.)

72. WHEN A SUBSTANTIVE OFFENSE WHICH WOULD OTHERWISE BE PRIORABLE IS DISMISSED PURSUANT TO SECTION 1385, IT CANNOT BE USED AS A STRIKE IN A SUBSEQUENT PROCEEDING:

a. *People v. Barro* (2001) 93 Cal.App.4th 62, the Second Appellate District, Division 4, held that a prior mayhem conviction, which was ultimately dismissed pursuant to section 1385, even though appellant was told that it could be used as a prior in the future, cannot be used as a strike in a subsequent prosecution. The Court of Appeal analyzed the differences between sections 1385 and 1203.4, subdivision (a), establishing that the legislature knew how to write in a provision that would permit the use of the dismissed count as a prior even though the court had dismissed it pursuant to section 1203.4, where it had not added the same clause in section 1385. Additionally, the Court of Appeal held that in spite of the fact that appellant was told that the mayhem count could be used as a prior, the prosecution benefitted from its bargain in that the defendant successfully completed the five years of formal probation.

73. THE PROSECUTION CANNOT AMEND THE INFORMATION TO ADD STRIKES AFTER THE JURY HAS COMPLETED THE GUILT PHASE AND HAS BEEN DISCHARGED:

a. *People v. Gutierrez* (2001) 93 Cal.App.4th 15, the Third Appelalte District held, based on its analysis of *People v. Tindall* (2000) 24 Cal.4th 767, that the trial court erred in permitting the prosecution to amend the information to add a strike allegation and a serious felony allegation after the guilt phase jury had been dismissed. Given the fact that the defendant did object to the amendment, there was no waiver or forfeiture, and the mandatory same jury provision applied here as well as in *Tindall* even though appellant had waived jury on priors that were previously alleged.

74. THE COURT REFUSES TO APPLY THE *PALERMO* DOCTRINE, AND HOLDS THAT CRIMES WHICH ARE VIOLENT FELONIES AFTER PROSECUTION 21 ARE LIMITED TO 15% EVEN THOUGH SECTION 2933.1 WAS NOT AMENDED:

a. *People v. Van Buren* (2001) 93 Cal.App.4th 825, the Second Appellate District, Division 6, held with virtually no discussion of the doctrine set forth in *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, that even though section 2933.1 was not amended to include all of the felonies added to section 667.5, subdivision (c), that those additional violent crimes may be

used in determining if a defendant's sentence is limited to the 15% provision of section 2933.1.

EFFECTIVE 01/01/2003, THE LEGISLATURE AMENDED SECTION 2933.1 TO ADD THE SPECIFIC REFERENCE TO SECTION 667.5, SUBDIVISION (C) TO CURE THE *PALERMO* PROBLEM.

75. THE SAME PRIOR CONVICTION CANNOT BE USED TO QUALIFY UNDER SECTION 667.61 AND UNDER THE THREE STRIKES LAW:

a. *People v. Johnson* (2002) 96 Cal.App.4th 188, the fourth Appellate District, Division 1, held that within the meaning of section 667.61, as contrasted to section 667.71 and the holding of *People v. Murphy* (2001) 25 Cal.4th 136, it is impermissible to use the same prior conviction to both qualify a defendant for 25 to life pursuant to section 667.61, subdivision (f) and to use the same prior to qualify for a 25 to life Three Strike sentence within the meaning of section 667, subdivision (e)(2)(A)(ii). However, the court found it permissible to use the same factor to impose the enhancement under section 667, subdivision (a) (see *People v. Martin* (1995) 32 Cal.App.4th 656), and the enhanced penalty provisions under section 647.6, subdivision (c)(2). (See *People v. Levesque* (1995) 35 Cal.App.4th 530.) If there was another qualify8iing prior, which is not present in this case, then the one trike law and the three strike law could be cumulatively applied within the meaning of *Murphy*.

b. *People v. Snow* (2002) 96 Cal.App.4th 239, the Fourth Appellate District, Division 1, held similarly to *People v. Johnson* (2002) 96 Cal.App.4th 188, the same justices held, within the meaning of section 667.61, where there are other qualifying priors, other than the one used to impose the one strike law, then the one strike law and the three strike law could be cumulatively applied within the meaning of *People v. Murphy* (2001) 25 Cal.4th 136. The Court of Appeal concluded that the legislature did not intend the imposition of both sections 667.61 and 667.71, even after the amendment to section 667.71 in 1998. Sections 667.761 and 667.71 are alternative sentencing schemes, to which section 654 does not apply. Therefore, it was err to impose and stay punishment under section 667.71. The matter is remanded to the trial court for resentencing for the determination of whether sentence under section 667.61 or section 667.71 should be imposed, and the other dismissed. The Court of Appeal also found that the enhancements under section 667, subdivision (a)(1), serious felony provision, could also be imposed.

c. *People v. Snow* (2003) 105 Cal.App.45h 271, the Fourth Appellate District, Division 1 held that, pursuant to *People v Murphy* (2001) 25 Cal.4th 136, a violation of section 288a (c)(1) is a strike, even though it is not specifically stated in either sections 667.5 or 1192.7, and therefore appellant is a "third-striker" in this case. Second, the Court of Appeal concluded, based on *People v. Acosta* (2002) 29 Cal.4th 105, that the three-strike law and the one-strike law can be applied cumulatively, and therefore, appellant is subject to the tripling formula of the three-strike law on top of the 25 to life sentence on the one strike law. However, the Court of Appeal drew the line and held that the habitual defender law section 667.71 could not also be applied cumulatively to the sections 667, subdivision (b)-(I) and 667.61 sentence.

76. THE JURY ONLY NEEDS TO DETERMINE IF THE DEFENDANT SUFFERED A PRIOR CONVICTION, AND A SEPARATE FINDING IS NOT REQUIRED FOR ECH ENHANCEMENT:

a. *People v. Williams* (2002) 99 Cal.App.4th 696, the Third Appellate District held that a defendant has a right to have a jury determine if he was previously convicted of a prior serious felony. (§§ 1025, 1158; *People v. Wiley* (1995) 9 Cal.4th 580, 589.) Here the information alleged two enhancements pursuant to section 667, subdivision (a)(1), but the jury only returned a verdict as to one of the allegations. However, as to that enhancement, the jury did decide that the defendant suffered a strike within the meaning of section 667, subdivision (b)-(i). The Court of Appeal found that the right to a jury trial extends only to the fact of the conviction alleged in the information, not to the truth of the enhancement allegation itself. The Court of Appeal fails to discuss the cases that indicate that all enhancements must be pled and proven beyond a reasonable doubt. (See *Peple v. Woodell* (1998) 176 Cal.4th 448, 461; *People v. Houck* (1998) 66 Cal.App.4th 350, 354.) **NOTE: THIS HOLDING SHOULD BE VIEWED WITH CAUTION AND AN APPLICATION OF *APPRENDI v. NEW JERSEY*** (2000) 530 U.S. 466 [147 L.Ed 2d 435, 120 S.Ct. 2348], SHOULD BE CONSIDERED IN LIGHT OF JUSTICE THOMAS'S STATEMENT IN THAT OPINION. HE HAS NOW DISAVOWED HIS VOTE IN *ALMENDAREZ-TORRES v. UNITED STATES* (1998) 523 U.S. 224, which held that sentence enhancement statute need not be alleged in an indictment as it is only a sentencing factor, not a criminal offense. *APPRENDI* NOTES THAT "IT IS ARGUABLE THAT *ALMENDAREZ-TORRES* WAS INCORRECTLY DECIDED AND THAT A LOGICAL APPLICATION

OF OUR REASONING TODAY SHOULD APPLY IF THE RECIDIVIST ISSUE WERE CONTESTED....”

77. ASSAULT WITH INTENT TO COMMIT LEWD ACTS ON A CHILD QUALIFIES AS A SERIOUS FELONY EVEN THOUGH NOT LISTED UNDER SECTION 1192.7:

a. *People v. Deporceri* (2003) 106 Cal.App.4th 60, the Sixth Appellate District held that, assault with intent to commit a violation of section 288 necessarily involves an attempt to commit a lewd or lascivious act on a child under the age of 14, making it a serious felony for purposes of sentencing under the Three-Strikes Law, regardless of whether current offense occurred before or after the list of serious felonies was revised by Proposition 21.

78. APPELLANT IS SENTENCED ON ALL COUNTS UNDER THE THREE STRIKES LAW EVEN THOUGH THE JURY ONLY FOUND, UNDER ONE COUNT THAT APPELLANT HAD BEEN CONVICTED OF A SERIOUS OR VIOLENT FELONY:

a. *People v. Morales* (2003) 106 Cal.App.4th 445, the Second Appellate District, Division 5, held that a jury’s finding that defendant had previously been convicted of a serious or violent felony required doubling of his sentence on all counts under Three Strikes Law, even though jury finding was made only as to one count.

79. IMPERMISSIBLE BOOTSTRAPPING IS NOT PERMITTED TO ADD A SERIOUS FELONY ENHANCEMENT AND A GANG ENHANCEMENT BASED ON THE SAME ACT; HOWEVER IT IS NOT BOOTSTRAPPING WHEN A MISDEMEANOR IS ELEVATED TO A FELONY UNDER SECTION 186.22, SUBDIVISION (D) AND THEN A THREE STRIKE SENTENCE IS IMPOSED ON THE ALTERNATIVE PENALTY SCHEME PROVISION

a. *People v. Martinez* (2005) 132 Cal.App.4th 531, section 654 bans multiple punishments for the same crime, bars the trial court from imposing a serious felony enhancement and gang enhancement based on the same act or conduct used to support the serious felony enhancement if the underlying crime is a serious felony only because it was committed for the benefit of a criminal street gang (see *People v. Briceno* (2004) 34 Cal.4th 451; *People v. Bautista* (2005) 125 Cal.App.4th 646), but it does not bar separate punishments if the underlying offense would have been a serious felony even

if it had not been committed for the benefit of the gang. The Court of Appeal finds that under *People v. Coronado* (1995) 12 Cal.4th 145, 157 [§ 654 does not apply to prior conviction enhancements], both can be imposed. However, they acknowledge, but, do not discuss the fact that the new Supreme Court ruling in *People v. Oates* (2004) 32 Cal.4th 1048, 1066, fn. 7, appears to contradict this holding.

b. *People v. Rocco* (2012) 209 Cal.App.4th 1571, the Fourth Appellate District, Division 4 held that the trial court did not err when it sentenced the defendant, who is convicted of a misdemeanor for simple assault, within the meaning of section 240, but he also suffered a conviction under section 186.22, subdivision (d), which elevates certain offenses from misdemeanors to felonies when committed for the benefit of a criminal street gang. As a result of the "felony conviction", the defendant "has been convicted of a felony" within the meaning of the Three Strikes law and is subject to a doubled sentence under section 667, subdivision (e)(1). The Court of Appeal found that this was not bootstrapping within the meaning of *People v. Briceno* (2004) 34 Cal.4th 451. The Court of Appeal found that this application is similar to *People v. Jones* (2009) 47 Cal.4th 566, 574, wherein the Supreme Court permitted the punishment for the 186.22 alternative penalty, and the section 12022.53 gun enhancement were from different statutory schemes and target different conduct. Here, one target is the gang offense and the other is under the Three Strikes law to punish repeat offenders.

80. UNDER PROPOSITION 21, THE DEFENDANT MAY HAVE A STRIKE WHEN THE DOCUMENTS DO NOT ESTABLISH THAT HE PERSONALLY USED A DANGEROUS OR DEADLY WEAPON IN COMMITTING AN ASSAULT WITH A DEADLY WEAPON:

a. *People v. Luna* (2003) 113 Cal.App.4th 395 [*DISAPPROVED IN People v. Delgado* (2008) 43 Cal.4th 1059], the Second Appellate District, Division 5, held that section 1192.7, subdivision (c)(31), adopted as part of Proposition 21, makes assault with a deadly weapon a serious felony without regard to whether defendant personally used the weapon. The Court of Appeal held that Proposition 21, decided after *People v. Rodriguez* (1998) 17 Cal.4th 253, modified the statute to that which was decided in *Rodriguez*, to do away with the requirement that the defendant had to personally use the dangerous or deadly weapon to suffer a serious felony for strike purposes. However, section 1192.7, subdivisions (c)(8), and (c)(23), still require the personal use of a gun, or dangerous or deadly weapon. Additionally, as we have seen in

Williams v. Superior Court (2001) 92 Cal.App.4th 612, not all assault with a deadly weapons convictions, within the meaning of section 1192.7, subdivision (c), as amended by Proposition 21, March 8, 2000, are serious felonies, and therefore, they are not strikes. (See also *People v. Winters* (2001) 93 Cal.App.4th 273; *People v. Winters* (2002) 96 Cal.App.4th 146.) Therefore, I would question the validity of this opinion.

b. *People v. Banuelos* (2005) 130 Cal.App.4th 601, modified at 130 Cal.App.4th 1609, the Second Appellate District, Division 6 held that an assault by means likely to cause great bodily injury is not a serious felony within the meaning of Three-Strikes Law or five-year enhancement statute unless the offense involves the use of a deadly weapon or actually results in the personal infliction of great bodily injury. The abstract of judgment reflecting a conviction for assault "GBI W/DEADLY WEAPON," without saying whether defendant personally used a deadly weapon or personally inflicted great bodily injury, failed to establish that conviction was for a serious felony. The Court of Appeal acknowledged that Division 5 of the Second Appellate District came to a different result in *People v. Luna* (2003) 113 Cal.App.4th 395 [DISAPPROVED IN *People v. Delgado* (2008) 43 Cal.4th 1059], however this court held that it cannot be confident that the abbreviated description of a statute prohibiting two types of criminal conduct was anything more than that particular court clerk's shorthand method of referring to the statute under which appellant was convicted. The Court of Appeal also concurred with *People v. Haykel* (2002) 96 Cal.App.4th 146, 148-149; *People v. Winters* (93 Cal.App.4th 273, 280; and *Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 622-624 when they indicated that even under the amended law post Proposition 21, a conviction of assault by means likely to cause great bodily injury is not a serious felony unless it also involves the use of a deadly weapon or actually results in the personal infliction of great bodily injury. Citing *People v. Cortez* (1999) 73 Cal.App.4th 276, 283, the court found that a plea to a criminal statute punishing alternative types of conduct is insufficient to prove that the defendant committed *each* type of conduct; and since that cannot be established in this case, it cannot be found to be a serious felony.

c. *People v. Semien* (2008) 162 Cal.App.4th 701, the Third Appellate District held that the defendant's prior conviction under section 245, subdivision (c) for assaulting a peace officer constituted a "strike" under section 1192.7, even though assault was not with a deadly weapon. The court distinguished *People v. Rodriguez* (1998) 17 Cal.4th 253, and *People v. Banuelos* (2005) 130 Cal.App.4th 601, 605, since both cases dealt with civilian and it

mattered whether a deadly weapon was used or not, and it does not matter if the victim is a police officer under subdivision (c) of section 245.

81. THE THREE STRIKES LAW TRUMPS THE CONTRACT CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS:

a. *People v. Gipson* (2004) 117 Cal.App.4th 1065, the Sixth Appellate District held that the Three Strike law serves public policy purposes, and as a result, trumps the defendant's contention that a plea bargain in prior case, which resulted in a strike, once that law was passed, did not violate the contracts clauses of the state and federal constitutions. Appellant's prior plea, which ultimately resulted in a strike, and the doubling of appellant's sentence, as his plea bargain is deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public safety. (*In re Marriage of Walton* (1972) 28 Cal.App.3d 108.) The Court of Appeal also indicated that the plea bargain vested no rights other than those which related to the immediate disposition of the case. (*Way v. Superior Court* (1977) 74 Cal.App.3d 165, 180.)

82. A CRIMINAL OR TERRORIST THREAT WITHIN THE MEANING OF SECTION 422 IS A STRIKE EVEN IF COMMITTED PRIOR TO THE ENACTMENT OF PROPOSITION 21:

a. *People v. Moore* (2004) 118 Cal.App.4th 74, the Sixth Appellate District held that a prior conviction for a violation of section 422, qualifies as a "strike" under the 2000 amendments to the Three Strikes Law, even where the current offense was committed after the amendments took effect, regardless of when the defendant was convicted of violating section 422. The amendment adding terrorist threats or criminal threats, to the list of serious felonies makes all violations of that section, not only those deemed to be terrorist threats, serious felonies.

b. *People v. Ringo* (2005) 134 Cal.App.4th 870, the Second Appellate District, Division 5, held that a pre-Proposition 21 conviction for making a criminal threat is a serious felony within the meaning of section 667, subdivision (a)(1). Appellant argued that the change in the lock-in date only affected the three-strikes law, and not section 667, subdivision (a)(1). However, the court rejected that argument, indicating that the lock-in date of June 30, 1993, within section 667, subdivision (h), applies only to the three-strikes law and not section 667, subdivision (a)(1), but that the subdivision (h)

provision never applied to subdivision (a)(1), and the only important date is the date of the charged offense. If the alleged prior serious felony was listed in section 1192.7, subdivision (c), on the date of the charged offense, then it can be a 5-year prior.

83. ALL FELONY VIOLATIONS OF SECTION 136.1 ARE SERIOUS FELONIES:

a. *People v. Neely* (2004) 124 Cal.App.4th 1258, the Second Appellate District, Division 5 held that when section 1192.7, subdivision (c)(37), "intimidation of victims or witnesses, in violation of Penal Code section 136.1" was added with the passage of Proposition 21, it added to the list of serious felonies all violations of that section, not only those that include "intimidation" or the use of, or threat, to use force as an element.

84. DEFENDANT'S ADOPTIVE ADMISSION AFTER A PLEA CANNOT ESTABLISH THE PRIOR AS A STRIKE:

a. *People v. Thoma* (2007) 150 Cal.App.4th 1096, the Second Appellate District, Division 6, after remand from the California Supreme Court, where the Court of Appeal was ordered to follow *People v. Trujillo* (2006) 40 Cal.4th 165, the Court of Appeal found that the prior conviction for drunk driving with bodily injury did not qualify as a "strike" under the Three Strikes Law where prior conviction was based on a plea. The court could not rely on an adoptive admission within the meaning of Evidence Code section 1221, theoretically made after the plea, to find the strike prior true. The defendant did not, as part of plea, stipulate as to extent of the victim's injuries and was not bound by court's characterization of them. Furthermore, the police officer's hearsay testimony at the preliminary hearing characterizing those injuries, was inadmissible for purpose of determining whether ensuing conviction was a strike. In *Trujillo*, the Supreme Court indicated that the defendant's statement in the post-plea probation officer's report does not describe the nature of the crime of which he was convicted and cannot be used to prove that the prior conviction was for a serious felony.

b. *People v. Roberts* (2011) 195 Cal.App.4th 1106, the Sixth Appellate District held that the trial court erred in admitting, over defendant's objection, a transcript of a Washington prosecutor's recitation of the alleged facts of a second-degree assault from that state to prove that this conviction consituted a strike. This hearsay evidence was not admissible as an adoptive admission.

(See *People v. Thoma* (2007) 150 Cal.App.4th 1096, 1100-1101; accord *People v. Trujillo* (2006) 40 Cal.4th 165.) Unsworn statements of the defendant, his attorney, and the victim made to the Washington court after it had accepted the guilty plea were also inadmissible to prove the strike allegation as theya re not part of the record of conviction. (See *People v. Guerrero* (1988) 44 Cal.3d 343, 352; *People v. Woodell* (1998) 17 Cal.4th 448, 458; *People v. Trujillo*, *supra*, 40 Cal.4th 165 at pp. 175-180.)

85. THE STATUTE OF LIMITATIONS FOR AN OFFENSE SUBJECT TO THE THREE STRIKES LAW IS BASED ON THE OFFENSE ITSELF AND NOT THE SENTENCE ENHANCEMENT OF THE THREE STRIKES SENTENCE:

a. *People v. Turner* (2005) 134 Cal.App.4th 1591, the First Appellate District, Division 1 held that in determining the maximum sentence for a crime, in order to determine which statute of limitations is applicable, the court must look to maximum penalty that may be imposed for crime itself, without regard to enhancements based on prior convictions (here the three-strikes law). Here the defendant was charged with robbery, a crime punishable by six years imprisonment, but was subject to potential life sentence under Three Strikes Law. The prosecution was subject to the general three-year statute of limitations, even though an "offense punishable by imprisonment in the state prison for life" may be prosecuted at any time.

86. A STRIKE ALLEGATION CAN BE ADDED TO THE INFORMATION BY ORAL AMENDMENT:

a. *People v. Sandoval* (2006) 140 Cal.App.4th 111, the Fourth Appellate District held that a "strike" allegation may be added to an information by an oral amendment, made in open court, in presence of defendant and counsel, absent prejudice.

87. A UTAH PRIOR FOR AGGRAVATED ROBBERY WAS INSUFFICIENTLY PROVEN TO HAVE THE SAME ELEMENTS AS A CALIFORNIA ROBBERY, AND COULD NOT BE IMPOSED AS A SERIOUS FELONY OR A STRIKE:

a. *People v. Jenkins* (2006) 140 Cal.App.4th 805, the Second Appellate District, Division 8, held that aggravated robbery, as defined under Utah law as of 1997, did not necessarily constitute a serious or violent felony under either section 667, subdivision (a)(1) or section 667, subdivision (b)-(i),

since the offense could be committed by employing force or fear against one person while taking property or while fleeing after taking property from another. Where evidence regarding defendants' Utah convictions showed only the existence, date, and statutory authority for the convictions, such evidence was insufficient to establish that the offenses were serious or violent felonies within the meaning of the aforementioned California statutes, but the prosecution was not precluded from retrying the enhancement allegations on the basis of additional evidence. (See *People v. Barragan* (2004) 32 Cal.4th 236; *People v. Monge* (1997) 16 Cal.4th 826.) The Court of Appeal rejected appellant's contention that this matter came within the provisions of *Apprendi v. New Jersey* (2000) 530 U.S. 466.)

88. A SERIOUS FELONY IS ADDED TO EACH COUNT IN A TWO OR THREE STRIKE CASE, WHERE AT LEAST ONE OF THE COUNTS IS AN INDETERMINATE TERM DUE TO APPELLANT'S RECIDIVISM, AND THE COURT MUST GIVE REASONS FOR STRIKING THE PRIOR PRISON TERMS IN AN INDETERMINATE CASE:

a. *People v. Misa* (2006) 140 Cal.App.4th 837, the Fourth Appellate District, Division 1 held that, within the interpretation of *People v. Williams* (2004) 34 Cal.4th 397, wherein the Supreme Court held that a defendant sentenced to an indeterminate Third Strike case of at least 25 to life, the court is to impose, on each of the substantive count(s) pursuant to section 667, subdivision (e)(2)(i-iii) and who is also subject to determinate serious felony prior(s) pursuant to section 667, subdivision (a), the court shall add the serious felony priors to each count. The rule set forth in section 1170.1, and in *People v. Tassell* (1984) 36 Cal.3d 77, only applies to determinate term sentencing (see *People v. Nguyen* (1999) 21 Cal.4th 197, 205), and not indeterminate terms.) Here, appellant was subject to an indeterminate term for torture (§ 206) and for the determinate terms for assault with a deadly weapon (§ 245, subd. (a)(1)). I question the logic of the court for imposing the additional time for the serious felony within the meaning of section 667, subdivision (a)(1) for the determinate term, in addition to the indeterminate term. This court holds that it is a logical extension of *Williams*, but hopefully that will be answered by the Supreme Court with the opposite conclusion.

b. *People v. Garcia* (2008) 167 Cal.App.4th 1550, modified at 168 Cal.App.4th 833d the Second Appellate District, Division 5 held that, where the court imposed indeterminate sentences, based on multiple offenses, some being serious felonies, and the priors that made him eligible for a three strike

sentence and the fact that the jury also found that he had served fie prior prison terms, and personally used a firearm in commission of all offenses, except a firearm possession by felon, the court was required to exercise its discretion and either impose one-year prior prison term enhancements pursuant to section 667.5, subdivision (b), on every appropriate count, depending on whether each offense was a "serious felony" (see *People v. Williams* (2004) 34 Cal.4th 401-405; *People v. Misa* (2006) 140 Cal.App.4th 837, 845-846, or strike the enhancements pursuant to section 1385, subdivision (a). (See *People v. Bradley* (1998) 64 Cal.App.4th 386, 395-396; see also *People v. McCray* (2006) 144 Cal.App.4th 258, 267.) The trial court had the discretion to impose a concurrent term on the conviction for a felon in possession of a firearm, as opposed to staying the conviction pursuant to section 654, where the defendant's possession of the weapon at moment of commission of crimes was not fortuitous but rather shared common acts or criminal conduct with all other counts. (See *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1411-1412.)

c. *People v. Thomas* (2013) 214 Cal.App.4th 636, the Second Appellate District, Division 5 held that pursuant to *People v. Williams* (2004) 34 Cal.4th 397, 401-402, where a sentence was imposed on two separate indeterminate counts, one for possession for sale and the other for transportation, under the Three-Strikes Law, the court had to impose both 3-year enhancements for Health and Safety Code section 11370.2. The enhancements would only be applied to one count had the defendant received a determinate term sentence on both counts. (*People v. Tassell* (1984) 36 Cal.3d 77, 89-92.) The Court of Appeal also found that on remand, the trial court can strike the enhancements as to either count within the meaning of section 1385, subdivision (a). (See *People v. Superior Court (Romero*) (1996) 13 Cal.4th 497, 531.)

89. ORAL COPULATION BY THREATENED RETALIATION IS NOT A SERIOUS FELONY THAT QUALIFIES AS A STRIKE IF COMMITTED BEFORE THE PASSAGE OF JESSICA'S LAW:

a. *People v. Towers* (2007) 150 Cal.App.4th 1273, the Second Appellate District, Division 8 held that conviction for oral copulation "by threatened retaliation" was not a "strike" under Three Strikes Law where record did not negate the possibility that the offense was classified as a felony solely because it was committed by threatening retaliation, in which case it was not a serious felony as defined by statute at time of defendant's current conviction; prior to the passage of Jessica's Law, Proposition 83.

Additionally, where the defendant was convicted of burglary under a Tennessee statute defining that crime as entering another person's residence with intent to commit an offense, and record of that conviction showed that the target offense was larceny, the offense was equivalent to a first degree burglary, in California, which qualifies as a serious felony.

90. JUVENILE, CONVICTED IN THE ADULT COURT OF A NON-SERIOUS FELONY, THAT WOULD NOT BE A WELFARE AND INSTITUTIONS CODE SECTION 707, SUBDIVISION (b) OFFENSE IF ADJUDICATED IN THE JUVENILE COURT, IS A STRIKE IF CONVICTED IN THE ADULT COURT, AND THERE IS NO EQUAL PROTECTION VIOLATION:

a. *People v. Cole* (2007) 152 Cal.App.4th 230, the Fifth Appellate District held that the legislature intended to treat a violation of section 288, subdivision (a) as a "strike" where the conduct was committed by a 16-year-old minor but the conviction occurred in the adult court. (*People v. Lara* (1967) 67 Cal.2d 365, 379-380 [to reconcile concerns for public safety].) If the minor commits a nonserious and nonviolent offense, that is listed as a Welfare and Institutions Code section 707, subdivision (b) offense, and is adjudicated in the juvenile court, it is not a strike. (*People v. Lang* (1999) 71 Cal.App.4th 1, 10.) If the minor commits a violent or serious felony, but not a Welfare and Institutions Code section 707, subdivision (b) offense, it is not a strike if adjudicated in the juvenile court. (*People v. Garcia* (1999) 21 Cal.4th 1, 6.) If the minor commits a serious or violent felony, and a Welfare and Institutions Code section 707, subdivision (b) offense, and is adjudicated in the juvenile court, it is a strike. Here, appellant was convicted of a serious felony, and was tried as an adult, at 16 years of age, and this court holds it is a strike. The case was tried in the adult court based on the prosecution's filing of the offense. Even so, the Court of Appeal held that imposing a "strike" sentence for the prior section 288, subdivision (a) conviction on a youthful offender tried in adult court, but not on juvenile offenders who committed same offense does not violate principles of equal protection.

91. IT IS ERROR TO EXCLUDE EVIDENCE, IN A SERIOUS VIOLENT PREDATOR CASE, THAT THE DEFENDANT WAS MOTIVATED TO SEEK TREATMENT SINCE HE FACED A LIFE SENTENCE AS A THIRD STRIKE DEFENDANT:

a. *People v. O'Shell* (2009) 172 Cal.App.4th 1296, the Fourth Appellate District, Division 1 held that the trial court erred by excluding the defendant's testimony that he was a two-strike offender who would face a

life sentence if convicted of a third felony as irrelevant, but such error was harmless in light of overwhelming and largely uncontested evidence that defendant posed a serious risk of reoffending and because the excluded evidence was tangential to the central issue of whether he had a diagnosable mental disorder for purposes of being adjudged a sexually violent predator.

92. PROPOSITION 36 THREE STRIKES MODIFICATION:

a. *People v. Yearwood* (2013) 213 Cal.App.4th 161, the Fifth Appellate District held that Proposition 36, which amended the Three-Strikes Law does not apply retroactively within the meaning of *In re Estrada* (1965) 63 Cal.2d 740, 744-746, but operates prospectively only. Accordingly, proper remedy for a defendant scheduled to an indeterminate life sentence for an offense that would not qualify as a third strike under the amended law is to file a petition for a recall of his sentence in compliance with section 1170.126, as this section "functionally" operates as a "savings clause."

b. *People v. Superior Court (Kaulick)* (2013) 216 Cal.App.4th 1279, the Second Appellate District, Division 3 held that as it pertains to a petition, filed by the defendant under section 1170.126, the prosecution has (1) a right to notice and an opportunity to be heard; (2) both the defendant and the victim of the crime have the right to be heard at any hearing on a petition for resentencing under the Act; (3) the resentencing should take place before the original sentencing judge, if available, although this is waivable, and (4) the prosecution has the burden of proof by a preponderance of the evidence on the issue of dangerousness. Finally, there is no Equal Protection violation by a finding of dangerousness on less than a standard of beyond a reasonable doubt.

c. *People v. White* (2014) 223 Cal.App.4th 512, the Fourth Appellate District, Division 1 held that the defendant was properly excluded from the resentencing provision of Proposition 36, section 1170.126 as his third strike conviction was for of possession of a firearm by a felon under section 12021, subdivision (a), as he was considered to be "armed with a firearm during the commission of that possession offense". The trial court may deny section 1170.126 resentencing relief under the "armed-with-a-firearm exclusion," even if the accusation for the crime of possession of a firearm by a felon does not allege that he was armed with a firearm during the offense. The defendant in this case had physical possession of the firearm. The exclusion would also apply if he had dominion and control or constructive possession

of the firearm. Additionally, the prosecution did not have to pled and prove that he was armed with the firearm.

d. *People v. Osuna* (2014) 225 Cal.App.4th 1020, the Fifth Appellate District held that the trial court did not err in failing to resentence the defendant under section 1170.126, where the facts show that in his qualifying strike, the defendant was actually holding a handgun when he emerged from a car, was "armed with a firearm" within the meaning of Proposition 36, and therefore, his conviction for then section 12021 (possession of a firearm by a convicted felon), was a serious or violent felony for which resentencing is not available under the act. There is nothing that requires the illegal gun possession be "tethered" to another felony for resentencing to be precluded.

e. *People v. Blakely* (2014) 225 Cal.App.4th 1042, the Fifth Appellate District held that where a defendant is convicted of possession of firearm by convicted felon, (former § 12021,subd. (a)), who stipulated to two prior "strikes," mere possession of the firearm did not establish that the defendant was armed with the firearm so as to be disqualified him from resentencing under the Three Strikes Reform Act of 2012, section 1170.126. To be armed, the gun has to be available for use, either offensively or defensively, and under his dominion and control at the time of the offense. (See *People v. Bland* (1995) 10 Cal.4th 991, 997.) However, the trial court was permitted to consider admissible portions of the record of conviction in determining whether the "dangerousness" provision in the act, and this conviction rendered him ineligible for resentencing under the act. Disqualifying factors need not be pled and proven to the trier of fact beyond a reasonable doubt.

f. *People v. Superior Court* (*Cervantes*) (2014) 225 Cal.App.4th 1007, the Fifth Appellate District held, consistent with its other opinions recently published, that an inmate serving an indeterminate life term under the Three Strikes Law may be found to have been "armed with a firearm" in the commission of his or her current offense, a violation of Health and Safety Code section 12022, subdivision (c) so as to be disqualified from resentencing under the Three Strikes Reform Act, section 1170.126 even if he or she did not carry the firearm on his or her person. The defendant was not entitled to a remand for resentencing under the act since he was ineligible due to his conviction for Health and Safety Code section 12022, subdivision (c).

g. *People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, the Fifth Appellate District held that the prosecution is entitled to petition the Court of

Appeal to review the trial court's eligibility decision, (see *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1294-1295, fn.14), that an inmate serving an indeterminate life term under the Three Strikes Law may be found to have been "armed with a firearm" in the commission of his or her current offense, a violation of Health and Safety Code section 11370.1 so as to be disqualified from resentencing under the Three Strikes Reform Act, section 1170.126 even if he or she did not carry the firearm on his or her person.

h. *People v. Anderson* REHEARING GRANTED; FORMERLY AT: (2014) 225 Cal.App.4th 1368, the Third Appellate District held that when counsel files a no-issue brief and asks the court for an independent review pursuant to *People v. Wende* (1979) 25 Cal.3d 436, said procedure does not apply to an appeal from the denial of resentencing under the Three Strikes Reform Act of 2012 (§ 1170.126). This was not defendant's first appeal as of right from a criminal conviction, and there is no independent due process right to *Wende* review in this particular context. A defendant has a statutory right to an appeal, but not a constitutional right. (*In re Sade C.* (1996) 13 Cal.4th 952, 966.) Here the defendant sought to have his sentence reduced pursuant to section 1170.126, but he was precluded since his prior convictions involved rape and oral copulation, which preclude him from resentencing. (See § 1170.126, subd. (e)(3).)

i. *People v. Espinoza* (2014) 226 Cal.App.4th 635, the Second Appellate District, Division 6 held that Defendant who was originally sentenced under the Three Strikes Law to 25-years to life, but then was resentenced after the trial court granted his petition under section 1170.126, and even though he was resentenced to 7-years, 4-months in state prison, and he had already served 5,690 days, far exceeding his new sentence, the Court of Appeal held that under section 3451, subdivision (a), (realignment), he was still required by the plain and unambiguous language of that legislation to participate in post-release community supervision (PRCS), and that requirement did not violate the ex post facto, due process, or equal protection clauses.

j. *People v. Dunckhurst* (2014) 226 Cal.App.4th 1034, the Third Appellate District held that Under the limited retroactivity provision of the Three Strikes Reform Act, section 1170.126, the defendant's commission, in 2010, of assault upon an inmate with a deadly weapon or force likely to cause great bodily injury while in prison, made him ineligible for recall of his earlier three-strikes sentence. The defendant argued that that offense, which came after the 2005, non-serious, non-violent offense for vehicle theft is not a

prior and can disqualify him for resentencing under section 1170.126. This ca found that the phrase "prior conviction," as used in the act, means any conviction that occurs before the court decides whether the inmate is eligible for resentencing. There are two parts to the Act: the first part is "prospective" only, reducing he sentence to be imposed in future three strike cases where the third strike is not a serious or violent felony; the second part is "retrospective", providing relief to third strike defendants already serving a three-strike sentence where the third strike was not serious or violent; the third requirement is that the inmate has no prior convictions for any certain specified felonies.

k. *People v. Manning* (2014) 226 Cal.App.4th 1133, the Second Appellate District, Division 3 held that the trial court erred in denying appellant's petition under section 1170.126, since there is nothing on the face of the prior conviction of rape of an unconscious person, in violation of section 261.4, subdivision(a), will disqualify him from being resentenced under the Three Strikes Reform Act since it was not shown that the acts were committed by force or violence or that the victim of those offenses was under 14 years of age. The defendant's sentence will not be modified only if the documents essential to the conviction establish that the crime was "sexually violent" as defined by the act, or that the victim was under 14 years of age and at least 10 years younger than defendant. Appellant admitted that he was convicted of two prior convictions for rape of an unconscious person under section 261.4, subdivision (a)(4), but those crimes are not enumerated excludable offenses nor violent sex offenses within the meaning of section 1170.126. Where appellant's prior convictions are not disqualifying on the face of the petition for resentencing, the prosecution must be given an opportunity to demonstrate to the trial court that at least one of the prior offenses involved disqualifying conduct, and in determining whether that is the case, the trial court must specify the records it relied on and its reasons for concluding that the defendant's prior offenses were or were not disqualifying.

l. *People v. Flores* (2014) 227 Cal.App.4th 1070, the Second Appellate District, Division 6 held that the phrase within Proposition 36, codified in section 1170.126, subdivision (f), that the defendant not "pose an unreasonable risk of danger to public safety" in order to qualify for retroactive application of the Three Strikes Reform Act is not, on its face, unconstitutionally vague. (See *People v. Mirmirani* (1981) 30 Cal.3d 375, 382 [pertaining to vagueness of a statute]; see also *People v. Sipe* (1995) 36 Cal.App.4th 468, 480 [vagueness applies to sentencing statutes].) The

prosecution, in seeking to prove that the petitioner is an "unreasonable risk of danger to public safety", need only prove "dangerousness" by a preponderance of the evidence. (*People v. Superior Court (Kaulick*) (2013) 215 Cal.App.4th 1279, 1301-1306.) The trial court was not required to remove the defendant's shackles during his testimony at the hearing on the petition for resentencing, where there was no evidence that the shackling impaired the defendant or prejudiced his right to testify, and the defendant in fact testified that the shackles were no more than a distraction.(See *People v. Anderson* (2001)25 Cal.4th 543, 596 [the shackles must impair or prejudice the defendant]; *People v. Jackson* (2014) 58 Cal.4th 724, 741 [restraints can impair a defendant's ability to testify effectively.]

m. *People v. Jernigan* (2014) 227 Cal.App.4th 1198, the Second Appellate District, Division 5 held that the trial court erred in finding that the defendant was disqualified from resentencing under section 1170.126, subdivision (f) due to his prior offenses for attempted oral copulation. The offense of attempted oral copulation is not within the crimes listed or within the meaning of Welfare and Institutions Code section 6600, subdivision (b), which precludes sexually violent offenses from resentencing. The matter is remanded to the superior court for the court to determine if the defendant poses a unreasonably high risk of danger to the public. (*People v. Superior Court (Kaulick*) 215 Cal.App.4th 1279, 1293-1294.)

n. *People v. Elder* (2014) 227 Cal.App.4th 1308, the Third Appellate District held that where the defendant had a prior conviction for prior section 12021 (now § 29800) (possession of a gun as a convicted felon), was "armed with a firearm" and thus ineligible for resentencing pursuant to section 1170.126, subdivision (e)(2) for the offense that falls within section 667(e)(2)(C)(iii).

o. *People v. Bradford* (2014) 227 Cal.App.4th 1322, the Third Appellate District held that In determining whether a defendant is eligible for resentencing under Proposition 36, section 1170.126, the trial court must review evidence obtained solely from the record of his "third strike" conviction, or "current" conviction. (*People v. Woodell* (1998) 17 Cal.4th 448 [defining record of conviction]; see also *People v. Guerrero* (1988) 44 Cal.3d 343 [pertaining to the record of conviction].) The trial court erred when it ruled petitioner ineligible for resentencing under section 1170.126, subdivision (f). The trial court erred in finding that the wire cutters, which were found on appellant was a dangerous or deadly weapon, and therefore they did not fall into the category of section 667, subdivision (e)(2)(C)(iii), which would make petitioner ineligible for resentencing. When the crime is

assault with a deadly weapon, the determination of whether an item is a deadly weapon that was not designed for use as a weapon has bee held to depend on the nature of the item as well as the manner in which it is used. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1029.) In appellant's "current" conviction, the wire cutter were used to cut security tags off of clothing, and not intended for stabbing or to be used as a weapon; therefore, petitioner should not be determined to be ineligible for resentencing under section 1170.126.

p. *Lowe v. Superior Court* (2014) 228 Cal.App.4th 387, the Third Appellate District held that the trial court did not err in failing to resentence petitioner on his petition for resentencing under the Three Strikes Reform Act of 2012 within the meaning of section 1170.126, for a conviction of being a felon in possession of a firearm (formerly § 12021, now § 29800), and it was not error to consider evidence presented at the trial of the underlying charge. Although there had been a prior dismissal of two counts of second-degree 187 and an acquittal on one count of section 245, those verdicts in appellant's favor did not preclude the trial court from deciding, based on the trial evidence, that defendant was armed with a firearm and intended to cause great bodily injury when he committed the felon-in-possession; and therefore he was ineligible for resentencing under the act. Further, the defendant's petition for resentencing did not invoke a Sixth Amendment right to a jury trial, under *Apprendi*, (see *People v. McGee* (2006) 38 Cal.4th 38 682) on whether he was armed with a firearm or intended to cause great bodily injury. The trial court's factual findings, in response to the petition for resentencing, did not implicate double jeopardy. (*Id.*, at pp. 691-692.)

q. *People v. Guilford* (2014) 228 Cal.App.4th 651, the Third Appellate District held that the trial court did not err in denying petitioner's motion to recall his sentence and resentence him under section 1170.126. This court previously found that the petitioner's "current" conviction for spousal abuse, intended to cause great bodily injury to the victim, is a serious and/or violent felony, and as a result he was disqualified from resentencing. (See sec. 667, subd. (e)(2)(C)(iii).) While the court is required to make findings with respect to disqualifying factors, there is no requirement that such factors be pled and proven by the prosecution. Additionally it was not error to look to evidence from this court's previous opinion to determine if the act qualifies as a strike. (See *People v. Woodell* (1998) 17 Cal.4th 448, 454-457.) Furthermore, the petitioner does not have the right to have a jury determine beyond a reasonable doubt, downward modifications of sentence due to intervening laws. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279,

1304; see also *Dillion v. United States* (2010) 560 U.S. 817, 828-829 [186 L.Ed.2d 314].)

r. *People v. Quinones* (2014) 228 Cal.App.4th 1040, the Third Appellate District held that an arming enhancement within the meaning of section 12022, subdivision (c), which was found true by jury, but was dismissed for sentencing purposes at the defendant's original 1996 sentencing hearing, may be used to disqualify him for resentencing under Proposition 36, section 1170.126, subdivision (c)(2)(C)(iii). (See *People v. White* (2014) 223 Cal.App.4th 512 [the trial court can look to the facts of the case to determine if a firearm was used, and if it would disqualify petitioner for resentencing].)

s. *People v. Atkins* (2014) 229 Cal.App.4th 536, the Second Appellate District, Division 5 held that where the defendant's sole indeterminate life term he was serving was for stalking, a non-serious, non-violent felony, and where his serious felony convictions for criminal threats were stayed, those criminal threat offenses did not permit the denial of his resentencing petition under Proposition 36. The defendant's current sentences and offenses contain none of the elements in section 667, subdivision (e)(2)(C)(i)-(iii) or 667, subdivision (c)(2)(C)(i)-(iii), and as a result appellant is eligible for resentencing. (See *People v. White* (2014) 223 Cal.App.4th 512-523.)

t. *People v. Anderson* (2014) 229 Cal.App.4th 925, the Third Appellate District held that the defendant is not entitled to Wende review on an appeal from the denial of a petition for resentencing under section 1170.126, Three Strikes Reform Act of 2012, since it was not the defendant's first appeal as of right from a criminal conviction, and there was no independent due process right to a Wende review in this particular context.

u. *Schinkel v. Superior Court* (2014) 229 Cal.App.4th 935, the Third Appellate District held that the defendant was ineligible for resentencing under section 1170.126, the Three Strikes Reform Act of 2012, since his conviction for solicitation of murder necessarily included the intent to cause great bodily injury. Additionally, the defendant was not eligible for resentencing on other nondisqualifying current convictions because the modification to the Three Strikes Law excludes the defendant's class of dangerous criminals from the benefit of resentencing. The defendant was not entitled to a jury trial on whether he was eligible for resentencing.

v. *People v. Tubbs* (2014) 230 Cal.App.4th 578, the Fifth Appellate District held that the trial court, in resentencing defendant under the Three Strikes

Reform Act, (Proposition 36) must impose a term of post-release community supervision if the underlying crime is one for which the law now requires PRCS, and defendant cannot receive credit against the term of PRCS for time served in excess of the reduced sentence. (See *People v. Espinoza* (2014) 226 Cal.App.4th 635, 639-641.)

w. *People v. Garcia* (2014) 230 Cal.App.4th 763, the Third Appellate District held that the term "unreasonable risk of danger to public safety," as used in the limited retroactivity provision of the Three Strikes Reform Act of 2012, section 1170.126, subdivision (g), which permits a trial court to deny resentencing to an otherwise-qualified defendant if the prosecution shows that the release of the defendant carries such a risk, is not unconstitutionally vague. The term is clear because it can be objectively ascertained by reference to the examples of evidence the trial court may consider in making this determination. (Cf. *People v. Morgan* (2007) 42 Cal.4th 593, 606.)

x. *People v. Brimmer* (2014) 230 Cal.App.4th 782, the Fourth Appellate District, Division 2 held that the trial court erred in granting the defendant's motion to resentence him to a determinate term under section 1170.126, where he was convicted of possession of firearm by convicted felon and possession of short-barreled shotgun, and this Court of AppealNovember 4, 2014 found that he was ineligible for resentencing since the offense involved a firearm, and he was therefore excluded pursuant to section 667, subdivision (e)(2)(C)(iii). There is no requirement that the arming occur during a separate offense in order for the ineligibility provision to apply. (See *People v. Blakely* (2014) 225 Cal.App.4th 1042; *People v. White* (2014) 223 Cal.App.4th 512, 523-525; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 128-130.) Additionally, the Court of Appeal found that there is no pleading and proof requirement even though the defendant argued such based on sections 667, subdivision (e)(2)(C) and 1170.12, subdivision (c)(2)(C). (*People v. White, supra*, 223 Cal.App.4th at p. 527.)

y. *People v. Anthony* (2014) 230 Cal.App.4th 1176, the Fourth Appellate District, Division 2 held that the trial court did not err when it failed to resentence the defendant under section 1170.126, subdivision (e)(1), due to the fact that one of his offenses was a serious or violent felony and the other not. The Court of Appeal found that the court's denial for both of his three-strikes sentences was correct where any of those sentences was imposed for a serious or violent felony.

z. *People v. Brown* (2014) 230 Cal.App.4th 1502, the Fourth Appellate District, Division 2 held that the trial court, in considering a resentencing petition under the Three Strikes Reform Act of 2012, section 1170.126, the trial court does not have discretion to strike a disqualifying prior conviction under *People v. Superior Court (Romero)* 1996) 13 Cal.4th 497), here a violation of section 288a, subdivision (c) (oral copulation by force).

aa. *Teal v. Superior Court* (2014) 60 Cal.4th 595, the California Supreme Court held that the denial of a petition to recall a sentence, under section 1170.126, under its limited retroactivity provision, is an appealable order.

bb. *People v. Hicks* (2014) 231 Cal.App.4th 275, the Third Appellate District held that where the defendant is serving a sentence for being a felon in possession of a firearm was "armed with a firearm," section 29800, and former section 12021, during the commission of the offense is ineligible for resentencing under the limited retroactivity provisions of the Three Strikes Reform Act of 2012, pursuant to section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii). There is no requirement that defendant receive a sentence for arming himself, distinct from the sentence imposed for the underlying crime, or that there be a separate pleading and proof of the arming. Additionally, the trial court did not err in relying on facts set forth in appellate opinion (see *People v. Woodell* (1998) 17 Cal.4th 448, 456), to determine that the defendant was "armed with a firearm" during commission of the offense. (See also *People v. Guerrero* (1988) 44 Cal.3d 343, 355.)

cc. *People v. Chubbuck* (2014) 231 Cal.App.4th 737, the Sixth Appellate District held that the trial court did not err when it denied the defendant's resentencing petition under Proposition 36, section 1170.126. The court found that the defendant was ineligible for resentencing due to the fact that "[d]uring the commission of" the third-strike offense, which was a violation of section 653f, subdivision (a), solicitation to commit an assault or by means of force likely to cause great bodily injury, the defendant "intended to cause great bodily injury to another person." There is no requirement that the disqualifying factor have been pled and proven in the underlying case. (See *People v. Brimmer* (2014) 230 Cal.App.4th 782; *People v. Elder* (2014) 227 Cal.App.4th 1308; *People v. Blakely* (2014) 225 Cal.App.4th 1042.)

dd. *People v. Oehmigen* (2014) 232 Cal.App.4th 1, the Third Appellate District held that the court did not err when it denied the defendant's motion to resentence him under Proposition 36, section 1170.126, due to the fact that

he admitted, at the time of entry of plea to charge of assault with force likely to inflict great bodily injury, that he had driven his car purposefully at a police officer. The use of the car was the deadly weapon. This admission established that the prior crime was a violent or serious felony, therefore, the trial court's denial of the resentencing petition without a hearing was not a due process violation, since he was not resentenced *(People v. Superior Court (Kaulick)* (2012) 215 Cal.App.4th 1279, 1297-1298 [defendant is entitled to be present for a resentencing]), and was correct on the merits.

ee. *People v. Payne* REVIEW GRANTED; FORMERLY AT: (2014) 232 Cal.App.4th 579, the Third Appellate District held that the trial court did not err in denying appellant's motion to modify his sentence within the meaning of section 1170.126, the Three-Strikes Reform Act, Proposition 36. The prosecution has the burden of proving, by a preponderance of the evidence, *(People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301), facts on which a finding that resentencing petitioner would pose an "unreasonable risk of danger to public safety" reasonably can be based. On appeal, the court determines whether there is substantial evidence to support a factual finding, but reviews the ultimate determination of dangerousness under the abuse-of-discretion standard. (See *People v. Rodriquez* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Williams* (1998) 17 Cal.4th 148, 162.)

ff. *People v. Losa* (2014) 232 Cal.App.4th 789, the Fifth Appellate District held that the trial court did not err in denying the defendant's motion for resentencing under section 1170.126, Proposition 36, where the petition for resentencing is opposed on dangerousness grounds (§ 1170.126, subd. (f)), has no equal protection right to a jury trial pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, and its progeny, or to a finding of proof beyond a reasonable doubt. *(People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301.) Defendants seeking resentencing under the initiative are not similarly situated to other defendants. (*Id.*, at p. 1306.)

gg. *People v. Franco* (2014) 232 Cal.App.4th 831, the Fifth Appellate District held that a trial court may, but is not required to, order a supplemental probation report for the "dangerousness" hearing, pursuant to section 1170.126, subdivision (f), in making the determination whether the court should resentence the defendant under Proposition 36. Where as here, the defendant was ineligible for probation, even though he could have been resentenced as a "two strike" defendant, the failure to object to proceeding without one, such is a waiver and the forfeiture of that right to object on appeal. (*People v. Murray* (2012) 203 Cal.App.4th 277, 289, fn 12.) Waiver

and forfeiture do not apply where the defendant is eligible for probation. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 178, 181-182.)

hh. *People v. Camp* (2015) 233 Cal.App.4th 461, the Fourth Appellate District, Division 1, held that the trial court did not err when it permitted appellant to be released to an immigration enforcement agent after he had served 14 months of a 28 month "split sentence" (see § 1170, subd. (h)(5)(B)(i)), based on a negotiated plea. Pursuant to the deal, appellant was to served another 14 months on mandatory supervision. The Court of Appeal upheld the trial court's ruling that he be released to the immigration officer, rather than serving the 14 months on mandatory supervision. Section 1170, subdivision (h)(5)(B)(i) indicates that a period of mandatory supervision may be terminated by court order; and there is no limitation on the court's order. Additionally, nothing in section 1203.2, subdivisions (a) and (b), nor section 1202.3, which governs proceedings to revoke or modify mandatory supervision, contains any language that would require a court to impose the suspended portion of the sentence upon early termination of mandatory supervision.

ii. *People v. Rodriguez* (2015) 233 Cal.App.4th 1403, the Fifth Appellate District held that the trial court did not err when it denied resentencing under the Three Strikes Reform Act of 2012, Proposition 36, Penal Code section 1170.126, to appoint an expert witness to testify whether the defendant would pose an unreasonable risk of danger to public safety. (People v. Flores (2014) 227 Cal.App.4th 1070, 175 [a superior court judge is capable of exercising discretion on determining whether the defendant would pose a risk of danger to public safety].) The court has discretion to appoint such an expert, but is not required to do so.

jj. *People v. Tittle* (2015) 234 Cal.App.4th 452 SEEMINGLY OVERRULED IN *PEOPLE V. SASSER, SUPRA.* , the Second Appellate District, Division 1 held that, the trial court did not err when it added sentence enhancements for violations of section 667.5, subdivision (b), prior prison terms, and for a prior serious felony pursuant to section 667, subdivision (a)(1) to two separate determinate counts. The Court of Appeal found that *People v. Tassell* (1984) 36 Cal.3d 77, which held that enhancements based on the defendant's status such as the two enhancements above, could be added only once to the aggregate sentence, is applicable when multiple terms are imposed pursuant to section 1170.1, but not when such terms are imposed under the Three Strikes Law.

kk. *People v. Davis* (2015) 234 Cal.App.4th 1001, the First Appellate District, Division 2 held that When a trial court declines to grant an inmate's petition for resentencing under the Three Strikes Reform Act on the ground that this would pose an unreasonable risk of danger to public safety, (§ 1170.126, subdivision (f)), that decision should be upheld on appeal unless the reviewing court is able to

conclude that the decision qualifies as an abuse of the considerable discretion granted by the act. The trial court did not abuse its discretion in making an "unreasonable risk" finding based on the defendant's continued denial that he committed the third-strike offense, his hostile attitude toward authority and society, and his lack of post-release plans. Additionally the more restrictive definition of "unreasonable risk" in Proposition 47 under section 1170.18, subdivision (c), did not narrow the definition of the term for purposes of the Three Strikes Reform Act.

ll. *People v. Smith* (2015) 234 Cal.App.4th 1460, the Fourth Appellate District, Division 3 held that where the defendant had suffered a third-strike conviction, for a crime not classified as a serious or violent felony, and not otherwise punishable as a third strike under section 1170.126 (Three Strikes Reform Act of 2012), became final prior to the enactment of section 1170.126, is not entitled to resentencing as a matter of right, (rejecting the argument under *In re Estrada* (1965) 63 Cal.2d 740), but must petition for discretionary resentencing pursuant to the act. (See § 1170.126, subdivision (a).) Persons sentenced before the act became law, and those sentenced after it became law, are not similarly situated for equal protection purposes, nor does treating such persons differently constitute "unusual" punishment.

mm. *People v. Berry* (2015) 235 Cal.App.4th 1417, the Fourth Appellate District, Division 3 held that the court erred in denying appellant's petition for resentencing under section 1170.126, and it is remanded to the trial court for a determination whether appellant poses an unreasonable risk to public safety under section 1170.126, subdivision (f). The Court of Appeal found that where the defendant was convicted and sentenced prior to the enactment of section 1170.126, and received an indeterminate life sentence for a crime that was not a serious or violent felony, after a firearms allegation was dismissed as part of a plea bargain, the trial court erred in relying on the alleged gun use to find defendant ineligible for resentencing. However, on remand the court can consider evidence of such use in determining whether to deny resentencing based on a finding of dangerousness.

nn. *People v. Rusconi* (2015) 236 Cal.App.4th 273, the Fourth Appellate District, Division 1 held that, where the defendant was convicted in 1986 of two counts of vehicular manslaughter, the two convictions arose out of an incident in which the defendant was driving under the influence, and two people were killed, and then in 2005, she was convicted of driving under the influence under Vehicle Code section 23152, subdivisions (a) and (b), and the court sentenced her to 25-L, the court properly denied a petition under Penal Code section 1170.126, since her two prior felony convictions were for manslaughter. Now the defendant argues that *People v. Vargas* (2014) 59 Cal.4th 635 should strike one of the manslaughter convictions.

A defendant's multiple felony convictions for injuring "multiple victims" by a single violent act are separate offenses, and strikes; as a result the court's refusal to modify the defendant's life sentence was not error.

oo. *People v. Denize* (2015) 236 Cal.App.4th 996, the Sixth Appellate District held that the trial court did not err in failing to appoint counsel for the petitioner who filed a writ under section 1170.126 seeking resentencing, where he did not establish a prima facie case that he was entitled to relief. He is entitled to counsel had the requirements been met. (See *People v. Shipman* (1965) 62 Cal.2d 226; *Gardner v. Florida* (1977) 430 U.S. 349, 358 [defendant is entitled to counsel at a sentencing hearing].) However the initial screening of a section 1170.126 petition to determine eligibility for resentencing is not a sentencing hearing. The Court of Appeal found that the petitioner who is serving two three-strikes sentences, one for a serious offense and one for a nonserious offense, is not eligible for resentencing under the Reform Act. NOW SEE *People v. Murchado* (2015) 61 Cal.4th 674.)

pp. *People v. Amaya* (2015) 239 Cal.App.4th 379, the Fourth Appellate District, Division 2 held that where the trial court initially resentenced the defendant under the Three Strikes Reform Act, Proposition 36, it did so in the mistaken belief that a gang finding which had originally attached to the original sentence had been stricken. The ca found that the new sentence under Proposition 36 was void on its face of the record. (See *People v. De Blasio* (1963) 219 Cal.App.2d 767, 769.) As a result the trial court did not err in vacating the reduced sentence upon discovery of the error and reimposing the original sentence.

qq. *People v. Arias* (2015) 240 Cal.App.4th 161, the Fifth Appellate District held that, a juvenile adjudication that constitutes a conviction for purposes of sentencing under the Three Strikes Law, section 667, subdivisions (b)-(i), also constitutes a conviction for purposes of determining eligibility for resentencing under the Three Strikes Reform Act, section 1170.126. The Court of Appeal found that the defendant, who was sentenced under the Three Strikes Law for crimes not classified as violent or serious, but who had a juvenile adjudication for murder, was not eligible for resentencing. Welfare and Institutions Code section 203, which precludes juvenile adjudications from being "deemed a conviction" "for any purpose," has been superseded to the extent it conflicts with the Three Strikes Law. (See *People v. Pacheco* (2011) 194 Cal.App.4th 343, 345-346.)

rr. *People v. Nettles* (2015) 240 Cal.App.4th 402, the Third Appellate District held that the defendant was ineligible for resentencing under the Three Strikes Reform

Act (Proposition 36), section 1170.126, given the fact that he had a prior conviction for a "sexually violent offense," assault with the intent to commit rape (Welf. & Inst. Code § 6600), even though it was not a disqualifying offense at the time it was committed in 1998. However, at the time of the resenting it was defined under section 1170.126, as a sexually violent felony, and therefore, he was disqualified for resentencing under the modified Three Strikes Law. (See *People v. Johnson* (2015) 61 Cal.4th 674, 683 [the classification of an offense as a serious or violent for purposes of resentencing is based on the law as of the date Prop. 36 went into effect, November 7, 2012].)

ss. *People v. Lynn* (2015) 242 Cal.App.4th 594, the Second Appellate District, Division 3 held that pursuant to *People v. Johnson* (2015) 61 Cal.4th 674, 688, the trial court erred in denying petitioner's petition for resentencing under Proposition 36, section 1170.126. The trial court erred in ruling that defendant's conviction of robbery, a serious or violent felony, made him ineligible for Proposition 36 resentencing on his conviction of attempted grand theft, which was not a serious or violent felony.

tt. *People v. Esparza* (2015) 242 Cal.App.4th 726, the Sixth Appellate District held that the trial court erred in using the wrong standard or definition for "an unreasonable risk of danger to public safety," when it denied petitioner's Proposition 36, section 1170.126, petition by placing the burden of proof upon the defendant pertaining to his dangerousness. Denial of Proposition 36 resentencing had to be reversed where the trial court based its ruling in part on defendant's extensive record of convictions, which were largely alcohol-related, and on a finding that defendant did not attend prison AA meetings until the law changed to make him eligible for resentencing, which finding was not supported by the record. In determining whether the prosecution has carried its burden of proving dangerousness, in order to support denial of resentencing to an eligible defendant, the primary focus must be on current rather than past dangerousness.

uu. *People v. Denard* (2015) 242 Cal.App.4th 1012, the Second Appellate District, Division 1 held that the prosecution failed to prove that the defendant's prior burglary and manslaughter convictions in Florida constituted "strikes" under California's Three Strikes Law. Because Florida second-degree burglary encompasses some forms of conduct that do not constitute serious or violent felonies in California, and Florida manslaughter includes conduct that would constitute involuntary manslaughter, which is not a serious or violent felony in California, the documents (see *People v. Woodell* (1998) 17 Cal.4th 448, 453) proving only that defendant was convicted of those Florida felonies did not establish that those convictions

were strikes. The nature of the "conviction" is at issue, and the court cannot go beyond the record of conviction. (See *People v. McGee* (2006) 38 Cal.4th 682691, 706; see also *People v.Guerrero* (1988) 44 Cal.3d 343, 355.) Additionally, reliance on the Florida probable cause affidavit in determining that appellant's manslaughter conviction constituted a strike violated his Sixth Amendment rights as it increased penalty. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Blakely v. Washington* (2004) 542 U.S. 296, 303-304 {124 S.Ct. 2531, 159 L.Ed.2d 243; *Cunningham v. California* (2007) 549 U.S. 270, 274-275; *Descamps v. U.S.* (2013) 570 U.S. [133 S.Ct. 2276, 2288, 186 L.Ed.2d 438, 456].)

vv. *People v. Burns* (2015) 242 Cal.App.4th 1452, the Sixth Appellate District held that the trial court erred in relying on facts described in a post-conviction probation report when determining that defendant was armed during the commission of his third "strike" and thus ineligible for resentencing under the Three Strikes Reform Act, Proposition 36, section 1170.126. The probation report was neither admissible nor reliable, (see *People v. Oehmigen* (2015) 232 Cal.App.4th 1, 5, [the probation report is not part of the ordinary record of conviction, and the court may only rely on reliable evidence in determining whether the defendant was eligible under Proposition 36]), constituting double hearsay or multiple hearsay, and not having been shown by the prosecution to be admissible under an exception to the hearsay rule. Mere possession of a firearm or deadly weapon does not establish that the defendant was armed with a firearm or deadly weapon. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1057) and the trial court could not rely on the probation report in making the determination whether the defendant was armed and had the firearm available for offensive or defensive use, and not merely in possession of weapon. (*Id.* at 1048.)

ww. *People v. Estrada* (2015) 243 Cal.App.4th 336, the Second Appellate District, Division 8 held that the trial court did not err when it denied the defendant's motion for resentencing under Proposition 36, Penal Code section 1170.126, as he was ineligible for resentencing due to the fact that the showing at the preliminary hearing established that he used a firearm during the commission of the grand theft, section 487, subdivision (c). Appellant pled to that offense, and other offenses, such as multiple robberies were dismissed. Therefore, the defendant was ineligible for resentencing since he had a strike within the meaning of section 667, subdivision (e)(2)(C)(iii). There is no requirement within Proposition 36 that the disqualifying enhancement has to be pled. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 279, 285.)

xx. *People v. Superior Court (Rangel*) (2016) 243 Cal.App.4th 992, the Fourth Appellate District, Division 2 held that the trial court did not err when it gave appellant credit for custody time served beyond the new sentence he received under Proposition 36, section 1170.126, against term of "community supervision" under section 3451, subdivision (a).

yy. *People v. Thurston* (2016) 243 Cal.App.4th 1311, the First Appellate District, Division 2 held that the defendant's juvenile adjudication (conviction) for rape, rendered him ineligible for resentencing under Proposition 36, the Three Strikes Reform Act, sectioin 1170.126, even though it was not pled or proven as a "strike" in the underlying three-strikes case. Section 1170.126 prospectively changed the Three Strikes law by reserving indeterminate sentences for cases where the new offense is also a serious or violent felony, unless the prosecution pleads and proves an enumerated disqualifying factor. (*People v. Chubbuck* (2014) 231 ca4 737, 740-741.) Under section 1170.126, subdivision (e)(3), an inmate is not eligible for resentencing if he or she has a prior conviction for any offense appearing in section 667, subdivision (e)(2)(C)(iv), or section 1170.12, subdivision (c)(2)(C)(iv). As relevant here, the referenced offenses include a " 'sexually violent offense' as defined by subdivision (b) of Section 6600 of the Welfare and Institutions Code." (§ 1170.12, subdivision (c)(2)(C)(iv)(I); § 667, subdivision (e)(2)(C)(iv)(I).) Section 1170.126 does not impose the same requirements in connection with the procedure for determining whether an inmate already sentenced as a third strike offender is eligible for resentencing as a second strike offender." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1033.) Section 1170.126, subdivision (e), provides: "An inmate is eligible for resentencing if: . . . [¶] (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." Clause (iv) of each of the referenced statutes, as indicated above, provides, "The defendant suffered a prior conviction, as defined in [the Three Strikes law], for any of the following serious and/or violent felonies: [¶] (I) A 'sexually violent offense' as defined in subdivision (b) of section 6600 of the Welfare and Institutions Code." (§§ 1170.12, subd. (c)(2)(C)(iv), 667, subd. (e)(2)(C)(iv).) section 1170.126, subdivision (e)(3), thus cross-references only "the offenses appearing in" the specified clauses and "not the text preceding them that specifies the procedural prerequisite of pleading and proof." (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1315; *People v. White* (2014) 223 Cal.App.4th 512, 526-527.) Therefore, the electorate intended to reduce the sentences of a Three Strikes inmate, who, if sentenced under the Reform Act, would still receive a three strikes sentence. (See *People v. Arias* (2015) 240 Cal.App.4th 161.)

zz. *People v. White* (2016) 243 Cal.App.4th 1354, the Fourth Appellate District, Division 3 held that, where the defendant was "armed" while committing the crime

of possession of a firearm by a convicted felon (§ 12021, subd. (a)), he was ineligible for resentencing under the Three Strikes Reform Act, section 1170.126, where a gun was found in a trash can, and jury necessarily found that defendant had either disposed of the gun while being followed by police, or that he had placed it there earlier. The Court of Appeal found that he was "armed," during the commission of the offense, and was not merely possessing the weapon. (See *People v. White* (2014) 223 Cal.App.4th 512; see also *People v. Elder* (2014) 227 Cal.App.4th 1308; *People v. Vang* (2010) 184 Cal.App.4th 912.)

aaa. *People v. Garcia* (2016) 244 Cal.App.4th 224, the Sixth Appellate District held that the trial court did not err in denying petitioners petition to reduce his sentence under Proposition 36, section 1170.126. The trial court commented that the defendant had made no efforts at rehabilitation, did not support the defendant's claim that the court erroneousley placed the burden of proof on the issue of dangerousness on the defendant. The court's statements during the hearing made it clear that the burden of proof was on the prosecution. The provisions of Proposition 36 that permits the trial court to deny resentencing if petitioner is found dangerous to society, a provision inapplicable to defendants sentenced since the law took effect, does not deprive the former class of equal protection. (See *People v. Yearwood* (2013) 213 Cal.App.4th 161, 178-179.) The two groups are not similarly situated. Proposition 36 does not create a presumption in favor of resentencing. There is no Sixth Amendment right to a jury trial on the dangerousness issue or to have the issue determined under a beyond a reasonable doubt standard with respect to a Proposition 36 resentencing petition.

bbb. *People v. Johnson* (2016) 244 Cal.App.4th 384, the Fifth Appellate District held that the trial court properly denied petitioner's request for resentencing under Proposition 36, section 1170.126. The ca held that the term "serious bodily injury," as used in section 243, subdivision (d) and defined in section 243, subdivision (f)(4), is the equivalent of "great bodily injury," as that phrase is used in section 1192.7, subdivision (c)(8). Given the fact that an offense that involves great bodily injury is designated a serious or violent felony, and Proposition 36 makes a defendant convicted of such a felony "serious" felony and sentenced under the Three Strikes Law ineligible for resentencing, a defendant convicted of battery with serious bodily injury in violation of section 243, subdivision (d) is not eligible for resentencing.

ccc. *People v. Arevalo* (2016) 244 Cal.App.4th 836, the Second Appellate District, Division 3 held that the trial court erred in denying the defendant a resentencing under Proposition 36, section 1170.126, as the Court of Appeal found him eligible

for resentencing. In his prior matter that subjected him to his three strike sentence, the defendant had been found guilty of grand theft auto, and driving without the owner's consent, but he had been found not guilty of burglary, being in possession of a firearm by an ex-felon, and the enhancement for being armed with a firearm, not true. The trial court, in its review of the record for the resentencing determined that the defendant was not eligible since he used a firearm and therefore was not eligible as it fell within the exclusion in section 667, subdivision (e)(2)(C)(iii). In order to determine whether the defendant was eligible, the court had to determine, whether the armed with a firearm allegation made him ineligible, using the factors set forth in *People v. Guerrero* (1988) 44 Cal.3d 343 and its progeny. The Court of Appeal concluded that the standard of proof required to make this finding was beyond a reasonable doubt, and not by a preponderance of the evidence. Therefore, given that burden of proof, and the fact that the defendant had been acquitted of the firearm offense and the arming enhancement, he was eligible for resentencing. (*People v. Johnson* (2015) 61 Cal.4th 674, 687.)

ddd. *People v. Garner* (2016) 244 Cal.App.4th 1113, the Third Appellate District held that the defendant, who had received a third-strike sentence based on a violation of sectoin 496, subdivision (a), was eligible for resentencing under Proposition 36, section 1170.126, but not for a reduction to a misdemeanor under Proposition 47. The trial court did not err in resentenced him on all of the charges that had been pending against him, including prior prison term enhancements, which purportedly had been stricken during the original sentencing proceeding in light of the third-strike life sentence. The Court of Appeal analogized this resentencing to a "recall" of sentence under section 1170, subdivision (d), where the court is entitled to consider the entire sentence. The invalidity of one component infects the entire scheme. (*People v. Hill* (1986) 185 Cal.App.3d 831, 834.) Additionally, the defendant was entitled to custody credits earned in prison prior to resentencing. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 37.)

eee. People v. Dobson (2016) 245 Cal.App.4th 310, the Fifth Appellate District held that Proposition 36, section 1170.126, the Three Strikes Reform Act, does not permit a person found not guilty by reason of insanity (NGI) to petition for a recalculation of his maximum term of commitment. The distinction between such persons, and persons sentenced under the Three Strikes Law who may petition for resentencing under the Reform Act, does not violate equal protection. The Reform Act authors may have rationally concluded that defendants found NGI should be treated differently because state hospitals do not have the same overcrowding issues that prisons do.

fff. *People v. Myers* (2016) __ Cal.App.4th __, reported on March 28, 2016, in 2016 Los Angeles Daily Journal 2559, the Third Appellate District held that

the trial court did not err when it used the definition of "dangerousness" within the provisions of Proposition 36, section 1170.126, and not the redefined definition as stated in Proposition 47, section 1170.18. This court found that Proposition 47, contained a "drafter's error" in that its statement that its definition of "an unreasonable risk of danger to public safety" must be read to mean "throughout this act,"as opposed to throughout this Code as it provides, in order to harmonize it with Proposition 36. The trial court did not abuse its discretion in finding that the defendant posed an unreasonable risk to public safety given his long record, defiance of authority, and vague plans for reintegration into society. the defendant did not have a Sixth Amendment right to a jury trial on the question whether he posed on undue risk to public safety.

ggg. *People v. Florez* (2016) __ Cal.App.4th __, reported on March 28, 2016, in 2016 Los Angeles Daily Journal 2832, the Sixth Appellate District held that The Three Strikes Reform Act, Propostion 36, section 1170.126, does not create a presumption, analogous to the presumption in favor of parole release after an inmate completes the mandatory portion of his or her sentence, in favor of resentencing of defendants sentenced prior to the act's enactment. The trial court did not abuse its discretion in denying resentencing petition, based on the "dangerousness" provision, section 1170.126, subdivision (f), based on his history of violence in prison and the inadequacy of evidence of his participation in substance abuse and anger management programs. Proposition 47, section 1170.18, did not amend the Three Strikes Reform Act, so its narrower definition of "dangerousness" does not apply to section 1170.126.

93. MISDEMEANOR DUI BECOMES A FELONY WHEN THERE IS A PRIOR DUI MANSLAUGHTER CONVICTION WITHOUT VIOLATING THE RULE AGAINST BOOTSTRAPPING:

a. *People v. Montrose* (2013) 220 Cal.App.4th 1242, the Fifth Appellate District held that section 1170, subdivision (h), which shifts responsibility for housing certain felons from state prisons to individual county jails, does not apply to persons whose sentences were first imposed but suspended prior to October 1, 2011, even though execution of the sentence occurred after that date when the statute's provisions took effect. This is just another Court of Appeal that lined up against the opposite conclusion set forth in *People v. Clytus* (2012) 209 Cal.App.4th 100.

94. A DISMISSAL OF A JUVENILE CONVICTION PURSUANT TO WELFARE AND INSTITUTIONS CODE SECTION 782 IS THE SAME AS A DISMISSAL UNDER PENAL CODE SECTION 1385 FOR ALL PURPOSES:

a. *People v. Haro* (2013) 221 Cal.App.4th 718, the Third Appellate District held that the trial court erred when it used a prior sustained juvenile petition for robbery, which had been dismissed pursuant to Welfare and Institutions Code section 782. Dismissal of the defendant's robbery sustained petition under Welfare and Institutions Code section 782 precludes the use of that adjudication as a strike under the Three Strikes Law. Welfare and Institutions Code section 782 is a general dismissal statute similar to section 1385. (*Derek L. v. Superior Court* (1982) 137 Cal.App.3d 288, 232-233.) In either case, the dismissal operates as a matter of law to erase the prior conviction as if the defendant had never suffered the conviction in the initial instance. (*People v. Barro* (2001) 93 Cal.App.4th 62, 66.)

95. WHERE A LIFE SENTENCE IS IMPOSED PURSUANT TO THE THREE STRIKES LAW AND THE DEFENDANT IS ALSO CONVICTED OF AN OFFENSE THAT FALLS WITHIN SECTION 186.22, SUBDIVISION (B)(5), HE IS SUBJECT TO THE 15 YEAR MINIMUM ELIGIBLE PAROLE PROVISION AND NOT THE 10 YEAR ENHANCEMENT UNDER SECTION 186.22, SUBDIVISION (b)(1)(C):

a. *People v. Williams* (2014) 227 Cal.App.4th 733, the Second Appellate District, Division 4 held that where the trial court imposes a life sentences pursuant to the Three Strikes Law, those sentences, being an alternative penalty scheme, (see *People v. Jones* (2009) 47 Cal.4th 566), are life sentences within the meaning of section 186.22, subdivision (b)(5), and therefore those sentences are subject to the 15-year minimum parole term of section 186.22, subdivision (b)(5), and not to the 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1)(C).

96. CONVICTION OF VOLUNTARY MANSLAUGHTER NOT A STRIKE IN THIS CASE AND THERE MUST BE A JURY TRIAL WHERE THE PROSECUTION MUST USE THE RECORD OF CONVICTION:

a. *People v. Marin* (2015) 240 Cal.App.4th 1344, the Second Appellate District, Division 4 held that the defendant's conviction for vehicular manslaughter was not shown to be a "strike" where neither the elements of the crime nor the evidence presented established that "defendant personally

inflict[ed] great bodily injury on any person, other than an accomplice." Where prosecutor must resort to documents in the record of conviction to prove that a prior conviction was a strike, the defendant is entitled to a jury trial on the issue, unless the defendant waived his right to a jury trial as to such facts and either admitted them or they were found true by the court with defendant's assent. Where the prosecution did not prove that the defendant's conduct made the prior conviction a strike, and defendant had right to trial by jury on that issue, but double jeopardy did not bar retrial.

CASES DECIDED
BY THE UNITED STATES SUPREME COURT

1. CRUEL AND UNUSUAL PUNISHMENT

a. *Lockyer v. Andrade* (2003) 538 U.S. 63 [155 L.Ed.2d 144, 123 S.Ct. 1166], the United States Supreme Court held that the California ruling that a potential life sentence for a repeat offender, whose past convictions were for serious crimes and whose new triggering offense was petty theft, did not constitute cruel and unusual punishment, and was not contrary to controlling U.S. Supreme Court precedent. The dissent indicated that the statutory safeguard of striking a strike in the appropriate case, failed here, and as a result the sentence is grossly disproportionate to the current offense – "if Andrade's sentence is not grossly disproportionate, the principle has no meaning. the California court's holding was an unreasonable application of clearly established precedent."

b. *Ewing v. California* (2003) 538 U.S. 11 [155 L.Ed.2d 108, 123 S.Ct. 1179], the United States Supreme Court held that the imposition of potential life sentence for a defendant who has a lengthy felony and misdemeanor record, and who has qualifying strikes, even though his current offense was for theft of golf clubs valued near $1,200, did not constitute cruel or unusual punishment. There is an extensive discussion of appellant's priors, and his lengthy record. However, there are, in this plurality opinion, 7 votes for proportionality review; a sentence that is grossly disproportionate is cruel and unusual punishment. As a result, if you can argue that your client's record is not as bad as Mr. Ewing's, and that the current crime is "passive," then you may have grounds to argue that your client's sentence is cruel and unusual punishment.

2. WHAT CAN THE COURT CONSIDER TO DETERMINE IF A PRIOR IS A SERIOUS OR VIOLENT FELONY

a. *Shepard v. United States* (2005) 544 U.S. 13 [124 S.Ct. 2531, 159 L.Ed.2d 403], the United States Supreme Court held that where the prosecution alleged a prior burglary conviction, based on a guilty plea to an offense which would qualify as a violent felony conviction, here a generic burglary, a reviewing court is limited to consideration of whether the guilty plea necessarily admitted elements of the generic offense, and the inquiry is limited to the terms of the charging document, to the terms of a plea agreement or transcript of the colloquy between the court and the defendant

in which the defendant confirmed the factual basis for the plea, or to some comparable judicial record of this information. "The Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence," he wrote. Unproven evidence such as police reports are "too far removed from the conclusive significance of a prior judicial record" to allow such to be considered. In a concurring opinion, Justice Clarence Thomas said the Court should have eliminated the "prior conviction" exception outright because it violates an individual's right to be tried and sentenced on factors that are determined "beyond a reasonable doubt" by a jury.

CASES DECIDED
BY THE NINTH CIRCUIT COURT OF APPEAL

1. HABEAS CORPUS RELIEF NOT WARRANTED AS THERE IS NO DUE PROCESS VIOLATION FOR USE OF OUT-OF-STATE OFFENSE AS PREDICATE FOR APPLICATION OF THREE-STRIKE SENTENCE

a. *Holgerson v. Knowles* (2002) 309 F.3d 1200, the Ninth Circuit Court of Appeal held that the California Supreme Court's ruling in *People v. Hazelton* (1996) 14 Cal.4th 101, retroactively applying previous ruling allowing an out-of-state conviction to be treated as one of two predicate convictions under the three-strikes law was not "contrary to" or "an unreasonable application" of the Due Process Clause and thus did not warrant habeas corpus relief. (See *United States v. Newman* (9th Cir. 2000) 203 F.3d 700, 703; *Bouie v. City of Columbia* (1964) 378 U.S. 347 [12 L.Ed.2d 894, 84 S.Ct. 1697] [applied only to after the fact increases in the scope of criminal liability and not to retroactive sentence enhancements.]) Section 667 does not prohibit conduct that was legal prior to its passage; rather it fixes sentencing ranges for already illegal conduct when the defendant convicted of that conduct has two or more prior strikes.

2. APPELLANT HAS THE RIGHT TO TESTIFY AT A SENTENCING HEARING TO DETERMINE IF THE PRIOR CONVICTION IS A SERIOUS OR VIOLENT FELONY

a. *Gill v. Ayers* (9th Cir. 2003) 322 F.3d 678, the Ninth Circuit Court of Appeal held that court's refusal at Three Strikes sentencing hearing to allow the defendant to testify in order to explain or refute the statements attributed to him, violated his due process rights and required reversal of denial of petition for habeas corpus relief. *Gill* sought to challenge the fact that his prior assault with a deadly weapon conviction, which was used as a strike, was not committed with a deadly weapon. The Court of Appeal held that even though the prosecution is limited to the record of conviction, the defendant is not so limited in providing evidence as to the prior convictions.

b. *Gill v. Ayers* (9th Cir. 2003) 342 F.3d 911, the Ninth Circuit Court of Appeal held that petitioner was wrongly denied the right to testify at his sentencing hearing in this Three Strikes case to explain statements attributed to him in the probation report wherein he allegedly admitted that prior assault conviction involved personal use of dangerous or deadly weapon. State trial court action violated Fourteenth Amendment right to due process, was an

unreasonable application of clearly established federal law as determined by the U.S. Supreme Court since 1925 and including *Rock v. Arkansas* (1987) 483 U.S. 44, 49 [97 L.Ed.2d 37, 107 S.Ct. 2704], wherein the High Court indicated that the defendant has a right to present evidence, including the right to testify; and the error was not harmless.

3. APPELLANT'S LIFE SENTENCE MAY OR MAY NOT VIOLATE THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

a. *Ramirez v. Castro* (2004) (9th Cir. 2004) 365 F.3d 755, the Ninth Circuit Court of Appeal held that a Three-strikes sentence of 25 years to life for theft of a VCR valued at less than $200 violated the Eighth Amendment prohibition against cruel and unusual punishment as applied to appellant's current and prior offenses. Appellant had previously been convicted of two second-degree robberies, and neither involved weapons; minimal force to escape from each of the petty thefts was used by appellant. Appellant had pled guilty to the priors, which th trial court conceded were actually petty thefts for which defendant served 6 months in county jail and successfully completed the 3 year probationary term without incident. The current offense is a wobbler due to the prior theft offenses; and he had never been convicted of any other felony. The Ninth Circuit Court of Appeal found the California's appellate court's upholding of the 25 to life sentence, in which appellant must serve a minimum of 25 years (see *In re Cervera* (2001) 24 Cal.4th 1073), was an unreasonable application of controlling federal law, and therefore relief was possible under AEDPA in this "rare case" as a violation of the Eighth Amendment. (See *Lockyer v. Andrade* (2003) 538 U.S. 63, 73-77.)

b. *Rios v. Garcia* (Ninth Cir. 2004) 390 F.3d 1082, the Ninth Circuit Court of Appeal held that the habeas petitioner's sentence of 25 years to life in prison for petty theft of two watches worth less than $80, based on his Three Strikes sentence, was not grossly disproportionate to his crime in light of his criminal history. (See *Ewing v. California* (2003) 538 U.S. 11.) This Court of Appeal distinguished *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, which held a 25 to life sentence for a theft of a VCR was grossly disproportionate to the crime, as the defendant surrendered without the use of violence, and the priors were two non-violent robberies. Here, petitioner struggled with the arresting security guard, and tried to avoid apprehension.

c. *Reyes v. Brown* (9th Cir. 2005) 399 F.3d 964, the Ninth Circuit held that the lower court erred in denying a habeas petition based on a violation of the

prohibition against cruel and unusual punishment, in this Three Strikes case, where the record did not reflect whether petitioner's most recent strike offense was a crime against persons or involved violence, and a remand for further development of record was required. It is clear that the Eighth Amendment will only apply to Three Strike cases in "exceedingly rare" cases. (See *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, 763 [appellant's conduct did not give rise to grave harm to society].)

d. *Taylor v. Lewis* (9th Cir. 2006) 460 F.3d 1093, the Ninth Circuit Court of Appeal held that where the defendant's history of recidivism marked was by violence over a 30 year period, the lower court did not err, within the meaning of *Ewing v. California* (2003) 538 U.S. 11, and *Rummel v. Estelle* (1980) 445 U.S. 263, that a three-strikes sentence of 25 years to life for possessing 0.036 grams of cocaine did not violate the Eighth Amendment prohibition of cruel and unusual punishment.

e. *Gonzalez v. Duncan* (9th Cir. 2008) 551 F.3d 875, the Ninth Circuit Court of Appeal held that where the defendant was convicted of failing to update his annual sex offender registration (see § 290, subd. (a)(1)(D), and, as a result of his priors, was sentenced to 28 years to life under the Three Strikes law, his sentence was grossly disproportionate to his offense, given the fact that the offense was a passive, harmless, and a technical violation where jury found that he had not moved, law enforcement was aware of his address, and he had registered at same address three previous times. The defendant's failure to register could not have interfered with law enforcement's ability to conduct surveillance and so the purpose of the registration requirement was not undermined by his technical offense; the offense resulted in no social harm and little or no moral culpability attached; and absent some connection between his prior offenses, the regulatory violation, and a propensity to recidivate, California's interest in deterring and incapacitating recidivist offenders did not justify severity of sentence imposed.

f. *Crosby v. Schwartz* (9th Cir. 2012) __ F.3d __, reported on May 7, 2012, in 2012 Los Angeles Daily Journal 5853, the Ninth Circuit Court of Appeal held that the defendant's sentence of 26-years-to-life imprisonment did not violate the Eighth Amendment ban on cruel and unusual punishment (see *Solem v. Helm* (1983) 463 U.S. 277, 288), where the defendant was convicted of both failing to annually update his sex offender registration five days after his birthday and failing to register within five days of a change of address, and had three prior felony convictions for rape, forced copulation and robbery. The court concluded that this situation was more closely in line

with *People v. Meeks* (2004) 123 Cal.App.4th 695 [life sentence for failure to register not unconstitutional], than the defendant's history and age of his priors in *People v. Carmony* (*Carmony II*) (2005) 127 Cal.App.4th 1066 [failure to register was found unconstitutional].

4. A NONJURY JUVENILE PRIOR CAN BE USED TO ENHANCE SENTENCE

a. *Boyd v. Newland* (9th Cir. 2004) 393 F.3d. 1008, amended in 2006 Los Angeles Daily Journal 14250, October 30, 2006, the Ninth Circuit Court of Appeal held that the Court of Appeal's ruling that the use of a prior juvenile adjudication to enhance sentence does not violate the defendant's right to a trial by jury as it was not contrary to clearly established U.S. Supreme Court precedent in *Apprendi*. The Court of Appeal also noted that *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1194, was not incorrectly decided; but apparently it was just not followed here, as it was not in *People v. Bowden* (2002) 102 Cal.App.4th 387.

5. THE REMEDY FOR INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO ADVISE THE DEFENDANT ABOUT A POTENTIAL THREE STRIKES CONSEQUENCE IS TO PUT THE PARTIES BACK TO THEIR POSITION PRIOR TO THE ERROR

a. *Riggs v. Fairman* (9th Cir. 2005) **REHEARING GRANTED IN BANK** (see 430 F.3d 1222); formerly at: 399 F.3d 1179, the Ninth Circuit Court of Appeal held that where federal habeas petitioner was denied effective assistance of counsel during the plea bargaining stage of his state criminal prosecution by his attorney's failure to inform him that the Three Strikes Law might apply to his case, the court acted within its discretion in vacating the conviction and sentence, thereby ordering the parties to return tot he pre-error negotiating stage. (See *United States v. Gordon* (2nd Cir. 1998) 156 F.3d 376, 381-382.) However, the Court of Appeal refused to order the government to put back on the table its original plea offer.

6. WHERE THE PLEA AGREEMENT, PRIOR TO THE ENACTMENT OF THE THREE-STRIKES STATUTES, STATED THAT THE PRIORS WOULD ONLY BE COUNTED AS ONE CONVICTION, MUST BE UPHELD

a. *David v. Woodford* (9th Cir. 2006) 446 F.3d 967, the Ninth Circuit Court of Appeal held that the prosecutor's agreement, in 1986, to treat the

defendant's guilty plea to eight counts of robbery as "one prior . . . for all purposes" precluded trial court's ruling in a subsequent case that the convictions constituted eight "strikes" under the Three Strikes Law, enacted in 1994; the denial of state habeas corpus petition was based on an unreasonable determination of the facts in light of the evidence presented in state court and a violation of *Santobello v. New York* (1971) 404 U.S. 257, 262 [30 L.Ed.2d 427, 92 S.Ct. 495] which holds that a prosecutor's promise is binding on the courts if it formed part of the inducement for the defendant to plead guilty.

7. NO ERROR OR INEFFECTIVE ASSISTANCE IN FAILING TO RECOMMEND THE DEFENDANT PLEAD TO A NON-THREE STRIKE SENTENCE WHEN THE BELIEF THAT THE DEFENDANT WAS NOT A THREE STRIKER WAS ERRONEOUS

a. *Perez v. Rosario* (9th Cir. 2006) 449 F.3d 954, the Ninth Circuit Court of Appeal held that where the prosecutor offered a plea bargain based on the mistaken belief that one of the defendant's prior convictions was not a strike, and the court held the same mistaken belief, and defendant followed counsel's advice that the offered prison term was excessive for a non-three-strikes case, the defendant's assertion that he would have accepted offer had he been told that the prior offense was a strike was insufficient to establish that the defendant was prejudiced by counsel's advice not to accept the offer, which would likely have been withdrawn once the prosecutor realized that the three strikes law applied.

8. PLEADING TO A GUILTY TO AN OFFENSE AFTER ERRONEOUSLY BEING TOLD A PRIOR WOULD NOT BE A STRIKE ALLOWS THE DEFENDANT TO RAISE THE ISSUE ON HABEAS CORPUS REVIEW OF HIS SUBSEQUENT CONVICTION

a. *Dubrin v. California* (2013) __ F.3d __, reported on June 21, 2013, in 2013 Los Angeles Daily Journal 7961, the Ninth Circuit Court of Appeal held that where the defendant pled guilty to a crime after being erroneously told that the offense was not a "strike" under California law and was erroneously denied habeas corpus review by the California courts on the ground that he was not "in custody," the defendant was entitled to raise the issue of the validity of the earlier strike on habeas corpus review of his subsequent conviction and the three-strikes sentence, even though he had completely served his sentence for that earlier conviction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

United States Code sections:

CALIFORNIA CASES

FEDERAL CONSTITUTION

CALIFORNIA STATUTES

Code of Civil Procedures:

Evidence Code Sections:

Government Code Sections:

Health & Safety Code Sections:

Penal Code Section:

Vehicle Code Section:

Welfare and Institutions Code Section:

CALIFORNIA RULES OF COURT

Rules: