THE AMENDMENT OF THE THREE STRIKES SENTENCING LAW

J. RICHARD COUZENS
Judge of the Superior Court
County of Placer (Ret.)

TRICIA A. BIGELOW
Presiding Justice, Court of Appeal, 2nd
Appellate District, Div. 8 (Ret.)

April 2023

Rev. 4/23

TABLE OF CONTENTS

I. INTRODUCTION 4

II. AMENDMENT OF PROVISIONS GOVERNING THIRD STRIKE SENTENCES 5

A. Effective Date and Application of the New Sentencing Provisions 5

1. Effective date, generally 5

B. Sentencing a Multiple Strike Offender as a Second Strike Offender 8

1. Sentencing of mixed counts 9

C. Defendants Excluded From the New Sentencing Provisions 10

1. Defendants excluded because of current felony 10

2. Defendants excluded because of a prior crime 21

3. No exclusion for dangerousness 31

4. Second strike offenders 31

III. AMENDMENT OF OTHER SENTENCING PROVISIONS 32

A. Amendment of Sections 1170.12(a)(7) and (8) Regarding Consecutive Sentencing 32

1. Amendment to section 1170.12(a)(7) 32

2. Deletion of section 1170.12(a)(8) 35

3. Interpretation of conflicting code sections 35

4. Statutes otherwise mandating consecutive sentencing 37

5. Summary of rules regarding consecutive sentencing 38

B. Other Amendments 40

1. Dismissal of strikes by the court 40

2. Date of interpretation 40

IV. PETITION FOR RESENTENCING 42

A. The Petition 42

B. Initial Screening of the Petition 44

1. Service of a life term 44

2. Excluded felonies 45

3. Excluded inmates 63

C. The Qualification Hearing 78

1. The hearing officer 79

2. The setting of the hearing; notice; presence of petitioner 80
3. Qualification hearing: confirmation of eligibility 81
4. Qualification hearing: determination of unreasonable risk to public safety 85
5. The effect of Proposition 47 97
6. Amendment of the pleadings and retrial of the petitioner 100
D. Order of the Court on Resentencing 101
1. If resentencing is granted 101
2. If resentencing is denied 108
E. The Right to Counsel 108
1. Preparation of the petition and initial screening 109
2. The qualification hearing 109
3. The resentencing 109
F. Successive Petitions 110
G. Constitutional Challenge to Disqualifying Prior Conviction 111
H. Appellate Review 111

APPENDIX A: FULL TEXT OF PROPOSITION 36 114

APPENDIX B: RESOURCES AVAILABLE FROM CDCR 129

APPENDIX C: CDCR TABLE OF DEFENDANTS POTENTIALLY ELIGIBLE FOR RECONSIDERATION OF SENTENCE 131

APPENDIX D: PROPOSED PETITION FOR RESENTENCING 133

APPENDIX E: PROPOSED ORDER DENYING PETITION FOR RESENTENCING AFTER INITIAL SCREENING 135

APPENDIX F: PROPOSED WAIVER OF PERSONAL APPEARANCE BY PETITIONER 137

APPENDIX G: PROPOSED ORDER RE HEARING ON REQUEST FOR RESENTENCING 139

APPENDIX H: TABLE OF CRIMES THAT WILL QUALIFY FOR THIRD STRIKE SENTENCING 140

Copyright © 2023 Barrister Press
Permission is granted to copy and distribute these materials to the judges and staff of the California judiciary

I. INTRODUCTION

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

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

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

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

II. AMENDMENT OF PROVISIONS GOVERNING THIRD STRIKE SENTENCES

A. Effective Date and Application of the New Sentencing Provisions

1. Effective date, generally

Section 10 of Proposition 36 specifies its provisions become effective on the first day after enactment by the voters. Accordingly, the initiative became fully effective on November 7, 2012. Clearly the new law will apply to all crimes committed on or after that date. The issue is the extent to which it applies to crimes committed prior to the effective date. Whether Proposition 36 will be retroactive as to cases not final will depend on the application of the seminal case of *In re Estrada* (1965) 63 Cal.2d 740. Several appellate cases addressed this issue, with differing results. The split of authority was resolved by the Supreme Court in *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*), which concludes there is no retroactive application of Proposition 36 such that a defendant whose case was not final as of November 7, 2012, is entitled to automatic resentencing.

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

Application of *Estrada*, as explained in *Conley*, depends of the intent of the enactors. "In *Estrada,* we considered the retroactive application of a statutory amendment that reduced the punishment prescribed for the offense of escape without force or violence. 'The problem,' we explained, 'is one of trying to ascertain the legislative intent—did the Legislature intend the old or new statute to apply? Had the Legislature expressly stated which statute should apply, its determination, either way, would have been legal and constitutional.' (*Estrada, supra,* 63 Cal.2d at p. 744, .) But in the absence of any textual indication of the Legislature's intent, we inferred that the Legislature must have intended for the new penalties, rather than the old, to apply. (*Id.* at pp. 744–745.) We reasoned that when the Legislature determines that a lesser punishment suffices for a

criminal act, there is ordinarily no reason to continue imposing the more severe penalty, beyond simply ' "satisfy[ing] a desire for vengeance." ' (*Id.* at p. 745, quoting *People v. Oliver* (1956) 1 N.Y.2d 152, 160, 151 N.Y.S.2d 367, 134 N.E.2d 197.) Thus, we concluded, '[i]t is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply,' including 'to acts committed before its passage[,] provided the judgment convicting the defendant of the act is not final.' (*Estrada, supra,* 63 Cal.2d at p. 745.)" (*Conley*, 63 Cal.4th at p. 656.)

In determining the voters had no intent to apply the new law retroactively, the court observed: "Here, a . . . set of interpretive considerations persuades us that the voters who passed the Reform Act did not intend to authorize automatic resentencing for third strike defendants serving nonfinal sentences imposed under the former version of the Three Strikes law. First, unlike the statute at issue in *Estrada, supra,* 63 Cal.2d 740, the Reform Act is not silent on the question of retroactivity. Rather, the Act expressly addresses the question in section 1170.126, the sole purpose of which is to extend the benefits of the Act retroactively. Section 1170.126 creates a special mechanism that entitles all persons 'presently serving' indeterminate life terms imposed under the prior law to seek resentencing under the new law. By its terms, the provision draws no distinction between persons serving final sentences and those serving nonfinal sentences, entitling both categories of prisoners to petition courts for recall of sentence under the Act. [¶] The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not. (See *Estrada, supra,* 63 Cal.2d at p. 745.) In enacting the recall provision, the voters adopted a different approach. They took the extraordinary step of extending the retroactive benefits of the Act beyond the bounds contemplated by *Estrada*—including even prisoners serving *final* sentences within the Act's ameliorative reach—but subject to a special procedural mechanism for the recall of sentences already imposed. In prescribing the scope and manner of the Act's retroactive application, the voters did not distinguish between final and nonfinal sentences, as *Estrada* would presume, but instead drew the relevant line between prisoners 'presently serving' indeterminate life terms—whether final or not—and defendants yet to be sentenced. [¶] Second, the nature of the recall mechanism and the substantive limitations it contains call into question the central premise underlying the *Estrada* presumption: that when an amendment lessens the punishment for a crime, it is reasonable to infer that the enacting legislative body has categorically determined that 'imposition of a lesser punishment' will in all cases 'sufficiently serve the public interest.' (*Pedro T., supra,* 8 Cal.4th at p. 1045.) [¶] There can be no doubt that the Reform Act was motivated in large measure by a determination that

sentences under the prior version of the Three Strikes law were excessive. As the ballot materials argued, '[p]eople convicted of shoplifting a pair of socks, stealing bread or baby formula don't deserve life sentences.' (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), rebuttal to argument against Prop. 36, p. 53.) But voters were motivated by other purposes as well, including the protection of public safety. The ballot materials explained that 'dangerous criminals are being released early from prison because jails are overcrowded with nonviolent offenders who pose no risk to the public.' (*Ibid.*) Voters were told that the Reform Act would protect public safety by 'prevent[ing] dangerous criminals from being released early' (*ibid.*) and would have no effect on 'truly dangerous criminals' (*id.,* argument in favor of Prop. 36, p. 52). [¶] The recall procedures in Penal Code section 1170.126 were designed to strike a balance between these objectives of mitigating punishment and protecting public safety by creating a resentencing mechanism for persons serving indeterminate life terms under the former Three Strikes law, but making resentencing subject to the trial court's evaluation of whether, based on their criminal history, their record of incarceration, and other relevant considerations, their early release would pose an 'unreasonable risk of danger to public safety.' (*Id.,* subd. (f).) [¶] Where, as here, the enacting body creates a special mechanism for application of the new lesser punishment to persons who have previously been sentenced, and where the body expressly makes retroactive application of the lesser punishment contingent on a court's evaluation of the defendant's dangerousness, we can no longer say with confidence, as we did in *Estrada,* that the enacting body lacked any discernible reason to limit application of the law with respect to cases pending on direct review. On the contrary, to confer an automatic entitlement to resentencing under these circumstances would undermine the apparent intent of the electorate that approved section 1170.126: to create broad access to resentencing for prisoners previously sentenced to indeterminate life terms, but subject to judicial evaluation of the impact of resentencing on public safety, based on the prisoner's criminal history, record of incarceration, and other factors. This public safety requirement must be applied realistically, with careful consideration of the Reform Act's purposes of mitigating excessive punishment and reducing prison overcrowding. But given that section 1170.126, by its terms, applies to all prisoners 'presently serving' indeterminate life terms, we can discern no basis to conclude that the electorate would have intended for courts to bypass the public safety inquiry altogether in the case of defendants serving sentences that are not yet final. [¶] Finally, unlike in *Estrada,* the revised sentencing provisions at issue in this case do more than merely reduce previously prescribed criminal penalties. They also establish a new set of disqualifying factors that preclude a third strike defendant from receiving a second strike sentence. (See Pen.Code, § 1170.12, subd. (c)(2)(C).) The sentencing provisions further require that these factors be 'plead[ed] and prove[d]' by the prosecution. (*Ibid.*) These provisions add an additional layer of complexity to defendant's request for automatic resentencing under the revised

penalty scheme." (*Conley*, *supra*, 63 Cal.4th at pp. 657-659.) Generally in accord with *Conley* are the Proposition 36 cases of *People v. Yearwood* (2013) 213 Cal.App.4th 161, and *People v. Smith* (2015) 234 Cal.App.4th 1460. All three cases concerned a defendant sentenced prior to the effective date of the proposition.

The practical application of *Conley* will result in the following distinctions:

- If the defendant is sentenced prior to the November 7,. 2012 effective date of Proposition 36, he must petition for relief under section 1170.126, even though the case is not final as of the effective date. Such a defendant will be entitled to resentencing "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126 subd. (f).)
- If the defendant commits a crime prior to the effective date, but is sentenced after November 7, 2012, the new law will apply.
- If the defendant commits a crime after the effective date, the new law will apply.

2. Effective date, mandatory consecutive sentencing

As will be discussed in Section III(A), *infra*, Proposition 36 changes the ability of the court to sentence concurrently. Likely these changes will only be effective as to crimes committed on or after November 7, 2012. To impose the statutory change on crimes committed prior to the effective date would violate the *ex post facto* clause.

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

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

The change was made to eliminate the ability of the court, with certain exceptions, to send persons to prison for 25 years to life when the new felony is not serious or violent. In the ballot argument in favor of Proposition 36, the

sponsors stated: “Precious financial and law enforcement resources should not be improperly diverted to impose life sentences for some non-violent offenses. [¶] Prop. 36 will help stop clogging overcrowded prisons with non-violent offenders, so we have room to keep violent felons off the streets.”

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

1. Sentencing of mixed counts

The initiative is not entirely clear regarding the sentencing of non-serious and non-violent new felonies when the defendant is also convicted in the current proceeding of a serious or violent felony. Nothing in the express terms of Proposition 36 limits the application of the new law in this manner. The issue was addressed in a number of appellate cases, with differing results. *People v. Johnson* (2015) 61 Cal.4th 674, resolves the issue, at least in the context of a motion for resentencing under section 1170.126. *Johnson* holds that a defendant, who has one or more serious or violent convictions in a case, is not excluded from the benefits of Proposition 36 on the counts that are not serious or violent. “In sum, section 1170.126 is ambiguous as to whether a current offense that is serious or violent disqualifies an inmate from resentencing with respect to another count that is neither serious nor violent. Considering section 1170.126 in the context of the history of sentencing under the Three Strikes law and Proposition 36's amendments to the sentencing provisions, and construing it in accordance with the legislative history, we conclude that resentencing is allowed with respect to a count that is neither serious nor violent, despite the presence of another count that is serious or violent. Because an inmate who is serving an indeterminate life term for a felony that is serious or violent will not be released on parole until the Board of Parole Hearings concludes he or she is not a threat to the public safety, resentencing with respect to another offense that is neither serious nor violent does not benefit an inmate who remains dangerous. Reducing the inmate's base term by reducing the sentence imposed for an offense that is neither serious nor violent will result only in earlier consideration for parole. If the Board of Parole Hearings determines that the inmate is not a threat to the public safety, the reduction in the base term and the resultant earlier parole date will make room for dangerous felons and save funds that would otherwise be spent incarcerating an inmate who has served a sentence that fits the crime and who is no longer dangerous.” (*Johnson*, at pp. 694-695.) Nothing in *Johnson* suggests its analysis would not be equally

applicable to an original sentencing proceeding for crimes committed after the effective date of Proposition 36.

Applying *Johnson*, *People v. Lynn* (2015) 242 Cal.App.4th 594, held defendant was eligible for resentencing of a third-strike conviction of grand theft person, even though he had been convicted of robbery in the same proceeding.

In accord with *Johnson* is *People v. Nettles* (2015) 240 Cal.App.4th 402, which rejected defendant's contention that the disqualifying conviction must be a strike as of the date of the underlying conviction.

C. Defendants Excluded From the New Sentencing Provisions

Even though the new felony is not a serious or violent felony, certain defendants are excluded from the new provisions and will be sentenced to at least 25 years to life as a traditional third strike offender. There are four exclusions, three of which relate to the current felony, and one of which relates to the defendant's past crimes. The prosecution *must pled and prove* the disqualifying factor. (§ 667, subd. (e)(2)(C).) The burden of proof for an exclusion from the benefits of Proposition 36 is on the People and must be proved beyond a reasonable doubt. (*People v. Frierson* (2017) 4 Cal.5th 225, 234.)

1. Defendants excluded because of current felony

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

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

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

As noted above, section 667, subdivision (e)(2)(C)(ii) excludes persons required to register under section 290, subdivision (c), except for specified sex crimes. In this regard it is important to observe the precise words of the exclusion: the statute will exclude a defendant from second strike sentencing if he is convicted of "any felony offense that results in *mandatory registration* as a sex offender pursuant to [section 290, subdivision (c). . . ." (italics added.) Section 290, subdivision (c) specifies all of the listed crimes mandate registration.

People v. Hofsheier (2006) 37 Cal.4th 1185, held registration for a conviction of section 288a, subdivision (b)(1), oral copulation of a person under 18, was not mandatory, but rather discretionary under section 290.006. The decision was based on a denial of equal protection – that there was no rational basis for requiring registration for consensual sexual offenses, such as section 288a, subdivision (b)(1), but not for unlawful sexual intercourse. Cases following *Hofsheier* extended its holding to a number of other sexual offenses where the activity was essentially consensual between the persons involved. The Supreme Court has overruled *Hofsheier* in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, finding there is indeed a rational basis for not mandating registration for unlawful sexual intercourse, but requiring it in other non-forcible sexual offenses. The court disapproved the following cases to the extent they were inconsistent with *Johnson*: *People v. Garcia* (2008) 161 Cal.App.4th 475; *People v. Hernandez* (2008) 166 Cal.App.4th 641*; In re J.P.* (2009) 170 Cal.App.4th 1292; *People v. Ranscht* (2009) 173 Cal.App.4th 1369; *People v. Luansing* (2009) 176 Cal.App.4th 676; *People v. Thompson* (2009) 177 Cal.App.4th 1424; and *People v. Ruffin* (2011) 200 Cal.App.4th 669. (*Johnson*, 60 Cal.4th at p. 888.)

The court made the holding in *Johnson* fully retroactive. (*Johnson*, 60 Cal.4th at pp. 888-889.) While the full implications of retroactivity may not be entirely clear, it is likely the decision will apply to previous cases where the court did not order registration or granted a request to end the registration requirement based on *Hofsheier* or its progeny. Since the exclusion in Proposition 36 is based on a *conviction* of an offense requiring registration, whether or not the offender was *actually* registered is immaterial. A person previously convicted of *any* offense listed in section 290, subdivision (c) will be excluded from any of the benefits of Proposition 47.

The exclusion likely will not apply when registration is required as a matter of the court's discretion under section 290.006. Discretionary registration is not a circumstance listed in section 290, subdivision (c).

It is sufficient that the prosecution plead simply that the current crime requires registration under section 290. It is not necessary that section 1170.12,

subdivision (c)(2)(C), be specifically pled. (*People v. Torres* (2018) 23 Cal.App.5th 185, 194-195.)

(c) The **current felony** was committed where the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person. The amendment does not require that great bodily injury actually be inflicted. Proposition 36 does not expressly require the defendant to personally use a firearm or personally be armed with a firearm or deadly weapon to be disqualified. Nothing in the statutes requires these factual circumstances be charged in relationship to a specific enhancement. In other words, it does not appear necessary that a factor such as use of a firearm be charged in connection with section 12022.5. Indeed, there is no enhancement or separate penalty when the defendant commits a crime where he "intended to cause great bodily injury to another person." The only requirement is that these factual allegations be pled and proved.

Firearms

People v. Caraballo (2016) 246 Cal.App.4th 936, in the context of an application for resentencing under section 1170.126, holds that vicarious arming is sufficient to exclude a defendant from the resentencing provisions. In *Caraballo,* the defendant and a coparticipant were involved in the commission of a burglary. During the attempt by police to arrest the defendants, the coparticipant discarded a gun. The defendant was convicted of the arming enhancement under section 12022, subdivision (a) because of the possession of the gun by the coparticipant. The appellate court found the exclusion of persons who vicariously possessed a firearm during the commission of a crime is consistent with the intent of Proposition 36 to assure longer prison terms for persons who commit serious and violent offenses. Although *Caraballo* discussed arming as an exclusion from resentencing, there is nothing to suggest it would not also apply to original sentencing proceedings.

Section 12022, subdivision (a) enhances the punishment for a crime if the defendant is armed with a firearm, "unless the arming is an element of that offense." No such limitation is specified by sections 667, subdivision (e)(2)(C)(iii) or 1170.12, subdivision (c)(2)(C)(iii). Presumably it is the intent of the enactors to impose traditional third strike sentencing whenever a firearm is used or possessed in the commission of a crime, whether or not the use or arming is an element of the crime. Accordingly, 25-year-to-life sentences may be imposed on such crimes as felon in possession of a firearm (§ 29800, subd. (a)(1)), or carrying a loaded or concealed firearm in a vehicle or in public (§§ 25400, subd. (c)(1) – (6); 25850, subd. (c)((1) – (6)).

Felon in possession of a firearm

Section 29800 prohibits a felon from possessing a firearm. Whether the conviction will disqualify the inmate from the resentencing provisions of section 1170.126 will depend on whether the "possession" of the firearm was under circumstances that will constitute "arming." In *People v. White* (2014) 223 Cal.App.4th 512, the inmate was convicted of possession of a firearm by a felon. Based on a review of the probation report and the transcripts of the preliminary hearing and trial in connection with the conviction, the appellate court determined the inmate was observed by police walking toward his vehicle, carrying a rolled-up pair of sweatpants. As the officers approached, the inmate began to run, reached into the rolled-up sweatpants, then tossed the pants and an item concealed inside into the back of his truck. The concealed item was a loaded firearm. The trial court found the inmate was disqualified from resentencing under section 1170.126 because he was "armed" within the meaning of the statutory exclusion. The appellate court agreed.

White was careful to observe the distinction between arming and possession. "The California Supreme Court has explained that '"[i]t is the availability–the ready access–of the weapon that constitutes arming."' (*People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*), quoting *People v. Mendival* (1992) 2 Cal.App.4th 562, 574.) ¶ 'The statutory elements of a violation of section 12021[(a)(1)] . . . are that a person, who has previously been convicted of a felony, had in his or her *possession* or under his or her *custody or control* any firearm.' (*People v. Padilla* (2002) 98 Cal.App.4th 127, 138, italics added.) [¶] Although the crime of possession of a firearm by a felon may involve the act of personally carrying or being in actual *physical* possession of a firearm, as occurred here, such an act is not an essential element of a violation of section 12021(a) because a conviction of this offense also may be based on a defendant's *constructive* possession of a firearm. (See *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417; *People v. Mejia* (1999) 72 Cal.App.4th 1269, 1272 [defendant need not physically have the weapon on his person; constructive possession of a firearm 'is established by showing a knowing exercise of dominion and control' over it].) 'To establish constructive possession, the prosecution must prove a defendant knowingly exercised a right to control the prohibited item, either directly or through another person.' (*People v. Sifuentes*, supra, 195 Cal.App.4th at p. 1417.) [¶] Thus, while the act of being armed with a firearm–that is, having ready access to a firearm (*Bland*, *supra*, 10 Cal.4th at p. 997) – necessarily requires possession of the firearm, possession of a firearm does not necessarily require that the possessor be armed with it. For example, a convicted felon may be found to be a felon in possession of a firearm if he or she knowingly kept a firearm in a locked offsite storage unit even though he or she had no ready access to the firearm and, thus, was not armed with it." (*White, supra,* 223 Cal.App.4th at p. 524; italics in original.)

White further held that because the appeal was from the denial of a petition for resentencing under section 1170.126, there was no duty for the prosecution to specifically "plead and prove" the disqualifier. The court observed, however, that there was a "plead and prove" requirement in the *prospective* portions of Proposition 36. "Section 667(e)(2)(C) provides in pertinent part that, '[i]f a defendant has two or more prior serious and/or violent felony convictions . . . and the current offense is not a serious or violent felony . . . , *the defendant shall be sentenced*' (italics added) as a second strike offender 'unless the prosecution *pleads and proves*' (italics added) any of the four enumerated exceptions or exclusions set forth in clauses (i) through (iv) of section 667(e)(2)(C). (See [*People v. Kaulick* (2013) 215 Cal.App.4th 1279] at p. 1293.) [¶] Section 1170.12(c)(2)(C) similarly provides that, '[i]f a defendant has two or more prior serious and/or violent felony convictions . . . and the current offense is not a [serious or violent] felony . . . , *the defendant shall be sentenced*' (italics added) as a second strike offender 'unless the prosecution *pleads and proves*' (italics added) any of the four enumerated exceptions or exclusions set forth in clauses (i) through (iv) of section 1170.12(c)(2)(C). (See *Kaulick*, *supra*, 215 Cal.App.4th at p. 1293.)" (*White*, *supra*, 223 Cal.App.4th at p. 526, italics in original.)

Substantially in accord with *White* are *People v. Osuna* (2014) 225 Cal.App.4th 1020, and *People v. Brimmer* (2014) 230 Cal.App.4th 782. "The lead case construing the language of 'armed with a firearm' and addressing the definition of arming for purposes of former section 12022 is *Bland, supra,* 10 Cal.4th 991, 43 Cal.Rptr.2d 77, 898 P.2d 391. In *Bland,* our Supreme Court, contrasting *arming* with *use* of a firearm, explained that former section 12022, which imposed an additional prison term for anyone "armed with a firearm in the commission" of a felony, applied where "the defendant has the specified weapon available for use, either offensively or defensively." (*Id.* at p. 997.) The court explained: '[T]he statutory language "in the commission of a felony" mean[s] any time during and in furtherance of the felony. Therefore ... [a] sentence enhancement for being "armed" with an assault weapon applies whenever during the commission of the underlying felony the defendant had an assault weapon available for use in the furtherance of that felony. [Citation.]' (*Id.* at p. 1001, italics omitted.) '[B]y specifying that the added penalty applies only if the defendant is armed with a firearm 'in the commission' of the felony offense, section 12022 implicitly requires both that the 'arming' take place *during* the underlying crime and that it have some "*facilitative nexus*" to that offense.' (*Bland,* at p. 1002) [¶] The Supreme Court has subsequently reiterated *Bland* 's holding that the *arming* under section 12022 must have occurred both during the commission of the underlying crime and have a facilitative nexus to the crime. (*In re Tameka C.* (2000) 22 Cal.4th 190, 197.) And, most recently, in *People v. Pitto* (2008) 43 Cal.4th 228, in refusing to overrule *Bland,* the court agreed

with the defendant's contention that '*Bland* appears to have adopted a "facilitative nexus" test and embraced a "purpose and effect" standard.' (*Id.* at p. 239.) In other words, a defendant is armed if the gun has a facilitative nexus with the underlying offense (i.e., it *serves* some purpose in connection with it); however, this requires only that the defendant is aware during the commission of the offense of the nearby presence of a gun available for use offensively or defensively, the presence of which is not a matter of happenstance. This does not require any intent to use the gun for this purpose. (*Pitto, supra,* at pp. 239–240.)" (*Brimmer*, 230 Cal.App.4th at pp. 794-795; italics in original.)

The requirement of a "facilitative nexus" was further discussed in *Osuna*: "Defendant . . . contends . . . that for disqualification under the [Three Strikes] Act, there must be an underlying felony to which the firearm possession is 'tethered' or to which it has some ' " 'facilitative nexus.' " ' He concludes one cannot be armed with a firearm during the commission of possession of the same firearm. [¶] Defendant would be correct if we were concerned with imposition of an arming *enhancement*—an additional term of imprisonment added to the base term, for which a defendant cannot be punished until and unless convicted of a related substantive offense. (*People v. Dennis* (1998) 17 Cal.4th 468, 500, ; see *People v. Izaguirre* (2007) 42 Cal.4th 126, 134, .) In *Bland, supra,* 10 Cal.4th 991, , the California Supreme Court construed the enhancement contained in section 12022, which imposes an additional prison term for anyone "armed with a firearm in the commission of" a felony. The court concluded that "a defendant convicted of a possessory drug offense [is] subject to this 'arming' enhancement when the defendant possesses both drugs and a gun, and keeps them together, but is not present when the police seize them from the defendant's house[.]" (*Bland, supra,* at p. 995.) . . . [¶] Having a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon. Thus, a defendant convicted of violating section 12021 does not, regardless of the facts of the offense, risk imposition of additional punishment pursuant to section 12022, because there is no 'facilitative nexus' between the arming and the possession. However, unlike section 12022, which requires that a defendant be armed '*in* the commission of' a felony for additional punishment to be imposed (italics added), the Act disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm '[*d*]*uring* the commission of' the current offense (italics added). 'During' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' (Webster's 3d New Internat. Dict. (1986) p. 703.) In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. (*Bland, supra,* 10 Cal.4th at p. 1002 [' "in the commission" of' requires both that ' "arming" ' occur during underlying crime *and* that it have facilitative nexus to offense].)" (*Osuna*, 225 Cal.App.4th at pp. 1030-1032 ; italics in original; in accord with *Osuna* is *People v. Frutoz* (2017) 8 Cal.App.5th 171, 177-178.)

The element of possession of a firearm was further defined in *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312: "As cross-referenced in section 1170.126, subdivision (e)(2), a commitment offense is ineligible for recall of sentence if "[*d]uring* [*its*] *commission* ..., the defendant used a firearm, *was armed with a firearm* or deadly weapon, or intended to cause great bodily injury to another person." (§ 667, subd. (e)(2)(C)(iii), italics added.) The parties have not suggested that we should interpret "armed" any differently in this context than its interpretation for purposes of the firearm enhancement in section 12022: A defendant is armed if the gun has a facilitative nexus with the underlying offense (i.e., it *serves* some purpose in connection with it); however, this requires only that the defendant is aware during the commission of the offense of the nearby presence of a gun *available* for use offensively or defensively, the presence of which is not a matter of happenstance. This does not require any *intent* to use the gun for this purpose. (*People v. Pitto* (2008) 43 Cal.4th 228, 239–240,.)" (italics in original; footnote omitted.) "[A]lthough we will not hazard a definitive effort to parse the sheep from the goats (see *Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321, 328), not *every* commitment offense for unlawful possession of a gun *necessarily* involves being armed with the gun, if the gun is not otherwise available for immediate use in connection with its possession, e.g., where it is under a defendant's dominion and control in a location not readily accessible to him at the time of its discovery." (*Elder*, *supra*, 227 Cal.App.4th at p. 1313, italics in original.)

Defendant was properly found to be armed with a firearm as part of his conviction for being a felon in possession of a gun. Although the police did not see him in actual possession of a gun, defendant was shown to have placed the gun in a trash can readily accessible to him. (*People v. White* (2016) 243 Cal.App.4th 1354.)

The probation report is not part of the record of conviction. (*People v. Burns* (2015) 242 Cal.App.4th 1452, 1459.) The court erred in relying on the probation report in determining whether the defendant was armed during the commission of a crime.

In *People v. Piper* (2019) 25 Cal.App.5th 1007 (*Piper*), the defendant was charged with evading a pursuing peace officer with an arming enhancement. He was also charged with possession of ammunition by a felon, possession of a firearm by a felon and carrying a loaded firearm. He was found guilty of the evading and possession of ammunition, but the jury found the firearm enhancement "not true." The jury also acquitted the defendant of the firearm possession and carrying a loaded firearm charges. The trial court denied resentencing based on the arming; the appellate court reversed. "We agree that as a matter of law, a jury's not-true finding on an arming enhancement does not necessarily preclude

a trial court from making an eligibility determination under the Reform Act that a defendant was armed. In this case, however, the jury's acquittals constituted findings inconsistent with either a facilitative or temporal nexus between appellant and any firearm." (*Id*, at p. 1015.)

The difference between "arming" and "possession" was discussed in *People v. Byers* (2020) 53 Cal.App.5th 1106 (*Byers*). "Being armed with a firearm is to be distinguished from possessing one. Possessing a firearm can be either actual, as when it is in the defendant's immediate possession, or it can be constructive, as when it is under the defendant's dominion or control. [Citation.] In contrast, being armed with a firearm means having it 'available for use, either offensively or defensively.' [Citations.] Also, a finding that a felon was armed during his possession of a firearm requires 'a temporal nexus between the arming and the underlying felony.' [Citations.] Thus, a defendant is armed with a weapon even if it is not on his person if he knows it is in a place readily accessible to him. [Citation.]" (*Byers*, *supra*, 53 Cal.App.5th at p. 1110.) "[The court's] reasoning appears to equate constructive possession of a firearm with a finding he was armed with them. But the two are not synonymous. '[C]onstructive possession does not equate to "armed" possession without at least some indication of ready access in close temporal proximity to the discovery of the offense.' [Citation.] '[N]ot every commitment offense for unlawful possession of a gun *necessarily* involves being armed with the gun, if the gun is not otherwise available for immediate use in connection with its possession, e.g., where it is under a defendant's dominion and control in a location not readily accessible to him at the time of its discovery.' [Citation.] Equating constructive possession of a firearm with being armed renders meaningless the requirements of ready access and temporal nexus. [Citation.] Byers was miles away from the firearms when they were found and, moreover, there was no evidence connecting him to those firearms other than that they were in a house where he had been seen earlier in the day and where his car was parked and documents bearing his name were found. Therefore, there is insufficient evidence he was armed with a firearm during the offense of possessing the firearm." (*Byers*, *supra*, 53 Cal.App.5h at p. 1112.)

Automobile as a deadly weapon

"[A]n inmate is armed with a deadly weapon within the meaning of clause (iii) of subparagraph (C) of paragraph (2) of subdivision (e) of section 667 and clause (iii) of subparagraph (C) of paragraph (2) of subdivision (c) of section 1170.12 (hereafter referred to collectively as "clause (iii)") when he or she personally and intentionally uses a vehicle in a manner likely to produce great bodily injury." *People v. Perez* (2016) 3 Cal.App.5th 812, 815.) "Although a vehicle is not a deadly weapon per se, it can become one, depending on how it is used. (See, e.g., *People v. Oehmigen*, *supra*, 232 Cal.App.4th at pp. 5, 11, [the defendant

purposefully drove his car at police vehicle]; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1183, [the defendant deliberately raced vehicle through red light at busy intersection and collided with another vehicle, causing injury to another]; *People v. Golde* (2008) 163 Cal.App.4th 101, 109, [the defendant accelerated toward victim at about 15 miles per hour three or four times as victim ran back and forth to avoid vehicle]; *People v. Russell* (2005) 129 Cal.App.4th 776, 779, 781–782, [the defendant knowingly and intentionally pushed victim into path of oncoming vehicle]; *People v. Wright* (2002) 100 Cal.App.4th 703, 705, 707–709, [the defendant intentionally drove pickup truck close to persons with whom he had contentious relations].)" (*Perez*, at pp. 824-825; footnote omitted.)

Other weapons

People v. Valdez (2017) 10 Cal.App.5th 1338, 1348 (*Valdez*), determined an incarcerated defendant was in possession of a knife found in his prison cell while he was in the shower. There, defendant was convicted of possession of a prison-made knife with two prior strike convictions. The denial of his motion for resentencing was affirmed because the defendant was armed with a knife. Defendant challenged the finding because he was in the shower when the knife was actually found in his cell by prison authorities. The challenge was rejected. "Here the possessory crime is the possession of a sharp instrument in prison. Possessory offenses, such as drug possession or possession of a deadly weapon, are ' "continuing offense[s], one[s] that extend[ ] through time' and create criminal liability 'throughout the entire time the defendant asserts dominion and control.' (*Bland, supra*, 10 Cal.4th at p. 999.) Thus, even if it is true that the weapon was not in defendant's actual physical possession at the precise time it was discovered, this does not necessarily undermine a finding that he was armed with the deadly weapon at other relevant times so as to support the trial court's determination. The instant case, where the weapon is stored in an inmate's cell, is an example of continuing or ongoing possession. Indeed, the discovery of the weapon in defendant's cell presents a stronger case for a finding that he was armed than the circumstances in *Bland* because defendant, an administrative segregation prisoner, spent the vast majority of his time in the cell where the weapon was discovered, whereas it is not clear how much time the defendant in *Bland* spent in his bedroom where police discovered the assault rifle." (*People v. Valdez* (2017) 10 Cal.App.5th 1338, 1348.)

Intent to cause bodily harm

Sections 667, subdivision (e)(2)(C)(iii) or 1170.12, subdivision (c)(2)(C)(iii) also require traditional third strike sentencing if "[d]uring commission of the current offense, the defendant . . . intended to cause great bodily injury to another person." It is not clear whether the intent must be specific to the particular

conviction or whether it is simply the general objective of the criminal enterprise.

For purposes of exclusion from the new sentencing provisions, "serious bodily injury" is the same as "great bodily injury." (*People v. Johnson* (2016) 244 Cal.App.4th 384, 392.)

Consideration of facts not part of the actual conviction

In determining whether the defendant was convicted of a serious or violent felony, it is not clear whether the court may consider facts that are not part of the actual conviction. The existence of a strike offense for the purposes of an original sentencing, for example, is permissibly made by the court considering the facts from the "record of conviction," even though the facts were not reflected in the actual conviction. (*People v. Guerrero* (1988) 44 Cal.3d 343, 355.) The transcript of the trial is part of the record of conviction and may be used to prove the existence of a strike. (*People v. Bartow* (1996) 46 Cal.App.4th 1573.) The probation report is not part of the record of conviction. (*People v. Burns* (2015) 242 Cal.App.4th 1452.) In certain circumstances the transcript of a preliminary examination may be used to prove a strike. (*People v. Reed* (1996) 13 Cal.4th 217.) In denying probation or in imposing the aggravated term, a sentencing court may consider factors that are inconsistent with the verdict of the jury. (*People v. Towne* (2008) 44 Cal.4th 63, 83-89.) For example, a jury's finding that a weapon-use enhancement was not true did not prevent the judge from considering the use of a weapon for the purposes of imposing a consecutive sentence. (*People v. Lewis* (1991) 229 Cal.App.3d 259, 264-265.) It seems likely that if the entire record of conviction can be used in determining the existence of a strike for an original sentencing proceeding, the same record can be used in determining whether a person qualifies for second strike sentencing under Proposition 36.

Several cases have addressed this issue in the context of a petition for resentencing. In *People v. White* (2014) 223 Cal.App.4th 512, 524-526, the trial court was found to have properly used facts from the record of conviction to disqualify an inmate from resentencing under section 1170.126. However, the issue was more fully discussed in *People v. Manning* (2014) 226 Cal.App.4th 1133. Relying on *Guerrero, supra,* 44 Cal.3d at p. 355, *Reed*, *supra*, 13 Cal.4th at p. 217, *People v. Trujillo* (2006) 40 Cal.4th 165, and others, the *Manning* court held that in determining a petitioner's eligibility under section 1170.126, the trial court may consider facts not directly reflected in the conviction. "As *People v. Guerrero* (1988) 44 Cal.3d 343, and its progeny demonstrate, California courts have routinely determined that prior convictions constitute serious or violent felonies by looking to '*the substance of a prior conviction, i.e., the nature and circumstances of the underlying conduct.*' (*People v. Martinez* (2000) 22 Cal.4th

106, 117, italics added; see also *People v. Gomez* (1994) 24 Cal.App.4th 22, 31, [what matters is 'the conduct of the defendant, not the specific criminal conviction'].) (*Manning*, at p. 1141; italics in original; see also *People v. Brimmer* (2014) 230 Cal.App.4th 782, 800-801.)

A defendant may be disqualified from relief under section 1170.126 based on facts that formed the basis of an enhancement, even though the enhancement or the punishment for the enhancement was struck under section 1385. Such a sentencing decision does not change the underlying facts for the purposes of defendant's disqualification. (*People v. Quinones* (2014) 228 Cal.App.4th 1040.) It is likely *Quinones* will apply to original sentencing proceedings.

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

The statute is not clear as to whether the defendant is excluded from relief on *all* new felonies if he is excluded from relief as to *any* current crime. Nothing in sections 667, subdivision (e)(2) or 1170.12, subdivision (c)(2) expressly limits the application of the new law in this manner. *People v. Johnson* (2015) 61 Cal.4th 674, appears to resolve the issue, at least in the context of a motion for resentencing under section 1170.126. *Johnson* holds that a defendant, who has one or more serious or violent convictions in a case, is not excluded from the benefits of Proposition 36 on the counts that are not serious or violent. "In sum, section 1170.126 is ambiguous as to whether a current offense that is serious or violent disqualifies an inmate from resentencing with respect to another count that is neither serious nor violent. Considering section 1170.126 in the context of the history of sentencing under the Three Strikes law and Proposition 36's amendments to the sentencing provisions, and construing it in accordance with the legislative history, we conclude that resentencing is allowed with respect to a count that is neither serious nor violent, despite the presence of another count that is serious or violent. Because an inmate who is serving an indeterminate life term for a felony that is serious or violent will not be released on parole until the Board of Parole Hearings concludes he or she is not a threat to the public safety, resentencing with respect to another offense that is neither serious nor violent does not benefit an inmate who remains dangerous. Reducing the inmate's base term by reducing the sentence imposed for an offense that is neither serious nor violent will result only in earlier consideration for parole. If the Board of Parole Hearings determines that the inmate is not a threat to the public safety, the reduction in the base term and the resultant earlier parole date will make room for dangerous felons and save funds that would otherwise be spent incarcerating an inmate who has served a sentence that fits the crime and who is no longer dangerous." (*Johnson*, at pp. 694-695.) Nothing in *Johnson* suggests its analysis would not be equally applicable to an original sentencing proceeding for crimes committed after the effective date of Proposition 36.

In accord with Johnson is *People v. Nettles* (2015) 240 Cal.App.4th 402, which rejected defendant's contention that the disqualifying conviction must be a strike as of the date of the underlying conviction.

2. Defendants excluded because of a prior crime

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

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

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

Since *attempted* forcible oral copulation is not listed in Welfare and Institutions Code, section 6600, subdivision (b), conviction of that offense, in itself, will not bar defendant from relief under section 1170.126. (*People v. Jernigan* (2014) 227 Cal.App.4th 1198.) A review of the entire record of conviction, however, may disclose facts that will result in the exclusion of the defendant. (*Id*. at pp.1208-1209.) *Jernigan* likely will also have application to original sentencing proceedings under the Three Strikes law.

Assault with intent to commit rape will disqualify a person from the benefits of the Act only if the crime was committed with force or fear. Such a determination must be made with reference to the specific facts of the case, and is not an element of the charge. (*People v. Cook* (2017) 8Cal.App.5th 309 .)

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

another person who is under 14 years of age, and who is more than 10 years younger than the defendant.

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

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

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

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

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

(h) Any serious or violent offense punishable in California by life imprisonment or death.

Persons convicted of a crime with a base term punishment of life in prison will be excluded from the benefits of Proposition 36. There is an issue, however, whether a defendant who has been convicted of a base term that does not provide a life term, but which becomes a life term by virtue of an enhancement or alternative sentencing scheme, is considered to have been convicted of an offense punishable by life imprisonment. *People v. Hernandez* (2017) 10 Cal.App.5th 192, a Proposition 47 case, holds subdivision (h) will not apply if the life term is imposed as a result of a recidivist statute such as the Three Strikes law. In *Hernandez* the defendant was convicted of a robbery, but because of prior serious felony convictions, he received a 25-life sentence under the Three Strikes law. Nothing in *Hernandez* suggests it should not apply to Proposition 36.

Hernandez did not address the situation where the life term is imposed because of an enhancement. The answer to this issue is found in the interpretation of the phrase "serious or violent offense *punishable in California by life imprisonment*." (italics added.) *People v. Williams* (2014) 227 Cal.App.4th 733 (*Williams*), which sets forth a helpful analysis of three California Supreme Court cases, is instructive.

The *Williams* case

Williams concerned the application of the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). That section requires the addition of 10 years to any term imposed for a violent felony committed for the benefit of a street gang under section 186.22, subdivision (b)(1). Section 186.22, subdivision (b)(1) "states that '[e]xcept as provided in paragraphs 4 and 5,' the trial court shall impose the gang enhancement. Subdivision (b)(5) provides, in relevant part: '[A]ny person who violates this subdivision in the commission of a felony *punishable by imprisonment in the state prison for life* shall not be paroled until a minimum of 15 calendar years have been served.' (Italics added.) 'This provision establishes a 15–year minimum parole eligibility period, rather than a sentence enhancement for a particular term of years.' [Citation omitted.]" (*Williams*, *supra*, 227 Cal.App.4th at p. 740; italics in original.)

Williams found three Supreme Court cases relevant to the issue. "The first is *People v. Montes* (2003) 31 Cal.4th 350, 352, (*Montes*). In *Montes,* the defendant was convicted of attempted murder with findings that he committed the crime for the benefit of a street gang (§ 186.22, subd. (b)(1)) and that he had personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). The trial court sentenced him to the 7–year midterm for the attempted murder conviction plus a consecutive 10–year term for the gang enhancement, plus a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). (*Id*. at p. 353, .) [¶] The issue was whether 186.22, subdivision (b)(5)'s use of the phrase 'a felony punishable by imprisonment ... for life' applied to the defendant because his felony conviction *coupled with his firearm enhancement* resulted in a life sentence. (*Montes, supra,* 31 Cal.4th at p. 352, .) Based upon its analysis of legislative and voter intent, *Montes* concluded: '[S]ection 186.22(b)(5) applies only where the felony *by its own terms provides for a life sentence*.' (*Ibid.*; italics added.) *Montes* therefore found that the consecutive 10–year term for the gang enhancement had been correctly imposed because the defendant had not been convicted of 'a felony punishable by imprisonment ... for life.' (§ 186.22, subd. (b)(5).) (*Id*. at p. 353, .)" (*Williams*, *supra*, 227 Cal.App.4th at pp. 740-741; italics in original; footnote & parallel citations omitted.)

The second case "is *People v. Lopez* (2005) 34 Cal.4th 1002 (*Lopez*). In *Lopez,* the defendant was convicted of first degree murder (§ 187). The punishment for that crime is a term of 25 years to life. (§ 190, subd. (a).) The jury also found that the defendant had committed the murder for the benefit of a street gang (§ 186.22, subd. (b)). The trial court sentenced the defendant, among other things, to 25 years to life in state prison for murder with a consecutive 10–year term for the gang enhancement. (*Id*. at p. 1005,.) [¶] The Supreme Court granted review in *Lopez* to decide whether a defendant convicted of first degree murder with a

gang enhancement finding should be subject to a consecutive term of 10 years under section 186.22, subdivision (b)(1)(C) or, instead, the minimum parole eligibility term of 15 years set forth in section 186.22, subdivision (b)(5). [¶] The heart of the dispute was whether the phrase 'punishable by imprisonment ... for life' in section 186.22, subdivision (b)(5) meant 'all life terms (including terms of years to life)' as contended by defendant or, as urged by the Attorney General, meant "merely 'straight' life terms" so that the phrase did not include a sentence for first or second degree murder. (*Lopez, supra,* 34 Cal.4th at p. 1007.) *Lopez* concluded that the statutory language 'is plain and its meaning unmistakable': 'the Legislature intended section 186.22(b)(5) to encompass both a straight life term as well as a term expressed as years to life ... and therefore intended to exempt those crimes from the 10–year enhancement in subdivision (b)(1)(C). [Citation.]' (*Id*. at pp. 1006–1007, 22 Cal.Rptr.3d 869, 103 P.3d 270.) Consequently, *Lopez* directed deletion of the 10–year sentence for the gang enhancement. (*Id*. at p. 1011,.)" (*Williams*, *supra*, 227 Cal.App.4th at pp. 741-742; footnote and parallel citations omitted.)

The third case is "[*People v. Jones* (2009)] 47 Cal.4th 566 In *Jones,* the defendant was convicted of shooting at an inhabited dwelling, a crime punishable by a sentence of three, five or seven years. (§ 246.) The trial court selected the seven-year term but then imposed a life sentence pursuant to section 186.22, subdivision (b)(4) because the jury had found the defendant committed the crime to benefit a street gang. (*Id*. at p. 571.) In addition, the trial court imposed a consecutive 20–year sentence because the defendant had personally and intentionally discharged a firearm in committing the offense. (§ 12022.53, subd. (c).) (*Id*. at p. 569.) The sentence for that latter enhancement applies to the felonies listed in section 12022.53, subd. (a)(1–16) as well as to '[a]ny felony punishable by ... imprisonment ... for life.' (§ 12022.53, subd. (a)(17).) Shooting at an inhabited dwelling is not one of the listed felonies but the trial court determined that defendant had been convicted of a felony punishable by life imprisonment because of the application of section 186.22, subdivision (b)(4).

"Section 186.22, subdivision (b)(4) provides: 'Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment ... [¶] (B) ... a felony violation of Section 246.' [¶] On appeal, the issue was whether the trial court properly imposed the 20–year sentence enhancement (§ 12022.53) based upon its finding that the defendant had suffered a felony punishable by life. The defense contended that the phrase '[a]ny felony punishable by ... imprisonment ... for life' (§ 12022.53, subd. (a)(17)) should be *narrowly construed* as it was in *Montes* to be limited to a felony which 'by its own terms provides for a life sentence.' (*Montes, supra,* 31

Cal.4th at p. 352.) In particular, the defendant urged that his life term could not trigger application of section 12022.53, subdivision (c)'s additional 20–year prison term 'because his sentence of life imprisonment did not result from his conviction of a *felony* (shooting at an inhabited dwelling) but from the application of section 186.22(b)(4), which sets forth not a felony but a penalty.' (*Jones, supra,* 47 Cal.4th at p. 575.)" (*Williams*, at pp. 742-743; footnotes omitted; italics in original.)

Williams observed that *Jones* distinguished *Montes,* quoting *Jones*: "'Thus, this court in *Montes, supra,* 31 Cal.4th 350 , narrowly construed the statutory phrase "a felony punishable by imprisonment ... for life," which appears in subdivision (b)(5) of section 186.22, as applying only to crimes where the underlying felony provides for a term of life imprisonment. (*Id.* at p. 352 .) Defendant here argues that to be consistent with *Montes,* we should give the statutory phrase "felony punishable by ... imprisonment in the state prison for life," which appears in subdivision (a)(17) of section 12022.53, the same narrow construction, and that, so construed, it does not include a life sentence imposed under an alternate penalty provision. *We agree with defendant that these statutory phrases should be construed similarly*. But we disagree that, construed narrowly, a felony that under section 186.22(b)(4) is punishable by life imprisonment is not a "felony punishable by ... imprisonment in the state prison for life" within the meaning of subdivision (a)(17) of section 12022.53. [¶] 'Unlike the life sentence of the defendant in *Montes, supra,* 31 Cal.4th 350 , which was imposed as a *sentence enhancement* (a punishment added to the base term), here defendant's life sentence was imposed under section 186.22(b)(4), which sets forth the *penalty for the underlying felony* under specified conditions. The difference between the two is subtle but significant. "Unlike an enhancement, which provides for an *additional term* of imprisonment, [a penalty provision] sets forth an alternate penalty *for the underlying felony itself,* when the jury has determined that the defendant has satisfied the conditions specified in the statute." [Citation.] Here, defendant committed the felony of shooting at an inhabited dwelling (§ 246), he personally and intentionally discharged a firearm in the commission of that felony (§ 12022.53(c)), and because the felony was committed to benefit a criminal street gang, it was punishable by life imprisonment (§ 186.22(b)(4)). Thus, imposition of the 20–year sentence enhancement of section 12022.53(c) was proper.' (*Jones, supra,* 47 Cal.4th at pp. 577–578,, some italics added.)" (*Williams*, supra, 227 Cal.App.4th at p. 743; italics in original, footnote omitted.)

In concluding the trial court erred in imposing the 10-year gang enhancement, *Williams* observed: "In this case, defendant received sentences of 25 years to life. These sentences of 25 years to life constitute life sentences within the meaning of section 186.22, subdivision (b)(5). (*Lopez*, *supra*, 34 Cal.4th at p. 1007, .) These life sentences resulted from the application of the Three Strikes law. The Three Strikes law is a penalty provision, not an enhancement. It is not

an enhancement because it does not add an additional term of imprisonment to the base term. Instead, it provides for an alternate sentence (25 years to life) when it is proven that the defendant has suffered at least two prior serious felony convictions. (See, *e.g.*, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527, ['The Three Strikes law ... articulates an alternative sentencing scheme for the current offense rather than an enhancement.'].)" (*Williams*, *supra*, 227 Cal.App.4th at p. 744.)

Application of *Montes, Lopez, Jones* and *Williams* to Proposition 36

Application of *Montes*, *Lopez*, *Jones*, and *Williams* to the Proposition 36 exclusion under section 667, subdivision (e)(2)(C)(iv)(h) must be guided by the intent of the enactors in creating the restriction. It is clear the enactors specifically intended to exclude dangerous and violent offenders from any of the benefits of the initiative. "Prop. 36 will assure that violent repeat offenders are punished and not released early." (Argument in Favor of Proposition 36, Voter Information Guide, p. 52.) "The Three Strikes law will continue to punish dangerous career criminals who commit serious violent crimes – keeping them off the streets for 25 years to life." (*Id.*) "Prosecutors, judges and police officers support Prop. 36 because Prop. 36 helps ensure that prisons can keep dangerous criminals behind bars for life. Prop. 36 will keep dangerous criminals off the streets." (*Id*.) "Criminal justice experts and law enforcement leaders carefully crafted Prop. 36 so that truly dangerous criminals will receive no benefits whatsoever from the reform. Repeat criminals will get life in prison for serious or violent third strike crimes." (*Id*.) "Prop. 36 requires that murders, rapists, child molesters, and other dangerous criminal *serve their full sentences*." (Rebuttal to Argument Against Proposition 36, Voter Information Guide, p. 53; italics in original.) The initiative provides that "[t]his act is an exercise of the public power of the people of the State of California for the protection of the health, safety, and welfare of the people of the State of California, and shall be liberally construed to effectuate those purposes." (§ 7, Proposition 36.)

Taking into consideration the intent of the enactors that the provisions of Proposition 36 be liberally construed to exclude dangerous and violent offenders from any of its benefits, it seems consistent that courts should consider the effect of enhancements in determining whether a particular person is excluded as having suffered an offense punishable by a life sentence.

Although *Montes* holds enhancements may not be considered for the purposes of the sentencing exception under section 186.22, subdivision (b)(5) of the STEP act, the case is distinguishable from the issue presented by Proposition 36. *Montes* did not permit the use of life-term enhancements for the purpose of prohibiting the 10-year gang enhancement because to do so would conflict with the intent of the voters. Based on the language of the STEP act, the court

concluded there was an intent to exclude the gang enhancement only when the crime itself specified a life term. (*Montes*, *supra*, 31 Cal.4th at pp. 358-359.) As further evidence of the voter's intent, the Supreme Court in *Montes* observed that the exception under section 186.22, subdivision (b)(4) expressly included consideration of any enhancement, but under section 186.22, subdivision (b)(5) it did not – the omission was intentional and indicative of the intent of the voters not to consider enhancements for that purpose. (*Montes*, *supra*, 31 Cal.4th at pp. 360-361.) No such intent appears in the language of Proposition 47 – indeed, the initiative indicates exactly the opposite intent in its stated desire to deny its benefits to dangerous and violent offenders. Nothing in the initiative or in logic indicates that the enactors would want courts to exclude offenders who were convicted of crimes with stand-alone life terms, but not exclude offenders who got life terms because of an enhancement – these are all dangerous and violent persons.

***People v. Thomas* (1999) 21 Cal.4th 1122 (*Thomas*), is inapplicable**

Also distinguishable is a line of cases where courts have interpreted similar life-term language in the context of credit limitations under section 2933.1. That section limits conduct credits for persons sent to prison for *violent* offenses to 15 percent. Section 667.5, subdivision (c)(7), includes as a violent offense "[a]ny felony punishable by death or life imprisonment." In rejecting the argument that the limitation applies to all third strike offenders because of the Three Strikes law, *Thomas, supra,* 21 Cal.4th at p. 1130, held that "sections 2933.1 and 667.5(c)(7) limit a defendant's presentence conduct credit to a maximum of 15 percent only when the defendant's current conviction is itself punishable by life imprisonment, not when it is so punishable solely due to his status as a recidivist." In accord are *People v. Henson* (1997) 57 Cal.App.4th 1380, and *People v. Philpot* (2004) 122 Cal.App.4th 893, 907-908.

As observed in *Thomas*: "[S]ection 1192.7, subdivision (c)(7) (section 1192.7(c)(7)), includes as a ' "serious" ' felony, '[*a*]*ny felony punishable by death or imprisonment in the state prison for life*.' (Italics added.) As can be seen, this language parallels the language at issue in section 667.5(c)(7). If we were to interpret section 667.5(c)(7) to mean a third strike defendant falls within its purview because of his life sentence, not because of the underlying offense, a similar interpretation would necessarily obtain for section 1192.7(c)(7). 'Under the three strikes law, a trial court must sentence a defendant with two or more qualifying prior felony convictions or strikes to an indeterminate term of life imprisonment.' (*People v. Dotson* (1997) 16 Cal.4th 547, 552.) A third strike would by definition, therefore, always qualify as a serious or violent offense. [¶] The plain language of the three strikes law and our cases interpreting it compel the opposite result. In *People v. Dotson*, *supra*, 16 Cal.4th 547, for example, this court observed that 'the defendant's current felony need not be "serious" for

the three strikes law to apply,' and distinguished between 'a recidivist who committed a serious third strike felony' and one 'who committed a *non*serious third strike felony.' (*Id.* at p. 555, original italics; [' "It is certainly appropriate to punish more harshly those" ' three strikes defendants ' "convicted of new serious felonies" ' than those whose most recent felony is not serious.].) Were the Attorney General's interpretation of section 667.5(c)(7) correct, this distinction would be nonsensical. [¶] Indeed, as noted in *Henson*, if every third strike qualified as a serious felony, virtually every third strike defendant would receive not only a life sentence but also a five-year enhancement under section 667, subdivision (a) (section 667(a)). (*People v. Henson*, *supra*, 57 Cal.App.4th at p. 1388.) This section 'imposes a five-year enhancement for each current conviction for a "serious" felony if the defendant previously has been convicted of a "serious" felony. If a third strike were automatically considered a "serious" felony by virtue of the fact it carries a life sentence, the five-year enhancement would be imposed in every third strike case involving a prior serious felony conviction regardless of what offense constituted the third strike." (*Ibid.*, fn. omitted.) We have held otherwise. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529 ['The five-year enhancements mandated by section 667, subdivision (a), ... apply only when the defendant's current offense is a "serious felony" within the meaning of section 1192.7, subdivision (c), while the sentences mandated by the Three Strikes law apply whether or not the current felony is "serious." ']; *People v. Dotson*, *supra*, 16 Cal.4th at p. 555 [under section 667(a), 'the current felony offense must be "serious" within the meaning of section 1192.7, subdivision (c), for the five-year enhancement to apply'].) [¶] Given this limitation of section 667(a) five-year enhancements to recidivists whose current offenses are serious, it is equally appropriate to limit sections 2933.1 and 667.5(c)(7) to defendants whose current offenses, in and of themselves, and without reference to the punishment accorded under the three strikes law, are violent. (*People v. Henson*, *supra*, 57 Cal.App.4th at p. 1389.)" (*Thomas*, *supra*, 21 Cal.4th at pp. 1128-1129.)

The circumstances discussed in *Thomas* are manifestly different than those contemplated by Proposition 36. The proposition does not involve consideration of whether a current non-violent offense becomes a statutorily defined violent offense under 667.5, subdivision (c)(7), by using the Three Strikes law, such that virtually every third strike defendant would receive not only a life sentence but also a five-year enhancement under section 667. The *Thomas* line of cases is thus inapplicable to interpreting the initiative.

The defendant's disqualification is based on a prior "conviction" of a designated crime. While the prosecution is required to plead and prove the prior crime as a disqualifier, there is no requirement that there be a pleading and proof of the prior crime as a "strike." (§ 667, subd. (e)(2)(C).) It is the fact of the conviction

of a particular crime that is relevant, not whether the prior conviction also was used as a strike under the Three Strikes law.

Sections 667, subdivision (e)(2)(C)(iv), and 1170.12, subdivision (c)(2)(C)(iv), specify the defendant will remain eligible for the traditional third strike sentence of at least 25-years to life if he "suffered a prior conviction, as defined in subdivision (b) of this section, for any of the following *serious and/or violent felonies*." (italics added.) The statutes then detail the specific prior crimes that will make him ineligible for the new sentencing scheme, and include solicitation to commit murder (§ 653f) and possession of a weapon of mass destruction (§ 11418, subd. (a)(1)), neither one of which are defined as a "serious or violent felony." It is reasonable to assume the introductory requirement of the prior crime being a serious or violent felony has no effect on the use of either sections 653f and 11418 as a disqualifier. Rather, the inclusion of the two statutes simply reflects the enactors' intent to also disqualify these persons from the benefits of Proposition 36.

Out-of-state convictions and juvenile adjudications

Section 667, subdivision (e)(2)(C)(iv), excludes a defendant who has "suffered a prior serious/and or violent *felony conviction*, as defined in subdivision (d) of this section, for any of the following felonies" -- the "super strikes. The reference to "subdivision (d) of this section" obviously means section 667, subdivision (d). Section 667(d) provides that "[n]ot withstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior *conviction of a serious and/or violent felony* shall be defined as" (1) an adult California conviction under sections 667.5, subdivision (c) and 1192.7, subdivision (c) [§ 667(d)(1)]; (2) an out-of-state conviction "for an offense that, if committed in California is punishable by imprisonment in the state prison . . . if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of" a California serious or violent felony [§ 667, subd. (d)(2)]; and (3) designated juvenile adjudications [§ 667, subd. (d)(3)].

People v. Carothers (2017) 13 Cal.App.5th 459, 465, holds that an out-of-state conviction of what would be a super strike in California will disqualify the defendant from Proposition 36 relief. "Each of those provisions (§§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv)) specifically refers to that section's definition of 'prior serious and/or violent conviction for a felony.' (§ 1170.12, subd. (b).) Under that definition, '[a] prior conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison shall constitute a prior conviction of a particular serious and/or violent felony if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of a particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of

Section 1192.7.' (§§ 667, subd. (d)(2), 1170.12, subd. (b)(2).) [¶] Read together, the meaning of these provisions is clear and unambiguous. An inmate is not eligible for resentencing under section 1170.126 if he or she has a prior out-of-state conviction for an offense that, if committed in California, includes all of the elements of any of the super strike offenses appearing in section 667, subdivision (e)(2)(C)(iv), or section 1170.12, subdivision (c)(2)(C)(iv)." In *Carothers*, however, the court found insufficient information in the record of conviction that the defendant's prior Texas murder conviction would have been murder under California law.

Since the definition of "conviction of a serious and/or violent felony" contained in section 667, subdivision (d), is incorporated by reference in section 667(e)(2)(C)(iv), and since that definition specifically includes designated juvenile adjudications, it appears that a person who has been adjudicated for an offense listed in section 667(d)(3) will be excluded from the benefits of Proposition 36. While juvenile "adjudications" and adult "convictions" are distinguished in many other contexts, for the purposes of the exclusion under section 667, subdivision (e)(2)(C)(iv), they are treated the same. Section 667, subdivision (d)(3), provides that "[a] prior juvenile adjudication shall constitute a *prior serious and/or violent felony conviction* for purposes of sentence enhancement if:

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

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

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

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

People v. Arias (2015) 240 Cal.App.4th 161, holds that a qualified juvenile adjudication will constitute a disqualifying prior conviction for the purposes of Proposition 36. The provisions of Welfare and Institutions Code, section 203, which specify that juvenile adjudications are precluded from being considered "convictions" "for any purpose," have no application to the Three Strikes law and Proposition 36. Generally in accord with *Arias* is *People v. Thurston* (2016) 244 Cal.App.4th 644 .

***P*leading a prior conviction as a "super strike" under Proposition 36**

People v. Tennard (2017) 18 Cal.App.5th 476, 486, discusses the level of specificity required for the pleading of a prior conviction as a "super strike" for the purposes of an exclusion from the benefits of Proposition 36. "The language of section 667, subdivision (e)(2)(C) is clear and unambiguous and governs our interpretation of the statute. Subdivision (e)(2)(C) has *two* pleading and proof requirements. The first requires the prosecution to plead and prove that the defendant has *two or more* prior strikes. This is plainly necessary because subdivision (e)(2)(C) applies *only* if the defendant has two or more prior strikes *and* the current offense is not a strike. (§ 667, subd. (e)(2)(C).) The second pleading and proof requirement requires the prosecution to plead and prove that 'any' of the exceptions to second strike sentencing eligibility listed in subdivision (e)(2)(C)(i) through (iv) apply. The question defendant raises requires us to determine the level of specificity that is required to plead that an exception to second strike sentencing eligibility applies. [¶] The plain language of section 667, subdivision (e)(2)(C) only requires the prosecution to 'plead and prove' that 'any' of the exceptions to second strike sentencing eligibility set forth in subparagraphs (i) through (iv) apply. Neither subdivision (e)(2)(C) nor any other part of section 667 requires the prosecution to *specifically* 'plead and prove' that an exception applies by using any particular language or by referencing the particular subparagraph of the exception or disqualifying factor. As noted, all of the exceptions are based either on the defendant's current conviction (§ 667, subd. (e)(2)(C)(i)-(iii)) or on specified super strike convictions (*id*., subd. (e)(2)(C)(iv))." (*Ibid*., italics in original.)

3. No exclusion for dangerousness

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

4. Second strike offenders

Except for the possible effect of an amendment to sections 1170.12, subdivision (a)(7) and (8), regarding consecutive sentencing (discussed in Section III(C), *infra*), Proposition 36 makes no changes in the way defendants with one prior strike ("second strike" offenders) are sentenced. These offenders will be sentenced in the traditional manner under the Three Strikes law, even if they

receive a life sentence because the underlying offense is sentenced under the Indeterminate Sentencing Law. As more fully discussed in Section IV(A), *infra*, second strike offenders also have no ability to petition for reconsideration of their sentence.

III. AMENDMENT OF OTHER SENTENCING PROVISIONS

A. Amendment of sections 1170.12, subdivision (a)(7) and (8), regarding consecutive sentencing

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

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

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

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

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

Subdivision (7) relates to sentencing of multiple *serious or violent* felony counts in the same case. Originally, subdivision (7) cross-referenced subdivision (6). The Supreme Court has read subdivisions (6) and (7) together to mean that

multiple serious or violent felonies must be sentenced consecutively only if they were not committed on the same occasion or out of the same set of operative facts. (*People v. Hendrix* (1997) 16 Cal.4th 508, 513.) Section 1170.12, subdivision (a)(7), has now been amended to delete the reference to subdivision (a)(6); it now refers to subdivision (b) - the portion of the statute defining which crimes are strikes.

The Supreme Court in *People v. Henderson* (2023) 14 Cal.5th 34 (*Henderson*), addresses the requirements of consecutive sentencing following the enactment of Proposition 36. "Following [Proposition 36], the rules as to consecutive sentencing apply as follows. When a strike defendant is convicted of any group of new felony offenses, the sentence imposed for each felony count must run consecutively to all the others not committed on the same occasion. The court retains discretion to impose concurrent sentences for new offenses, whether qualifying felonies or not, that were committed on the same occasion. [¶] One further variation occurs when a defendant stands convicted of a group of new qualifying offenses along with nonqualifying offenses. In that circumstance, new terms for *all* felonies committed on separate occasions must run consecutively to each other under section 1170.12, subdivision (a)(6). Additionally, under subdivision (a)(7), the total term for all qualifying offenses must run consecutively to the total term imposed for nonqualifying offenses." (*Henderson*, *supra*, 14 Cal.5th at p. 55.)

By way of explanation of its ruling, the Supreme Court references two sentencing scenarios.

"In the first example, a defendant with two prior strikes is newly convicted of robbing two stores on two different days, as well as two separate and unrelated counts of auto theft. His current second degree robberies are qualifying offenses and the prior strikes bring him under the Three Strikes scheme. Using its authority under section 1385, subdivision (a), the court dismisses one strike. [Citation.] Under the interpretation we adopt here, the court would sentence him on the first robbery to a base term chosen from the available determinate sentencing triad of two, three, or five years (§ 213, subd. (a)(2)), doubled because of the remaining strike prior. The term for the second robbery would be one-third of the midterm, doubled, resulting in a two-year term. (§ 1170.1, subd. (a).) The two-year term must be ordered to run consecutively to the first because both offenses were committed on separate occasions and did not arise from the same set of operative facts. [Citations.] The felony auto thefts are not qualifying offenses, but the court must also order the robbery sentences to be served consecutively to 'any other conviction,' which would include terms imposed for the auto thefts. The auto theft sentences called for by the standard determinate sentencing statutes can be ordered to run consecutively or concurrently to each other. If the court chooses the upper term for the first

robbery, it would order the defendant to serve a total of 12 years (10 years plus two years) for the two qualifying robberies consecutive to the combined sentence imposed for the auto thefts.

In the second example, the defendant has two prior strikes. His charged offenses result in convictions for two separate felony auto thefts and two counts of second degree robbery. The robberies occurred when he went into a store, robbed the clerk and, on his way out, also robbed a patron. The court dismisses one strike, and none of the exceptions in section 1170.12 subdivision (c) apply, so an indeterminate life term is not called for. Sentencing would progress as follows. The term for the robbery of the clerk would be the base term chosen from the triad, then doubled. The two robberies are qualifying offenses, but they were committed on the same occasion. As a result, under subdivision (a)(6), the court would have the discretion to order the sentence for each robbery to run either consecutively or concurrently to each other. [Citation.] If imposed consecutively, the term for robbing the patron would be one-third of the midterm, doubled. If the court runs the term concurrently, it would impose a full base term, doubled. [Citations.] As in the prior example, the auto thefts would not be qualifying offenses, but whatever sentence is imposed for the qualifying robberies must be ordered to run consecutively to the total term imposed for the auto thefts.

(*Henderson*, *supra*, 14 Cal.5th at pp. 55-56.)

NOTE: The stated terms for the two auto thefts only works if the reader assumes that although eligible for strike treatment, the two felony auto thefts received a standard sentence because the prior strikes were not pled and proved for those offenses. When the court states that the auto thefts are not “qualified” offenses, it means that they are not “serious” or “violent” crimes. (*Henderson*, *supra*, 14 Cal.5th at p. 44.)

Generally in accord with *Henderson* are *People v. Torres* (2018) 23 Cl.App.5th 185; *People v. Buchanan* (2019) 39 Cal.App.5th 385; *People v. Gangi* (2019) 42 Cal.App.5th 58; and *People v. Marcus* (2020) 45 Cal.App.5th 201.

Left unchanged by Proposition 36 is the requirement in subdivision (7) that the sentence for multiple current serious or violent felonies shall be "consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." The change is also consistent with the provisions of section 1170.12, subdivision (c)(2)(B): “The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of

paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison." The language of sections 1170.12, subdivision (a)(7) and (c)(2)(B), is sufficiently broad to require sentencing of the current serious or violent felonies consecutively to any sentence the defendant already is serving.

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

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

Proposition 36 deletes section 1170.12, subdivision (a)(8), which had required *any* sentence imposed under the Three Strikes law on a new felony be served consecutively to any other term the defendant was then serving, unless otherwise provided by law. The intent of the amendment is not clear, nor is its effect on the ability of the court to impose a concurrent sentence. On one hand, the deletion of subdivision (8) appears to allow courts to impose a *second strike* sentence on a new felony concurrently to any other term the defendant is serving unless consecutive sentencing (a) is required by subdivision (7), or (b) required by some other provision of law. If the current crime is being sentenced as a third strike offense, the term must be imposed consecutively to any existing term by reason of the requirements of section 1170.12, subdivision (c)(2)(B).

On the other hand, a term already being served may be considered a "current conviction" for the purposes of subdivision (6) which mandates consecutive sentencing for multiple current convictions for crimes not committed on the same occasion or out of the same operative facts. Certainly if the court imposes a sentence consecutive to the term already being served, both cases must be "resentenced" as a single case under the requirements of California Rules of Court, Rule 4.452.

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

3. Interpretation of conflicting code sections

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

> **(6)** If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of

operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

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

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

Those provisions were not modified by Proposition 36.

There appears no clear legislative direction for dealing with the direct conflict between sections 667, subdivision (c), and 1170.12, subdivision (a). There is no discernible reason for amending one statute but not the other. The problem likely stems from a simple drafting error in failing to amend sections 667, subdivision (c)(7) and (8), to conform to sections 1170.12, subdivision (a)(7) and (8). Indeed, *Torres* has so held: "We . . . agree with the Attorney General that the only reasonable explanation for the failure to amend the identical language of section 667, subdivision (c)(7) was oversight." (*Torres*, *supra*, 23 Cal.App.5th at p. 202.)

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

It does not seem reasonably possible to harmonize the two sets of code sections since they deal with the same subject matter in different ways. The intent of the

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

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

Interestingly, the correction of the apparent drafting error likely can be accomplished by the Legislature. The original version of section 1170.12 was enacted by Proposition 184 in 1994. As such, it can only be amended by the Legislature by a super-majority vote or by a vote of the electorate. Proposition 36 accomplished that amendment. But section 667 was enacted by the Legislature; its provisions can be changed by a simple majority vote.

4. Statutes otherwise mandating consecutive sentencing

Aside from the provisions of the Three Strikes law, there are a number of statutes that require consecutive sentencing for multiple counts. Section 4501.1, the crime of battery by gassing, for example, provides in relevant part, "(a) ... Every state prison inmate convicted of a felony under this section shall serve his or her term of imprisonment as prescribed in section 4501.5." Under section 4501.5, "Every person confined in a state prison of this state who commits a battery upon the person of any individual who is not himself a person confined therein shall be guilty of a felony and shall be imprisoned in the state prison for two, three, or four years, to be served consecutively." Other examples include sections 667.6, subdivision (d) [violent sex crimes], 4532 [escape], 12022.1 [crime committed on bail or O.R.], and 1170.1(c) [crimes committed in prison].

If particular counts must be sentenced consecutively, the provisions of the Three Strikes permitting concurrent sentencing of certain crimes committed "on the same occasion" or "out of the same operative facts" do not override the mandatory requirements. (See § 1170.12, subd. (a)(6).) As observed in *People v. Hojnowski* (2014) 228 Cal.App.4th 794, 800: "Section 667, subdivision (c)(6) does not give a trial court the discretion to impose concurrent terms when consecutive sentences would otherwise be mandatory. It increases the punishment for certain recidivist offenders by making consecutive sentences mandatory in Three Strikes cases when the defendant was convicted of more than one offense *not* committed on the same occasion or arising out of the same operative facts. Our Supreme Court has construed this language to mean ' "consecutive sentences are not mandatory [under the Three Strikes law] if the multiple current felony convictions are 'committed on the same occasion' or 'aris[e] from the same set of operative facts.' " ' (*People v. Deloza* (1998) 18 Cal.4th 585, 591, (*Deloza*); see *People v. Hendrix* (1997) 16 Cal.4th 508, 512–513, (*Hendrix*).) But in those cases, a concurrent term was not otherwise barred by statute and the only basis for arguing a consecutive term was mandatory was the Three Strikes law itself. (*Deloza, supra,* 18 Cal.4th at p. 589, [multiple robbery counts]; *Hendrix, supra,* 16 Cal.4th at p. 512,[robbery and attempted robbery counts].) Section 667, subdivision (c)(6) does not permit concurrent sentences when a different provision of the Penal Code requires consecutive sentences."

5. Summary of rules regarding consecutive sentencing

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

(a) Multiple *second or third strike* counts, whether or not serious or violent offenses

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

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

(b) Multiple *second or third strike* counts, with a mix of crimes, some serious or violent, and some not serious or violent

- Multiple serious or violent crimes must be consecutively sentenced if they did not occur on the same occasion or arise out of the

same operative facts, and must be sentenced consecutively to any non-serious or non-violent crimes.

- If the multiple serious or violent crimes occurred on the same occasion or arose out of the same operative facts, the court may sentence them concurrently, but must sentence them consecutively to any non-serious or non-violent crimes.

(c) Terms already being served

- If the current felony is a non-serious and non-violent *second strike* crime, it is unclear whether the court may sentence the crime concurrently with any other term being served. With the elimination of section 1170.12, subdivision (a)(8), there is no express statutory provision mandating consecutive sentencing in such a situation, but the circumstances may come within the provisions of section 1170.12, subdivision (a)(6).

- If the current felony is *one* serious and/or violent *second strike* felony, it is unclear whether the court may sentence the crime concurrently with any other term being served. With the elimination of section 1170.12, subdivision (a)(8), there is no express statutory provision mandating consecutive sentencing in such a situation, but the circumstances may come within the provisions of section 1170.12, subdivision (a)(6). If there are *multiple* serious and/or violent felonies being sentenced, however, section 1170.12, subdivision (a)(7), would require the sentences to be "consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." The requirement is broad enough to include other terms being served.

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

(d) Crimes mandating consecutive sentencing

If multiple counts must be sentenced consecutively for reasons other than the Three Strikes law, such provisions override section 1170.12, subdivision (a)(6), which permits concurrent sentencing if the crimes were committed "on the same occasion" or "out of the same operative facts." (*People v. Hojnowski* (2014) 228 Cal.App.4th 794, 800-802.)

(e) Effective date of changes made to mandatory consecutive sentencing

- The changes to section 1170.12, subdivision (a)(7), mandating consecutive sentencing for multiple serious or violent felony convictions, will be effective only as to crimes committed on or after November 7, 2012. Since the mandatory provisions remove any of the court's discretion to sentence concurrently, the punishment is increased for crimes sentenced under this circumstance. To impose the statutory change on crimes committed prior to the effective date, therefore, would violate the *ex post facto* clause.

B. Other Amendments

1. Dismissal of strikes by the court

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

2. Date of interpretation

Proposition 36 amends **Section 667, subdivision (h),** to provide that "[a]ll references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on November 7, 2012."

Similarly, **section 667.1** is amended to provide that "[n]otwithstanding subdivision (h) of Section 667, for all offenses committed on or after November 7, 2012, all references to existing statutes in subdivisions (c) to (g), inclusive, of Section 667, are to those statutes as they existed on November 7, 2012."

Finally, **section 1170.125** is amended to specify that "[n]otwithstanding Section 2 of Proposition 184, as adopted at the November 8, 1994, General Election, for all offenses committed on or after November 7, 2012, all references to existing statutes in Sections 1170.12 and 1170.126 are to those sections as they existed on November 7, 2012."

The amendment of sections 667.1 and 1170.125 potentially affect the application of Proposition 36 to persons sentenced in an original proceeding under sections 667, subdivisions (b) – (j) and 1170.12, and persons requesting resentencing under section 1170.126.

Persons sentenced in an original proceeding

The amendments to sections 667, subdivision (h), 667.1, and 1170.125 clearly provide that for offenses committed on or after November 7, 2012, statutory references will be to the statutes as they existed on November 7, 2012. For crimes committed prior to November 7, 2012, however, the applicable law will be determined by the date of the offense. Such an interpretation date is necessary to avoid any ex post factor concerns created by the periodic amendment to sections 667.5 and 1192.7 to add more crimes to the list of serious and violent felonies.

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

Persons requesting resentencing under section 1170.126

The intent of the amendment to section 1170.125 with the respect to the eligibility for resentencing is not entirely clear. As noted above, section 1170.125 is amended to provide that "for all offenses committed on or after November 7, 2012, all references to existing statutes in Sections 1170.12 and 1170.126 are to those sections as they existed on November 7, 2012." On its face, the amendment with respect to section 1170.126 makes no sense – section 1170.126 only applies to crimes committed *prior to* November 7, 2012: "The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment pursuant to [the Three Strikes law], whose sentence under this act would not have been an indeterminate life sentence." (§ 1170.126(a).)

Likely the intent of the amendment to section 1170.125, when viewed against the opening paragraph to section 1170.126, subdivision (a), is to limit the ability to request resentencing to those persons who would be eligible for a lower sentence *had the crime been committed on or after November 7, 2012.* One of the prerequisites to obtaining a resentencing is that the offense which resulted in the life sentence is not itself a serious or violent felony. Sections 667.5, subdivision (c), and 1192.7, subdivision (c), defining violent and serious felonies, for the most part, have remained substantially the same since the enactment of the Three Strikes law in 1994. From time to time, however, the lists have been augmented to include new offenses. For example, Proposition 21, enacted

March 7, 2000, added section 422, making criminal threats, to the list of serious felonies in section 1192.7, subdivision (c)(38). It is of no benefit to a defendant sentenced to a 25-life term for a violation of section 422 prior to 2000 that the crime was not then listed as a serious felony. Based on the objective intent of the amendment to section 1170.125 and the opening paragraph of section 1170.126, subdivision (a), eligibility for resentencing must be based on the interpretation of statutes as they exist on or after November 7, 2012. In the case of a person convicted of a violation of section 422 prior to March 7, 2000, he or she would not be eligible for resentencing because section 1192.7, subdivision (c)(38), as it read on November 7, 2012, lists section 422 as a serious felony.

IV. PETITION FOR RESENTENCING

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

The resentencing procedure is available to any inmate who comes within its terms, whether or not his case was final as of November 7, 2011. (*People v. Yearwood* (2013) 213 Cal.App.4th 161.)

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

A. The Petition

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

Section 1170.126(b) does not define what constitutes "good cause" for a delay in filing a petition for resentencing. In a case of first impression, *People v. Drew* (2017) 16 Cal.App.5th 253, 257, explained: "The briefs of both parties refer us to case law interpreting section 1382—which contains various time limitations that ensure a defendant receives a speedy trial—suggesting that it may provide at least rough guidance for construing 'good cause' under section 1170.126, subdivision (b). Like section 1170.126, '[s]ection 1382 does not define "good cause" as that term is used in the provision, but numerous California appellate decisions that have reviewed good-cause determinations under this statute demonstrate that, in general, a number of factors are relevant to a determination of good cause: (1) the nature and strength of the justification for the delay, (2) the duration of the delay, and (3) the prejudice to either the defendant or the prosecution that is likely to result from the delay.' (*People v. Sutton* (2010) 48 Cal.4th 533, 546.) The courts have concluded in other contexts that, when making a 'good-cause' determination, a trial court must consider all of the relevant circumstances of the particular case, 'applying principles of common sense to the totality of circumstances.' (See, e.g., *Stroud v Superior Court* (2000) 23 Cal.4th 952, 969.)" [¶] We recognize that the analogy between section 1382 (which is focused on the state's obligation to timely bringing a person to trial) and section 1170.126 (which focuses on an inmate's obligation to commence the recall petition process) is an imperfect one because they involve entirely different phases of the criminal process. But the analogy may provide some guidance because both statutes are concerned with time limits within which certain actions must be taken and under what circumstances a delay beyond those deadlines should be permitted. Under both, delays beyond the deadlines carry consequences, and 'good cause' functions as a barometer to evaluate the excuse for the delay and decide whether to obviate those consequences." Ultimately the court declined to consider the third factor, finding there was no circumstance where the prosecution could be prejudiced by the late filing of a motion for resentencing. The defendant's explanation of the two-year delay was that he did not understand that he had a right to relief. The appellate court affirmed the trial court's determination that such a reason did not constitute the requisite "good cause."

People v. Lopez (2015) 238 Cal.App.4th 177, a Proposition 47 case, holds that because the trial court loses jurisdiction over a case when it is on appeal, the defendant must file for relief under section 1170.18 after the trial court regains jurisdiction when the case becomes final. According to *Lopez*, the temporary loss of jurisdiction during that time period constitutes "good cause" for the delayed filing.

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

- A request for resentencing as a second strike offender.

- All of the charged felonies which resulted in a third strike sentence.

- All of the prior strikes alleged and proved under section 667, subdivision (d), and 1170.12, subdivision (b).

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

A proposed form of petition is in Appendix D.

Scope of relief

The scope of relief requested in a petition for resentencing is limited to the authority granted the court by section 1170.126. The petition may not include a request by petitioner to have the resentencing court determine whether petitioner's underlying conviction was correctly characterized as a serious felony. Such a determination is part of a judgment of the court, which is final. (*People v. Cabrera* (2018) 21 Cal.App.5th 470.) Similarly, the petition may not include a request to set aside a conviction based on alleged *Boykin/Tahl* error (*People v. Clark* (2017) 8 Cal.App.5th 863, 873), or a request under section 1385 to dismiss a disqualifying prior conviction (*People v. Brown* (2014) 230 Cal.App.4th 1502, 1511-1512).

B. Initial Screening of the Petition

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

1. Service of a life term

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

Section 1170.126 is not entirely clear regarding the eligibility of inmates who are serving 25 year-to-life sentences for multiple felonies, where the current felonies are a mix of serious or violent crimes and non-serious and non-violent crimes. Stated differently, the issue is whether an inmate who is serving an indeterminate term for *any* serious or violent felony is then disqualified from requesting relief as to all other felonies. Section 1170.126, subdivision (e)(1), states an inmate is eligible for relief if, among other things, he "is serving an

indeterminate term of life imprisonment imposed pursuant to [section 667, subdivision (e)(2)] or [section 1170.12, subdivision (c)] for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by [section 667.5, subdivision (c)] or [section 1192.7, subdivision (c)]." Clearly the inmate will not be permitted to apply for resentencing of a serious or violent felony. Nothing in section 1170.126, however, suggests the inmate would be prohibited from requesting relief for the other non-serious and non-violent crimes. Section 1170.126, subdivision (e)(1), is not limited in any way to exclude inmates who are serving life terms for serious or violent felonies and other life terms for non-serious or non-violent felonies. Such an interpretation is consistent with the intent of Proposition 36 to eliminate indeterminate sentences for non-serious and non-violent crimes. However, such an interpretation may be inconsistent with the intent of the initiative to maintain long sentences for people who have committed serious or violent offenses.

Proposition 36 has no application to persons committed to the state hospital system because of a finding they were not guilty by reason of insanity. "By its terms, section 1170.126 applies exclusively to certain 'persons presently serving an indeterminate term of *imprisonment*....' (§ 1170.126, subd. (a), italics added.) Dobson is not presently serving any term of imprisonment whatsoever; he has been committed to a state hospital as an NGI committee. He falls outside the scope of section 1170.126's plain language." (*People v. Dobson* (2016) 245 Cal.App.4th 310, 315; italics in original.)

2. Excluded felonies

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

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

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

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

As noted above, section 1170.126, subdivision (e)(2)(C)(ii), excludes persons required to register under section 290, subdivision (c), except for specified sex crimes. In this regard it is important to observe the precise words of the exclusion: the statute will exclude defendants convicted of "any felony offense that results in *mandatory registration* as a sex offender pursuant to [section 290(c). . . ." (italics added.) Section 290, subdivision (c), specifies all of the listed crimes mandate registration.

People v. Hofsheier (2006) 37 Cal.4th 1185, held registration for a conviction of section 288a, subdivision (b)(1), oral copulation of a person under 18, was not mandatory, but rather discretionary under section 290.006. The decision was based on a denial of equal protection – that there was no rational basis for requiring registration for consensual sexual offenses, such as section 288a, subdivision (b)(1), but not for unlawful sexual intercourse. Cases following *Hofsheier* extended its holding to a number of other sexual offenses where the activity was essentially consensual between the persons involved. The Supreme Court has overruled *Hofsheier* in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, finding there is indeed a rational basis for not mandating registration for unlawful sexual intercourse, but requiring it in other non-forcible sexual offenses. The court disapproved the following cases to the extent they were inconsistent with *Johnson*: *People v. Garcia* (2008) 161 Cal.App.4th 475; *People v. Hernandez* (2008) 166 Cal.App.4th 641*; In re J.P.* (2009) 170 Cal.App.4th 1292; *People v. Ranscht* (2009) 173 Cal.App.4th 1369; *People v. Luansing* (2009) 176 Cal.App.4th 676; *People v. Thompson* (2009) 177 Cal.App.4th 1424; and *People v. Ruffin* (2011) 200 Cal.App.4th 669. (*Johnson*, *supra*, 60 Cal.4th at p. 888.)

The court made the holding in *Johnson* fully retroactive. (*Johnson*, *supra*, 60 Cal.4th at pp. 888-889.) While the full implications of retroactivity may not be entirely clear, it is likely the decision will apply to previous cases where the court did not order registration or granted a request to end the registration requirement based on *Hofsheier* or its progeny. Since the exclusion in Proposition 36 is based on a *conviction* of an offense requiring registration, whether or not the offender was *actually* registered is immaterial. A person previously convicted of *any* offense listed in section 290, subdivision (c), will be excluded from any of the benefits of Proposition 47.

The exclusion likely will not apply when registration is required as a matter of the court's discretion under section 290.006. Discretionary registration is not a circumstance listed in section 290, subdivision (c).

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

People v. Caraballo (2016) 246 Cal.App.4th 936, holds that vicarious arming is sufficient to exclude a defendant from the resentencing provisions. In *Caraballo* the defendant and a coparticipant were involved in the commission of a burglary. During the attempt by police to arrest the defendants, the coparticipant discarded a gun. The defendant was convicted of the arming enhancement under section 12022, subdivision (a), because of the possession of the gun by the coparticipant. The appellate court found the exclusion of persons who vicariously possessed a firearm during the commission of a crime is consistent with the intent of Proposition 36 to assure longer prison terms for persons who commit serious and violent offenses.

It has been argued that the exclusion based on section 1170.126, subdivision (e)(2), can only occur if the defendant was actually sentenced on the disqualifying factor. In other words, for the inmate to be disqualified based on a current crime where the inmate used a firearm, the inmate must have been convicted of an enhancement such as section 12022.5. The argument is misplaced. The act merely specifies that to qualify for resentencing, the "inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive," of sections 667, subdivision (e)(2)(C), or 1170.12, subdivision (c)(2)(C). Nothing requires a sentence to be imposed for a specific disqualifying factor; indeed, there is no crime or special penalty for committing a crime with the intent to cause great bodily injury.

For the purposes of exclusion from the new sentencing provisions, “serious bodily injury” is the same as “great bodily injury.” (*People v. Johnson* (2016) 244 Cal.App.4th 384, 392.)

People v. Thomas (2019) 39 Cal.App.5th 930, 938-939 (*Thomas*), holds the defendant may be excluded from the benefits of Proposition 36 because the current crime demonstrated an intent to cause great bodily injury to another person, even though the defendant was acquitted by the jury of personally inflicting great bodily injury. It is only necessary to show defendant *intended* to cause such injury. The court properly inferred such intent from the following

facts: “Here, substantial evidence supports the trial court's finding that appellant acted with intent to cause great bodily injury based on the circumstances of the offense. As Chillious was taking his jacket out of the closet, appellant—suddenly and without provocation—punched Chillious hard on the left side of his jaw. The blow caused Chillious to fall into the closet door, landing on his knee and hitting his head on the wall. While Chillious was still down, appellant punched him again on the right side of his jaw. The force of the two blows broke Chillious's jawbone in two places, caused a gash on the right side of his jaw, and dislocated a tooth. The trial court emphasized that its finding that appellant intended to inflict great bodily injury was based on the evidence of appellant's conduct, and not on the severity of the victim's injuries.” (*Id.*, at pp. 936-937.)

Consideration of facts not part of the actual conviction

In *People v. Perez* (2018) 4 Cal.5th 1055(*Perez*), the Supreme Court considered the use of evidence not expressly found by the jury in denying eligibility for resentencing. There, the defendant had been convicted of assault with force likely to inflict great bodily injury. The evidence showed that defendant, in his attempt to flee from the scene of an attempted robbery, dragged the victim with defendant’s truck at speeds of up to 15 miles per hour over some distance. The court found defendant was properly excluded from resentencing of the assault charge. “We hold, consistent with our decision in *People v. Frierson* (2017) 4 Cal.5th 225 (*Frierson*), that Proposition 36 permits a trial court to find a defendant was armed with a deadly weapon and is therefore ineligible for resentencing only if the prosecutor proves this basis for ineligibility beyond a reasonable doubt. In addition, we hold that the trial court’s eligibility determination may rely on facts not found by a jury; such reliance does not violate the right to a jury trial under the Sixth Amendment to the United States Constitution. A reviewing court, in turn, must defer to the trial court’s determination if it is supported by substantial evidence.” (*Perez*, at p. 1059.) “We hold that the Sixth Amendment does not prohibit trial courts from relying on facts not found by a jury in determining the applicability of Proposition 36’s resentencing ineligibility criteria. (Accord, *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1059–1062; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 805; *People v. Guilford* (2014) 228 Cal.App.4th 651, 662–663; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1334–1336 (*Bradford*).)” (*Perez*, at p. 1064.)

In determining whether the defendant was convicted of a serious or violent felony, the court may consider anything in the record of conviction. Several cases have addressed this issue in the context of a petition for resentencing. In *People v. White* (2014) 223 Cal.App.4th 512, 524-526, the court used facts from the record of conviction to disqualify inmate from resentencing under section 1170.126. However, the issue was more fully discussed in *People v. Manning* (2014) 226 Cal.App.4th 1133. Relying on *Guerrero, supra,* 44 Cal.3d at p. 355,

Reed, *supra,* 13 Cal.4th at p. 217, *People v. Trujillo* (2006) 40 Cal.4th 165, and others, the *Manning* court held in determining a petitioner's eligibility under section 1170.126, the trial court may consider facts not directly reflected in the conviction. "As *People v. Guerrero* (1988) 44 Cal.3d 343, and its progeny demonstrate, California courts have routinely determined that prior convictions constitute serious or violent felonies by looking to '*the substance of a prior conviction, i.e., the nature and circumstances of the underlying conduct.*' (*People v. Martinez* (2000) 22 Cal.4th 106, 117, italics added; see also *People v. Gomez* (1994) 24 Cal.App.4th 22, 31, [what matters is 'the conduct of the defendant, not the specific criminal conviction'].) (*Manning*, at p. 1141; italics in original; in accord, *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1063.)

The scope of evidence that may be considered in a motion for resentencing also was discussed in *People v. Cruz* (2017) 15 Cal.App.5th 1105, 1110: "In ruling on a petition for resentencing, the trial court may consider the entire record of conviction including the transcript of the trial testimony and the appellate opinion affirming the judgment of conviction. (*People v. Woodell* (1998) 17 Cal.4th 448, 456; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1063 (*Blakely*).) '[A] trial court may deny resentencing under the Act on the basis of facts underlying previously dismissed counts.' (*People v. Estrada*, *supra*, 3 Cal.5th at p. 665.) [¶] Relying on *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*), appellant argues that the court is limited to the facts established by the conviction and may not relitigate the circumstances of the crime. *Guerrero* is inapposite and deals with evidence bearing on an increase in punishment, such as whether a prior conviction is a serious felony. (*Id.* at pp. 355-356.) In a Proposition 36 resentencing proceeding, the trial court does not consider an increase in punishment, but only whether the convicted defendant is entitled to a reduction in punishment. [¶] In ruling on a section 1170.126 petition for resentencing, 'a trial court determining eligibility for resentencing . . . is not limited to a consideration of the elements of the current offense and the evidence that was presented at the trial (or plea proceedings) at which the defendant was convicted. Rather, the court may examine relevant, reliable, admissible portions of the record of conviction to determine the existence or nonexistence of disqualifying factors. [Citation.]' (*Blakely*, *supra*, 225 Cal.App.4th at p. 1063; accord, e.g., *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458; *People v. Hicks* (2014) 231 Cal.App.4th 275, 286 (*Hicks*); *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1327.) *Guerrero* does not preclude a Proposition 36 court from considering facts not encompassed within the judgment of conviction. (*People v. Estrada*, *supra*, 3 Cal.5th at p. 672.) [¶] Appellant's reliance on *People v. Wilson* (2013) 219 Cal.App.4th 500 (*Wilson*) is misplaced. There, the court held that, under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), trial courts may not impose a sentence enhancement based on their own independent resolution of a disputed factual issue regarding defendant's prior conviction. (*Wilson*, at pp. 515-516.) *Apprendi* has no bearing on sentence

reduction, and holds, under the Sixth Amendment, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' (*Apprendi*, at p. 490.) '*Apprendi* and its progeny do not apply to a determination of eligibility for resentencing under the Act.' (*Osuna*, *supra*, 225 Cal.App.4th at p. 1039; *People v. Manning* (2014) 226 Cal.App.4th 1133, 1141, fn.3 [*People v. Wilson* inapplicable to eligibility determination under section 1170.126].)"

The court should identify on the record what is considered in granting or denying the petition. "[W]hen making its ultimate ruling on [the qualification of the defendant for relief under section 1170.126], the trial court must specify the records it relied on and its reasons for concluding defendant's prior offenses were or were not disqualifying." (*Manning*, *supra*, 226 Cal.App.4th p. 1144.)

The trial court may consider the facts of a prior conviction as summarized by an appellate court in determining whether the prior crime was committed in such a manner as to exclude the defendant from any relief under section 1170.126. (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1316-1317; *People v. Guilford* (2014) 228 Cal.App.4th 651; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 800-801; *People v. Hicks* (2014) 231 Cal.App.4th 275.)

In *People v. Bradford* (2014) 227 Cal.App.4th 1322, the court held that disqualification from resentencing may be based on facts determined by a review of the entire record of conviction, but only the record of conviction. "We conclude the statutory language and framework of Proposition 36 contemplate a determination of a petitioner's eligibility for resentencing based on the record of conviction, as in the line of cases including [*People v. Guerrero* (1988) 44 Cal.3d 343,] and [*People v. Woodell* 1998) 17 Cal.4th 448]. The statutory language we have previously identified requires the trial court to consider the nature of a petitioner's prior conviction. Specifically, the court must consider whether, during the commission of an offense that has been previously adjudicated at the time of the resentencing proceedings, "the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) The current resentencing statute is necessarily retrospective, like proceedings to establish proof of a prior conviction as an enhancement, in that the eligibility determination based on the "current" conviction at issue is based on the previously adjudicated crime. Given the similarities in the two determinations, we conclude the trial court should be guided by *Guerrero* and its progeny and should consider the record of conviction to decide whether petitioner is eligible for resentencing. [¶] Regarding eligibility, the current statute contains no procedure permitting the trial court to consider new evidence outside of the record of conviction, and we decline to imply such a procedure. To do so would impose a cumbersome two-step process in which the trial court would be

required to consider new evidence at two stages of the proceedings. Had the drafters of Proposition 36 intended the trial court to consider newly offered 'evidence' at the eligibility stage, they would have included express language of the type they did to describe the nature of the court's later, discretionary sentencing determination. (See [*People v. Tilbury* (1991) 54 Cal.3d 56,] 61.) Further, as indicated in *Guerrero* itself, consideration that is limited to the record of conviction promotes the efficient administration of justice while preventing relitigation of the circumstances of a crime committed years ago, which could potentially implicate other constitutional concerns. (See *Guerrero, supra,* 44 Cal.3d at p. 355.) Consideration of evidence outside the record of conviction at a resentencing proceeding under Proposition 36 would likewise present significant challenges for convictions that date back nearly 20 years, as witnesses and evidence available at the time the case was adjudicated may no longer be available." (*Bradford*, *supra*, 227 Cal.App.4th at pp. 1338-1339.)

The right of the petitioner to participate in the initial screening of a petition brought under section 1170.126 also is discussed in *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 6-8 (italics in original): "[Section 1170.126] accords [a petitioner] the right to a *resentencing hearing* only upon a showing that he is *eligible*. It is not a right to a hearing on the issue of eligibility, followed by the hearing on whether he would present a risk of danger to the public if resentenced. . . . [¶] [E]ligibility is *not* a question of fact that requires the resolution of disputed issues. The *facts* are limited to the record of conviction underlying a defendant's commitment offense; the statute neither contemplates an evidentiary hearing to establish these facts, nor any other procedure for receiving new evidence beyond the record of conviction. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1337, 1339 (*Bradford*).) What the trial court decides is a question of *law*: whether the facts in the record of conviction are the proper subject of consideration, and whether they establish eligibility. Therefore, this is not analogous to a hearing on a petition for habeas corpus. [¶] Finally, due process does not command a *hearing* on the threshold criteria that establish entitlement to resentencing. In a context more analogous than a petition for habeas corpus, it does not violate the due process rights of parties in a dependency proceeding for a juvenile court to refuse to hold *any* hearing on a motion for modification (Welf. & Inst. Code, § 388) unless there are allegations adequate to establish a prima facie showing of the necessary criteria of changed circumstances and benefit to the minor; nor is the court obliged to hold an *evidentiary* hearing even upon a prima facie showing, as opposed to entertaining argument as to whether the allegations establish the right to relief. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1463 [right of due process compels hearing only after prima facie showing of changed circumstances]; *In re E.S.* (2011) 196 Cal.App.4th 1329, 1339-1340 [due process does not require evidentiary hearing on motion]; *In re Heather P.* (1989) 209 Cal.App.3d 886, 891 [leaving to court the determination of prima facie showing does not violate due process].)

[Footnote omitted.] [¶] Similar to the limited reach of due process in the context of modification petitions, we recently held that the parties to a section 1170.126 proceeding are entitled to a limited "additional procedural protection[]" of their right under due process to be heard (*Bradford*, *supra*, 227 Cal.App.4th at p. 1337.) The petitioner has a right to provide 'input' in the form of briefing 'if the petitioner has not addressed the issue [of eligibility in the petition] and the matter of eligibility concerns facts that were not actually adjudicated at the time of the petitioner's original conviction (as here)'; the People also have the right to submit a brief in response if the trial court sets a hearing on dangerousness (indicating that it made a preliminary determination of eligibility) in order to highlight facts in the record they assert establish ineligibility. (*Bradford*, *supra*, 227 Cal.App.4th at pp. 1340, 1341.)"

Proof of disqualification

The courts were divided on the issue of the burden of proof of a factor that disqualifies a person from the benefits of Proposition 36. The conflict was resolved in *People v. Frierson* (2017) 4 Cal.5th 225. "[W]e have previously noted that 'the parallel structure of [Proposition 36's] amendments to the sentencing provisions and the Act's resentencing provisions reflects an intent that sentences imposed on individuals with the same criminal history be the same, *regardless of whether they are being sentenced or resentenced*. Both the sentencing scheme and the resentencing scheme provide for a second strike sentence if the current offense is not a serious or violent felony, and they set forth identical exceptions to the new sentencing rules.' (*People v. Johnson* (2015) 61 Cal.4th 674, 686, 189 Cal.Rptr.3d 794, 352 P.3d 366 (*Johnson*), italics added.) We conclude the parallel structure of the Act and section 1170.126's wholesale incorporation of the ineligibility criteria of section 1170.12, subdivision (c)(2)(C) reflects an intent to apply the same burden of proof regardless of whether the Three Strikes law is being applied prospectively or retrospectively through a resentencing petition. The People's position would create an anomaly with respect to proof of the ineligibility factors. Although prospective application of such a factor would require proof of it beyond a reasonable doubt, the People's position would allow a similar defendant seeking resentencing to be declared ineligible based upon a finding of the same factor supported by a preponderance of the evidence. Nothing in the parallel structure of the Act would suggest an electoral intent that similar defendants be subject to vastly different sentences simply by application of a different standard of proof." (*Frierson*, p. 236; italics in original.] In accord with Frierson is *People v. Arevalo* (2016) 244 Cal.App.4th 836.

Frierson disapproved the following cases to the extent they were in conflict: *People v. Newman* (2016) 2 Cal.App.5th 718, 727-732, , and *People v. Osuna* (2015) 225 Cal.App.4th 1020, 1038-1040. (*Frierson*, *supra*, 4 Cal.5th at p. 240, fn. 8.)

Facts considered by the court

The probation report is not part of the record of conviction. (*People v. Burns* (2015) 242 Cal.App.4th 1452.) On the other hand, the transcript of a preliminary hearing is part of the record of conviction, at least if there is no trial.

A defendant may be disqualified from relief under section 1170.126 based facts that formed the basis of an enhancement, even though the enhancement or the punishment for the enhancement was struck under section 1385. Such a sentencing decision does not change the underlying facts for the purposes of defendant's disqualification. (*People v. Quinones* (2014) 228 Cal.App.4th 1040.) It is not necessary that the defendant be actually sentenced on any disqualifying factor to be disqualified from the ability to obtain resentencing. (*People v. Hicks* (2014) 231 Cal.App.4th 275.)

Felon in possession of a firearm

Section 29800 prohibits a felon from possessing a firearm. Whether the conviction will disqualify the inmate from the resentencing provisions of section 1170.126 will depend on whether the "possession" of the firearm was under circumstances that constitute "arming." In *People v. White* (2014) 223 Cal.App.4th 512, the inmate was convicted of possession of a firearm by a felon. Based on a review of the probation report and the transcripts of the preliminary hearing and trial in connection with the conviction, the appellate court determined the inmate was observed by police walking toward his vehicle, carrying a rolled-up pair of sweatpants. As the officers approached, the inmate began to run, reached into the rolled-up sweatpants, then tossed the pants and an item concealed inside into the back of his truck. The concealed item was a loaded firearm. The trial court found the inmate was disqualified from resentencing under section 1170.126 because he was "armed" within the meaning of the statutory exclusion. The appellate court agreed.

Based on a review of the record of conviction, the appellate court found the inmate was "armed" for the purposes of the exclusion. "Here, the record of conviction establishes that the applicable resentencing eligibility criterion set forth in section 1170.126(e)(2) is not satisfied, and, thus, White is ineligible for resentencing relief under the Reform Act. Specifically, the record of conviction establishes that White's life sentence was imposed because he was in physical possession of a firearm when the police officers approached him, and, thus, he was armed with a firearm during the commission of his current offense." (*White, supra,* 223 Cal.App.4th at p. 524.)

White was careful to observe the distinction between arming and possession. "The California Supreme Court has explained that '"[i]t is the availability – the ready access – of the weapon that constitutes arming."' (*People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*), quoting *People v. Mendival* (1992) 2 Cal.App.4th 562, 574.) [¶] 'The statutory elements of a violation of section 12021, subdivision [(a)(1)] . . . are that a person, who has previously been convicted of a felony, had in his or her *possession* or under his or her *custody or control* any firearm.' (*People v. Padilla* (2002) 98 Cal.App.4th 127, 138, italics added.) [¶] Although the crime of possession of a firearm by a felon may involve the act of personally carrying or being in actual *physical* possession of a firearm, as occurred here, such an act is not an essential element of a violation of section 12021(a) because a conviction of this offense also may be based on a defendant's *constructive* possession of a firearm. (See *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417; *People v. Mejia* (1999) 72 Cal.App.4th 1269, 1272 [defendant need not physically have the weapon on his person; constructive possession of a firearm 'is established by showing a knowing exercise of dominion and control' over it].) 'To establish constructive possession, the prosecution must prove a defendant knowingly exercised a right to control the prohibited item, either directly or through another person.' (*People v. Sifuentes*, supra, 195 Cal.App.4th at p. 1417.) [¶] Thus, while the act of being armed with a firearm – that is, having ready access to a firearm (*Bland*, *supra*, 10 Cal.4th at p. 997)–necessarily requires possession of the firearm, possession of a firearm does not necessarily require that the possessor be armed with it. For example, a convicted felon may be found to be a felon in possession of a firearm if he or she knowingly kept a firearm in a locked offsite storage unit even though he or she had no ready access to the firearm and, thus, was not armed with it." (*White, supra,* 223 Cal.App.4th at p. 524; italics in original.)

White determined it was unnecessary for there to be a specific allegation in the prior proceeding that the inmate was armed. "Although the information did not allege that White was armed with a firearm when he committed that offense, and it contained no sentence enhancement allegation that he was armed with a firearm, the record shows the prosecution's case was based on evidence that White not only possessed the firearm, but also that he was armed with the firearm during his commission of the current offense. Specifically, the record of conviction establishes that White not only had a firearm "in [his] possession or under [his] custody or control"; he also was personally armed with the firearm on that date because he was carrying – and, thus, had "ready access" (*Bland*, *supra*, 10 Cal.4th at p. 997) to – that firearm. The trial evidence shows the police officers conducting a surveillance of White's residence saw White walking towards his pickup truck and carrying a rolled-up cloth (sweatpants) with an object inside. The officers believed White might be armed, and when they moved towards him and drew their guns, White began to run, reached inside the rolled-up sweatpants he was carrying, and soon thereafter threw both the

sweatpants and the object inside the sweatpants into the bed of his truck. The officers arrested White and found that the object he had thrown into the truck bed was a loaded .357-magnum revolver." (*White, supra,* 223 Cal.App.4th at p. 525.) "In sum, the record shows the prosecution's case was not based on the theory that White was guilty of possession of a firearm by a felon because he had constructive possession of the firearm; it was based on the theory that he was guilty of that offense because he had actual physical possession of the firearm. Although White was not explicitly charged with being armed during the commission of his current offense, and he was convicted only of being a felon in possession of a firearm in violation of section 12021(a), the foregoing record amply supports a finding under section 1170.126(e)(2) that his life sentence was imposed because he was in fact armed with a firearm during his commission of his current section 12021(a) offense within the meaning of the armed-with-a-firearm exclusion." (*Id.* at pp. 525-526.)

White expressly rejected any "plead and prove" requirement for the disqualifier from the resentencing provisions of section 1170.126 – it determined such a requirement is limited to the *prospective* aspects of Proposition 36 for new convictions. (*White, supra,* 223 Cal.App.4th at pp. 526-527.) "We hold that, where the record establishes that a defendant convicted under the pre-Proposition 36 version of the Three Strikes law as a third strike offender of possession of a firearm by a felon was armed with the firearm during the commission of that offense, the armed-with-a-firearm exclusion applies and, thus, the defendant is not entitled to resentencing relief under the Reform Act. We also hold that**,** in such a case, a trial court may deny section 1170.126 resentencing relief under the armed-with-a-firearm exclusion even if the accusatory pleading, under which the defendant was charged and convicted of possession of a firearm by a felon, did not allege he or she was armed with a firearm during the commission of that possession offense." (*Id*. at p. 527.)

Substantially in accord with *White* are *People v. Osuna* (2014) 225 Cal.App.4th 1020, *People v. Brimmer* (2014) 230 Cal.App.4th 782, *People v. Hicks* (2014) 231 Cal.App.4th 275, and *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051-1054 [mere possession of a firearm by a felon will not exclude him from Proposition 36 unless the felon is "armed" – it was available for offensive or defensive purposes.]. "The lead case construing the language of 'armed with a firearm' and addressing the definition of arming for purposes of former section 12022 is *Bland, supra,* 10 Cal.4th 991. In *Bland,* our Supreme Court, contrasting *arming* with *use* of a firearm, explained that former section 12022, which imposed an additional prison term for anyone "armed with a firearm in the commission" of a felony, applied where "the defendant has the specified weapon available for use, either offensively or defensively." (*Id.* at p. 997.) The court explained: '[T]he statutory language "in the commission of a felony" mean[s] any time during and in furtherance of the felony. Therefore ... [a] sentence enhancement for being

"armed" with an assault weapon applies whenever during the commission of the underlying felony the defendant had an assault weapon available for use in the furtherance of that felony. [Citation.]' (*Id.* at p. 1001, italics omitted.) '[B]y specifying that the added penalty applies only if the defendant is armed with a firearm 'in the commission' of the felony offense, section 12022 implicitly requires both that the 'arming' take place *during* the underlying crime and that it have some "*facilitative nexus*" to that offense.' (*Bland,* at p. 1002.) [¶] The Supreme Court has subsequently reiterated *Bland* 's holding that the *arming* under section 12022 must have occurred both during the commission of the underlying crime and have a facilitative nexus to the crime. (*In re Tameka C.* (2000) 22 Cal.4th 190, 197.) And, most recently, in *People v. Pitto* (2008) 43 Cal.4th 228, in refusing to overrule *Bland,* the court agreed with the defendant's contention that '*Bland* appears to have adopted a "facilitative nexus" test and embraced a "purpose and effect" standard.' (*Id.* at p. 239.) In other words, a defendant is armed if the gun has a facilitative nexus with the underlying offense (i.e., it *serves* some purpose in connection with it); however, this requires only that the defendant is aware during the commission of the offense of the nearby presence of a gun available for use offensively or defensively, the presence of which is not a matter of happenstance. This does not require any intent to use the gun for this purpose. (*Pitto, supra,* at pp. 239–240.)" (*Brimmer*, *supra*, 230 Cal.App.4th at pp. 794-795; italics in original.)

The requirement of a "facilitative nexus" was further discussed in *Osuna*: "Defendant . . . contends . . . that for disqualification under the [Three Strikes] Act, there must be an underlying felony to which the firearm possession is 'tethered' or to which it has some ' " 'facilitative nexus.' " ' He concludes one cannot be armed with a firearm during the commission of possession of the same firearm. [¶] Defendant would be correct if we were concerned with imposition of an arming *enhancement*—an additional term of imprisonment added to the base term, for which a defendant cannot be punished until and unless convicted of a related substantive offense. (*People v. Dennis* (1998) 17 Cal.4th 468, 500; see *People v. Izaguirre* (2007) 42 Cal.4th 126, 134.) In *Bland, supra,* 10 Cal.4th 991, the California Supreme Court construed the enhancement contained in section 12022, which imposes an additional prison term for anyone "armed with a firearm in the commission of" a felony. The court concluded that "a defendant convicted of a possessory drug offense [is] subject to this 'arming' enhancement when the defendant possesses both drugs and a gun, and keeps them together, but is not present when the police seize them from the defendant's house[.]" (*Bland, supra,* at p. 995.) . . . [¶] Having a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon. Thus, a defendant convicted of violating section 12021 does not, regardless of the facts of the offense, risk imposition of additional punishment pursuant to section 12022, because there is no 'facilitative nexus' between the arming and the possession. However, unlike section 12022, which requires that a

defendant be armed '*in* the commission of' a felony for additional punishment to be imposed (italics added), the Act disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm '[*d*] *uring* the commission of' the current offense (italics added). 'During' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' (Webster's 3d New Internat. Dict. (1986) p. 703.) In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. (*Bland, supra,* 10 Cal.4th at p. 1002 [' "in the commission" of' requires both that ' "arming" ' occur during underlying crime *and* that it have facilitative nexus to offense].)" (*Osuna*, *supra*, 225 Cal.App.4th at pp. 1030-1032, italics in original.)

The element of possession of a firearm was further defined in *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312 (italics in original, footnote omitted): "As cross-referenced in section 1170.126, subdivision (e)(2), a commitment offense is ineligible for recall of sentence if "[*d*] *uring* [*its*] *commission* ..., the defendant used a firearm, *was armed with a firearm* or deadly weapon, or intended to cause great bodily injury to another person." (§ 667, subd. (e)(2)(C)(iii), italics added.) The parties have not suggested that we should interpret "armed" any differently in this context than its interpretation for purposes of the firearm enhancement in section 12022: A defendant is armed if the gun has a facilitative nexus with the underlying offense (i.e., it *serves* some purpose in connection with it); however, this requires only that the defendant is aware during the commission of the offense of the nearby presence of a gun *available* for use offensively or defensively, the presence of which is not a matter of happenstance. This does not require any *intent* to use the gun for this purpose. (*People v. Pitto* (2008) 43 Cal.4th 228, 239–240.)" "[A]lthough we will not hazard a definitive effort to parse the sheep from the goats (see *Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321, 328), not *every* commitment offense for unlawful possession of a gun *necessarily* involves being armed with the gun, if the gun is not otherwise available for immediate use in connection with its possession, e.g., where it is under a defendant's dominion and control in a location not readily accessible to him at the time of its discovery." (*Elder*, 227 Cal.App.4th at p. 1313; italics in original.)

Defendant was properly found to be armed with a firearm as part of his conviction for being a felon in possession of a gun. Although the police did not see him in actual possession of a gun, defendant was shown to have placed the gun in a trash can readily accessible to him. (*People v. White* (2016) 243 Cal.App.4th 1354.)

The probation report is not part of the record of conviction. (*People v. Burns* (2015) 242 Cal.App.4th 1452.) The court erred in relying on the probation report

in determining whether the defendant was armed during the commission of a crime.

The difference between "arming" and "possession" was discussed in *People v. Byers* (2020) 53 Cal.App.5th 1106 (*Byers*). "Being armed with a firearm is to be distinguished from possessing one. Possessing a firearm can be either actual, as when it is in the defendant's immediate possession, or it can be constructive, as when it is under the defendant's dominion or control. [Citation.] In contrast, being armed with a firearm means having it 'available for use, either offensively or defensively.' [Citations.] Also, a finding that a felon was armed during his possession of a firearm requires 'a temporal nexus between the arming and the underlying felony.' [Citations.] Thus, a defendant is armed with a weapon even if it is not on his person if he knows it is in a place readily accessible to him. [Citation.]" (*Byers*, *supra*, 53 Cal.App.5th at p. 1110.) "[The court's] reasoning appears to equate constructive possession of a firearm with a finding he was armed with them. But the two are not synonymous. '[C]onstructive possession does not equate to "armed" possession without at least some indication of ready access in close temporal proximity to the discovery of the offense.' [Citation.] '[N]ot every commitment offense for unlawful possession of a gun *necessarily* involves being armed with the gun, if the gun is not otherwise available for immediate use in connection with its possession, e.g., where it is under a defendant's dominion and control in a location not readily accessible to him at the time of its discovery.' [Citation.] Equating constructive possession of a firearm with being armed renders meaningless the requirements of ready access and temporal nexus. [Citation.] Byers was miles away from the firearms when they were found and, moreover, there was no evidence connecting him to those firearms other than that they were in a house where he had been seen earlier in the day and where his car was parked and documents bearing his name were found. Therefore, there is insufficient evidence he was armed with a firearm during the offense of possessing the firearm." (*Byers*, *supra*, 53 Cal.App.5h at p. 1112.)

Automobile as a deadly weapon

An inmate is armed with a deadly weapon within the meaning of clause (iii) of subparagraph (C) of paragraph (2) of subdivision (e) of section 667 and clause (iii) of subparagraph (C) of paragraph (2) of subdivision (c) of section 1170.12 (hereafter referred to collectively as "clause (iii)") when he or she personally and intentionally uses a vehicle in a manner likely to produce great bodily injury. *People v. Perez* (2018) 4 Cal.5th 1055, 1065-1068.) Although a vehicle is not a deadly weapon per se, it can become one, depending on how it is used. (See, *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1183 [the defendant deliberately raced vehicle through red light at busy intersection and collided with another vehicle, causing injury to another]; *People v. Golde* (2008) 163

Cal.App.4th 101, 109 [the defendant accelerated toward victim at about 15 miles per hour three or four times as victim ran back and forth to avoid vehicle]; *People v. Russell* (2005) 129 Cal.App.4th 776, 779, 781–782 [the defendant knowingly and intentionally pushed victim into path of oncoming vehicle]; *People v. Wright* (2002) 100 Cal.App.4th 703, 705, 707–709 [the defendant intentionally drove pickup truck close to persons with whom he had contentious relations].)

Other weapons

People v. Valdez (2017) 10 Cal.App.5th 1338, 1348 (*Valdez*), determined an incarcerated defendant was in possession of a knife found in his prison cell while he was in the shower. There, defendant was convicted of possession of a prison-made knife with two prior strike convictions. The denial of his motion for resentencing was affirmed because the defendant was armed with a knife. Defendant challenged the finding because he was in the shower when the knife was actually found in his cell by prison authorities. The challenge was rejected. "Here the possessory crime is the possession of a sharp instrument in prison. Possessory offenses, such as drug possession or possession of a deadly weapon, are ' "continuing offense[s], one[s] that extend[ ] through time' and create criminal liability 'throughout the entire time the defendant asserts dominion and control.' (*Bland, supra*, 10 Cal.4th at p. 999.) Thus, even if it is true that the weapon was not in defendant's actual physical possession at the precise time it was discovered, this does not necessarily undermine a finding that he was armed with the deadly weapon at other relevant times so as to support the trial court's determination. The instant case, where the weapon is stored in an inmate's cell, is an example of continuing or ongoing possession. Indeed, the discovery of the weapon in defendant's cell presents a stronger case for a finding that he was armed than the circumstances in *Bland* because defendant, an administrative segregation prisoner, spent the vast majority of his time in the cell where the weapon was discovered, whereas it is not clear how much time the defendant in *Bland* spent in his bedroom where police discovered the assault rifle." (*People v. Valdez* (2017) 10 Cal.App.5th 1338, 1348.)

People v. Cruz (2017) 15 Cal.App.5th 1105, held that a "not guilty" verdict does not prohibit the court finding, by a preponderance of the evidence, that a defendant was armed with a weapon for purposes of disqualification from Propoosition 36. Cruz was convicted of false imprisonment by violence and misdemeanor assault. Although the victim testified defendant tried to stab her with a knife and ran the knife between her legs, the jury found the defendant not guilty of assault with a deadly weapon and assault with intent to commit rape. The jury found the allegation that the defendant used a knife in the commission of the false imprisonment as "not true." "Appellant argue[d] that

the jury acquitted on the ADW count. But that is not dispositive of whether he was armed during the commission of the false imprisonment. Arming 'requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. [Citation.]' (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032.) 'A defendant is *armed* if the defendant has the specified available weapon for use, either offensively or defensively. [Citations.]' (*Bland*, *supra*, 10 Cal.4th at p. 997; *Blakely*, *supra*, 225 Cal.App.4th at p. 1051; *Osuna*, at p. 1029.) "'[I]t is the availability - the ready access - of the weapon that constitutes arming.' [Citation.]" (*Bland*, at p. 997.) [¶] Appellant had a kitchen knife and struggled with the victim while holding it. He was 'armed' with a knife. The record shows that appellant had ready access to more than one knife for offensive or defensive purposes during the commission of the false imprisonment. (*Hicks*, *supra*, 231 Cal.App.4th at p. 286 [substantial evidence standard applies]; *Osuna*, *supra*, 225 Cal.App.4th at p. 1040 [same].) We, accordingly, reject the argument that the not guilty verdict on the ADW count constitutes a finding that appellant was not armed during the commission of the false imprisonment by violence." (*Cruz*, supra, 15 Cal.App.5th at p. 1111, italics in original.)

Cruz found that the acquittal on the "use" allegation also was not dispositive. "Appellant argues that the jury's not true finding on the knife use enhancement (§ 12022, subd. (b)(1)) establishes eligibility for resentencing. This enhancement applies only if the knife had a facilitative nexus in the commission of the offense. (*Bland, supra,* 10 Cal.4th at pp. 1001-1003; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 794-795.) Proposition 36 turns on whether the defendant was armed "*during the commission* of the current offense" (§ 1170.12, subd. (c)(2)(C)(iii)), which is different than a sentence enhancement for use of a weapon "*in the commission*" of the offense. (§ 12022, subd. (b)(1).) "'During' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' [Citation.] In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032; see *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1313 [noting "illogic" of conflating section 12202 enhancement provision with Proposition 36's ineligibility provision].) [¶] "'[I]n the commission" of the felony offense, . . . implicitly requires both that the "arming" take place *during* the underlying crime and that it have some "*facilitative nexus"* to that offense.' (*Bland*, *supra*, 10 Cal.4th at p. 1002.) As explained in *Osuna*, *supra,* 225 Cal.App.4th at page 1032, the difference in language is significant. 'Since the Act uses the phrase "[d]uring the commission of the current offense," and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, we conclude the literal language of the Act disqualifies an inmate from resentencing if he or she was armed with a [knife] during the [false imprisonment].' (*Osuna*, at p. 1032.) Because Proposition 36 looks to whether appellant was armed 'during' the false

imprisonment rather than 'in the commission of it,' the not true finding on the weapon use enhancement does not render appellant eligible for resentencing. [¶] The Proposition 36 trial court did mention that appellant 'used' the knife during the false imprisonment. This may be factually true but the observation is at variance with the prior jury determination. The trial court's choice of the word, 'used,' was superfluous. Its choice of the word 'armed' is determinative." (*Cruz, supra,* 15 Cal.App.5th at pp. 1111-1112; italics in original.)

Intent to cause bodily harm

Sections 667, subdivision (e)(2)(C)(iii), or 1170.12, subdivision (c)(2)(C)(iii), also require traditional third strike sentencing if "[d]uring commission of the current offense, the defendant . . . intended to cause great bodily injury to another person." It is not clear whether the intent must be specific to the particular conviction or whether it is simply the general objective of the criminal enterprise.

People v. Thomas (2019) 39 Cal.App.5th 930, 938-939 (*Thomas*), holds the defendant may be excluded from the benefits of Proposition 36 because the current crime demonstrated an intent to cause great bodily injury to another person, even though the defendant was acquitted by the jury of personally inflicting great bodily injury. It is only necessary to show defendant *intended* to cause such injury. The court properly inferred such intent from the following facts: "Here, substantial evidence supports the trial court's finding that appellant acted with intent to cause great bodily injury based on the circumstances of the offense. As Chillious was taking his jacket out of the closet, appellant—suddenly and without provocation—punched Chillious hard on the left side of his jaw. The blow caused Chillious to fall into the closet door, landing on his knee and hitting his head on the wall. While Chillious was still down, appellant punched him again on the right side of his jaw. The force of the two blows broke Chillious's jawbone in two places, caused a gash on the right side of his jaw, and dislocated a tooth. The trial court emphasized that its finding that appellant intended to inflict great bodily injury was based on the evidence of appellant's conduct, and not on the severity of the victim's injuries." (*Id.*, at pp. 936-937.)

For the purposes of exclusion from the new sentencing provisions, "serious bodily injury" is the same as "great bodily injury." (*People v. Johnson* (2016) 244 Cal.App.4th 384.)

Date of interpretation of statutes

Proposition 36 amended section 1170.125 to specify that "[n]otwithstanding Section 2 of Proposition 184, as adopted at the November 8, 1994, General

Election, for all offenses committed on or after November 7, 2012, all references to existing statutes in Sections 1170.12 and 1170.126 are to those sections as they existed on November 7, 2012." *People v. Johnson* (2015) 61 Cal.4th 674, 682-688, specifies whether a crime is a serious or violent felony for the purpose of Proposition 36 is determined as of the effective date of the proposition, November 7, 2012.

The intent of the amendment to section 1170.125 with the respect to the eligibility for resentencing is not entirely clear. As noted above, section 1170.125 is amended to provide that "for all offenses committed on or after November 7, 2012, all references to existing statutes in [section] . . . 1170.126 are to those sections as they existed on November 7, 2012." On its face, the amendment makes no sense – section 1170.126 only applies to crimes committed *prior to* November 7, 2012: "The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment pursuant to [the Three Strikes law], whose sentence under this act would not have been an indeterminate life sentence." (§ 1170.126, subd. (a).)

The intent of the amendment to section 1170.125, when viewed against the opening paragraph to section 1170.126(a), is to limit the ability to request resentencing to those persons who would be eligible for a lower sentence *had the crime been committed on or after November 7, 2012.* In determining whether the defendant has been convicted of a serious or violent felony for the purposes of determining eligibility for resentencing, the court must look to the list of serious or violent felonies existing at the time of filing the petition for relief, not the time when the underlying crime was committed. (*People v. Galvan* (2015) 235 Cal.App.4th 1318.) For example, Proposition 21, enacted March 7, 2000, added section 422, making criminal threats, to the list of serious felonies in section 1192.7, subdivision (c)(38). It is of no benefit to a defendant sentenced to a 25 year-to-life term for a violation of section 422 prior to 2000 that the crime was not then listed as a serious felony. Based on the objective intent of the amendment to section 1170.125, eligibility for resentencing is based on the interpretation of statutes as they existed on or after November 7, 2012. In the case of a person convicted of a violation of section 422 prior to March 7, 2000, he or she would not be eligible for resentencing because section 1192.7, subdivision (c)(38), as it read on November 7, 2012, lists section 422 as a serious felony.

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

The initiative is not entirely clear regarding the sentencing of non-serious and non-violent new felonies when the defendant is also convicted in the current proceeding of a serious or violent felony.

People v. Johnson (2015) 61 Cal.4th 674, appears to resolve the issue, at least in the context of a motion for resentencing under section 1170.126. *Johnson* holds that a defendant, who has one or more serious or violent convictions in a case, is not excluded from the benefits of Proposition 36 on the counts that are not serious or violent. "In sum, section 1170.126 is ambiguous as to whether a current offense that is serious or violent disqualifies an inmate from resentencing with respect to another count that is neither serious nor violent. Considering section 1170.126 in the context of the history of sentencing under the Three Strikes law and Proposition 36's amendments to the sentencing provisions, and construing it in accordance with the legislative history, we conclude that resentencing is allowed with respect to a count that is neither serious nor violent, despite the presence of another count that is serious or violent. Because an inmate who is serving an indeterminate life term for a felony that is serious or violent will not be released on parole until the Board of Parole Hearings concludes he or she is not a threat to the public safety, resentencing with respect to another offense that is neither serious nor violent does not benefit an inmate who remains dangerous. Reducing the inmate's base term by reducing the sentence imposed for an offense that is neither serious nor violent will result only in earlier consideration for parole. If the Board of Parole Hearings determines that the inmate is not a threat to the public safety, the reduction in the base term and the resultant earlier parole date will make room for dangerous felons and save funds that would otherwise be spent incarcerating an inmate who has served a sentence that fits the crime and who is no longer dangerous." (*Johnson*, at pp. 694-695.)

3. Excluded inmates

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

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

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

Since *attempted* forcible oral copulation is not listed in Welfare and Institutions Code, section 6600, subdivision (b), conviction of that offense, in itself, will not bar defendant from relief under section 1170.126. (*People v. Jernigan* (2014) 227 Cal.App.4th 1198.) A review of the entire record of conviction, however, may disclose facts that will result in the exclusion of the defendant. (*Id*. at pp. 1208-1209.)

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

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

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

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

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

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

(h) Any serious or violent offense punishable in California by life imprisonment or death.

Persons convicted of a crime with a base term punishment of life in prison will be excluded from the benefits of Proposition 36. There is an issue, however, whether a defendant who has been convicted of a base term that does not provide a life term, but which becomes a life term by virtue of an enhancement or alternative sentencing scheme, is considered to have been convicted of an

offense punishable by life imprisonment. *People v. Hernandez* (2017) 10 Cal.App.5th 192, a Proposition 47 case, holds subdivision (h) will not apply if the life term is imposed as a result of a recidivist statute such as the Three Strikes law. In *Hernandez* the defendant was convicted of a robbery, but because of prior serious felony convictions, he received a 25-life sentence under the Three Strikes law. Nothing in *Hernandez* suggests it should not apply to Proposition 36.

Hernandez did not address the situation where the life term is imposed because of an enhancement. The answer to this issue is found in the interpretation of the phrase "serious or violent offense *punishable in California by life imprisonment*." (italics added.) *People v. Williams* (2014) 227 Cal.App.4th 733 (*Williams*), which sets forth a helpful analysis of three California Supreme Court cases, is instructive.

The *Williams* case

Williams concerned the application of the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). That section requires the addition of 10 years to any term imposed for a violent felony committed for the benefit of a street gang under section 186.22, subdivision (b)(1). Section 186.22, subdivision (b)(1) "states that '[e]xcept as provided in paragraphs 4 and 5,' the trial court shall impose the gang enhancement. Subdivision (b)(5) provides, in relevant part: '[A]ny person who violates this subdivision in the commission of a felony *punishable by imprisonment in the state prison for life* shall not be paroled until a minimum of 15 calendar years have been served.' (Italics added.) 'This provision establishes a 15–year minimum parole eligibility period, rather than a sentence enhancement for a particular term of years.' [Citation omitted.]" (*Williams*, *supra*, 227 Cal.App.4th at p. 740; italics in original.)

Williams found three Supreme Court cases relevant to the issue. "The first is *People v. Montes* (2003) 31 Cal.4th 350, 352 (*Montes*). In *Montes,* the defendant was convicted of attempted murder with findings that he committed the crime for the benefit of a street gang (§ 186.22, subd. (b)(1)) and that he had personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). The trial court sentenced him to the 7–year midterm for the attempted murder conviction plus a consecutive 10–year term for the gang enhancement, plus a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). (*Id*. at p. 353.) [¶] The issue was whether 186.22, subdivision (b)(5)'s use of the phrase 'a felony punishable by imprisonment ... for life' applied to the defendant because his felony conviction *coupled with his firearm enhancement* resulted in a life sentence. (*Montes, supra,* 31 Cal.4th at p. 352.) Based upon its analysis of legislative and voter intent, *Montes* concluded: '[S]ection 186.22(b)(5) applies only where the felony *by its own terms provides for a life sentence.*' (*Ibid.*; italics added.) *Montes*

therefore found that the consecutive 10–year term for the gang enhancement had been correctly imposed because the defendant had not been convicted of 'a felony punishable by imprisonment ... for life.' (§ 186.22, subd. (b)(5).) (*Id*. at p. 353.)" (*Williams*, *supra*, 227 Cal.App.4th at pp. 740-741; italics in original; footnote omitted.)

The second case "is *People v. Lopez* (2005) 34 Cal.4th 1002(*Lopez*). In *Lopez,* the defendant was convicted of first degree murder (§ 187). The punishment for that crime is a term of 25 years to life. (§ 190, subd. (a).) The jury also found that the defendant had committed the murder for the benefit of a street gang (§ 186.22, subd. (b)). The trial court sentenced the defendant, among other things, to 25 years to life in state prison for murder with a consecutive 10–year term for the gang enhancement. (*Id*. at p. 1005.) [¶] The Supreme Court granted review in *Lopez* to decide whether a defendant convicted of first degree murder with a gang enhancement finding should be subject to a consecutive term of 10 years under section 186.22, subdivision (b)(1)(C) or, instead, the minimum parole eligibility term of 15 years set forth in section 186.22, subdivision (b)(5). [¶] The heart of the dispute was whether the phrase 'punishable by imprisonment ... for life' in section 186.22, subdivision (b)(5) meant 'all life terms (including terms of years to life)' as contended by defendant or, as urged by the Attorney General, meant "merely 'straight' life terms" so that the phrase did not include a sentence for first or second degree murder. (*Lopez, supra,* 34 Cal.4th at p. 1007.) *Lopez* concluded that the statutory language 'is plain and its meaning unmistakable': 'the Legislature intended section 186.22(b)(5) to encompass both a straight life term as well as a term expressed as years to life ... and therefore intended to exempt those crimes from the 10–year enhancement in subdivision (b)(1)(C). [Citation.]' (*Id*. at pp. 1006–1007.) Consequently, *Lopez* directed deletion of the 10–year sentence for the gang enhancement. (*Id*. at p. 1011" (*Williams*, *supra*, 227 Cal.App.4th at pp. 741-742; footnote omitted.)

The third case is "[*People v. Jones* (2009)] 47 Cal.4th 566. In *Jones,* the defendant was convicted of shooting at an inhabited dwelling, a crime punishable by a sentence of three, five or seven years. (§ 246.) The trial court selected the seven-year term but then imposed a life sentence pursuant to section 186.22, subdivision (b)(4) because the jury had found the defendant committed the crime to benefit a street gang. (*Id*. at p. 571, 98 Cal.Rptr.3d 546, 213 P.3d 997.) In addition, the trial court imposed a consecutive 20–year sentence because the defendant had personally and intentionally discharged a firearm in committing the offense. (§ 12022.53, subd. (c).) (*Id*. at p. 569.) The sentence for that latter enhancement applies to the felonies listed in section 12022.53, subd. (a)(1–16) as well as to '[a]ny felony punishable by ... imprisonment ... for life.' (§ 12022.53, subd. (a)(17).) Shooting at an inhabited dwelling is not one of the listed felonies but the trial court determined that

defendant had been convicted of a felony punishable by life imprisonment because of the application of section 186.22, subdivision (b)(4).

"Section 186.22, subdivision (b)(4) provides: 'Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment ... [¶] (B) ... a felony violation of Section 246.' [¶] On appeal, the issue was whether the trial court properly imposed the 20–year sentence enhancement (§ 12022.53) based upon its finding that the defendant had suffered a felony punishable by life. The defense contended that the phrase '[a]ny felony punishable by ... imprisonment ... for life' (§ 12022.53, subd. (a)(17)) should be *narrowly construed* as it was in *Montes* to be limited to a felony which 'by its own terms provides for a life sentence.' (*Montes, supra,* 31 Cal.4th at p. 352.) In particular, the defendant urged that his life term could not trigger application of section 12022.53, subdivision (c)'s additional 20–year prison term 'because his sentence of life imprisonment did not result from his conviction of a *felony* (shooting at an inhabited dwelling) but from the application of section 186.22(b)(4), which sets forth not a felony but a penalty.' (*Jones, supra,* 47 Cal.4th at p. 575.)" (*Williams*, *supra*, 227 Cal.App.4th at pp. 742-743, footnotes omitted, italics in original.)

Williams observed that *Jones* distinguished *Montes,* quoting *Jones*: "'Thus, this court in *Montes, supra,* 31 Cal.4th 350 , narrowly construed the statutory phrase "a felony punishable by imprisonment ... for life," which appears in subdivision (b)(5) of section 186.22, as applying only to crimes where the underlying felony provides for a term of life imprisonment. (*Id.* at p. 352 .) Defendant here argues that to be consistent with *Montes,* we should give the statutory phrase "felony punishable by ... imprisonment in the state prison for life," which appears in subdivision (a)(17) of section 12022.53, the same narrow construction, and that, so construed, it does not include a life sentence imposed under an alternate penalty provision. *We agree with defendant that these statutory phrases should be construed similarly*. But we disagree that, construed narrowly, a felony that under section 186.22(b)(4) is punishable by life imprisonment is not a "felony punishable by ... imprisonment in the state prison for life" within the meaning of subdivision (a)(17) of section 12022.53. [¶] 'Unlike the life sentence of the defendant in *Montes, supra,* 31 Cal.4th 350 , which was imposed as a *sentence enhancement* (a punishment added to the base term), here defendant's life sentence was imposed under section 186.22(b)(4), which sets forth the *penalty for the underlying felony* under specified conditions. The difference between the two is subtle but significant. "Unlike an enhancement, which provides for an *additional term* of imprisonment, [a penalty provision] sets forth an alternate penalty *for the underlying felony itself,* when the jury has determined that the

defendant has satisfied the conditions specified in the statute." [Citation.] Here, defendant committed the felony of shooting at an inhabited dwelling (§ 246), he personally and intentionally discharged a firearm in the commission of that felony (§ 12022.53(c)), and because the felony was committed to benefit a criminal street gang, it was punishable by life imprisonment (§ 186.22(b)(4)). Thus, imposition of the 20–year sentence enhancement of section 12022.53(c) was proper.' (*Jones, supra,* 47 Cal.4th at pp. 577–578, some italics added.)" (*Williams*, *supra*, 227 Cal.App.4th at p. 743, italics in original, footnote omitted.)

In concluding the trial court erred in imposing the 10-year gang enhancement, *Williams* observed: "In this case, defendant received sentences of 25 years to life. These sentences of 25 years to life constitute life sentences within the meaning of section 186.22, subdivision (b)(5). (*Lopez*, *supra*, 34 Cal.4th at p. 1007.) These life sentences resulted from the application of the Three Strikes law. The Three Strikes law is a penalty provision, not an enhancement. It is not an enhancement because it does not add an additional term of imprisonment to the base term. Instead, it provides for an alternate sentence (25 years to life) when it is proven that the defendant has suffered at least two prior serious felony convictions. (See, *e.g.*, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527['The Three Strikes law ... articulates an alternative sentencing scheme for the current offense rather than an enhancement.'].)" (*Williams*, *supra*, 227 Cal.App.4th at p. 744.)

Application of *Montes, Lopez, Jones* and *Williams* to Proposition 36

Application of *Montes*, *Lopez*, *Jones*, and *Williams* to the Proposition 36 exclusion under section 667, subdivision (e)(2)(C)(iv)(h), must be guided by the intent of the enactors in creating the restriction. It is clear the enactors specifically intended to exclude dangerous and violent offenders from any of the benefits of the initiative. "Prop. 36 will assure that violent repeat offenders are punished and not released early." (Argument in Favor of Proposition 36, Voter Information Guide, p. 52.) "The Three Strikes law will continue to punish dangerous career criminals who commit serious violent crimes – keeping them off the streets for 25 years to life." (*Id.*) "Prosecutors, judges and police officers support Prop. 36 because Prop. 36 helps ensure that prisons can keep dangerous criminals behind bars for life. Prop. 36 will keep dangerous criminals off the streets." (*Id*.) "Criminal justice experts and law enforcement leaders carefully crafted Prop. 36 so that truly dangerous criminals will receive no benefits whatsoever from the reform. Repeat criminals will get life in prison for serious or violent third strike crimes." (*Id*.) "Prop. 36 requires that murders, rapists, child molesters, and other dangerous criminal *serve their full sentences*." (Rebuttal to Argument Against Proposition 36, Voter Information Guide, p. 53; italics in original.) The initiative provides that "[t]his act is an exercise of the public power of the people of the State of California for the protection of the

health, safety, and welfare of the people of the State of California, and shall be liberally construed to effectuate those purposes." (§ 7, Proposition 36.)

Taking into consideration the intent of the enactors that the provisions of Proposition 36 be liberally construed to exclude dangerous and violent offenders from any of its benefits, it seems consistent that courts should consider the effect of enhancements in determining whether a particular person is excluded as having suffered an offense punishable by a life sentence.

Although *Montes* holds enhancements may not be considered for the purposes of the sentencing exception under section 186.22, subdivision (b)(5), of the STEP act, the case is distinguishable from the issue presented by Proposition 36. *Montes* did not permit the use of life-term enhancements for the purpose of prohibiting the 10-year gang enhancement because to do so would conflict with the intent of the voters. Based on the language of the STEP act, the court concluded there was an intent to exclude the gang enhancement only when the crime itself specified a life term. (*Montes*, *supra*, 31 Cal.4th at pp. 358-359.) As further evidence of the voter's intent, the Supreme Court in *Montes* observed that the exception under section 186.22, subdivision (b)(4), expressly included consideration of any enhancement, but under section 186.22, subdivision (b)(5), it did not – the omission was intentional and indicative of the intent of the voters not to consider enhancements for that purpose. (*Montes*, *supra*, 31 Cal.4th at pp. 360-361.) No such intent appears in the language of Proposition 47 – indeed, the initiative indicates exactly the opposite intent in its stated desire to deny its benefits to dangerous and violent offenders. Nothing in the initiative or in logic indicates that the enactors would want courts to exclude offenders who were convicted of crimes with stand-alone life terms, but not exclude offenders who got life terms because of an enhancement – these are all dangerous and violent persons.

***People v. Thomas* (1999) 21 Cal.4th 1122 (*Thomas*), is inapplicable**

Also distinguishable is a line of cases where courts have interpreted similar life-term language in the context of credit limitations under section 2933.1. That section limits conduct credits for persons sent to prison for *violent* offenses to 15 percent. Section 667.5, subdivision (c)(7), includes as a violent offense "[a]ny felony punishable by death or life imprisonment." In rejecting the argument that the limitation applies to all third strike offenders because of the Three Strikes law, *People v. Thomas* (1999) 21 Cal.4th 1122, 1130, held that "sections 2933.1 and 667.5(c)(7) limit a defendant's presentence conduct credit to a maximum of 15 percent only when the defendant's current conviction is itself punishable by life imprisonment, not when it is so punishable solely due to his status as a recidivist." In accord are *People v. Henson* (1997) 57 Cal.App.4th 1380, and *People v. Philpot* (2004) 122 Cal.App.4th 893, 907-908.

As observed in *Thomas*: "[S]ection 1192.7, subdivision (c)(7) (section 1192.7(c)(7)), includes as a ' "serious" ' felony, '[*a*]*ny felony punishable by death or imprisonment in the state prison for life*.' (Italics added.) As can be seen, this language parallels the language at issue in section 667.5(c)(7). If we were to interpret section 667.5(c)(7) to mean a third strike defendant falls within its purview because of his life sentence, not because of the underlying offense, a similar interpretation would necessarily obtain for section 1192.7(c)(7). 'Under the three strikes law, a trial court must sentence a defendant with two or more qualifying prior felony convictions or strikes to an indeterminate term of life imprisonment.' (*People v. Dotson* (1997) 16 Cal.4th 547, 552.) A third strike would by definition, therefore, always qualify as a serious or violent offense. [¶] The plain language of the three strikes law and our cases interpreting it compel the opposite result. In *People v. Dotson*, *supra*, 16 Cal.4th 547, for example, this court observed that 'the defendant's current felony need not be "serious" for the three strikes law to apply,' and distinguished between 'a recidivist who committed a serious third strike felony' and one 'who committed a *non*serious third strike felony.' (*Id.* at p. 555, original italics; [' "It is certainly appropriate to punish more harshly those" ' three strikes defendants ' "convicted of new serious felonies" ' than those whose most recent felony is not serious.].) Were the Attorney General's interpretation of section 667.5(c)(7) correct, this distinction would be nonsensical. [¶] Indeed, as noted in *Henson*, if every third strike qualified as a serious felony, virtually every third strike defendant would receive not only a life sentence but also a five-year enhancement under section 667, subdivision (a) (section 667(a)). (*People v. Henson*, *supra*, 57 Cal.App.4th at p. 1388.) This section 'imposes a five-year enhancement for each current conviction for a "serious" felony if the defendant previously has been convicted of a "serious" felony. If a third strike were automatically considered a "serious" felony by virtue of the fact it carries a life sentence, the five-year enhancement would be imposed in every third strike case involving a prior serious felony conviction regardless of what offense constituted the third strike." (*Ibid.*, fn. omitted.) We have held otherwise. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529 ['The five-year enhancements mandated by section 667, subdivision (a), ... apply only when the defendant's current offense is a "serious felony" within the meaning of section 1192.7, subdivision (c), while the sentences mandated by the Three Strikes law apply whether or not the current felony is "serious." ']; *People v. Dotson*, *supra*, 16 Cal.4th at p. 555 [under section 667(a), 'the current felony offense must be "serious" within the meaning of section 1192.7, subdivision (c), for the five-year enhancement to apply'].) [¶] Given this limitation of section 667(a) five-year enhancements to recidivists whose current offenses are serious, it is equally appropriate to limit sections 2933.1 and 667.5(c)(7) to defendants whose current offenses, in and of themselves, and without reference to the punishment accorded under the three

strikes law, are violent. (*People v. Henson*, *supra*, 57 Cal.App.4th at p. 1389.)" (*Thomas*, *supra*, 21 Cal.4th at pp. 1128-1129.)

The circumstances as discussed in *Thomas* are manifestly different than those contemplated by Proposition 36. The proposition does not involve consideration of whether a current non-violent offense becomes a statutorily defined violent offense under 667.5, subdivision (c)(7), by using the Three Strikes law, such that virtually every third strike defendant would receive not only a life sentence but also a five-year enhancement under section 667. The *Thomas* line of cases is thus inapplicable to interpreting the initiative.

The defendant's disqualification is based on a prior "conviction" of a designated crime. While the prosecution is required to plead and prove the prior crime as a disqualifier, there is no requirement that there be a pleading and proof of the prior crime as a "strike." (§ 667, subd. (e)(2)(C).) It is the fact of the conviction of a particular crime that is relevant, not whether the prior conviction also was used as a strike under the Three Strikes law.

Sections 667, subdivision (e)(2)(C)(iv), and 1170.12, subdivision (c)(2)(C)(iv), specify the defendant will remain eligible for the traditional third strike sentence of at least 25-years to life if he "suffered a prior conviction, as defined in subdivision (b) of this section, for any of the following *serious and/or violent felonies*." (Italics added.) The statutes then detail the specific prior crimes that will make him ineligible for the new sentencing scheme, and include solicitation to commit murder (§ 653f) and possession of a weapon of mass destruction (§ 11418, subd. (a)(1)), neither one of which are defined as a "serious or violent felony." It is reasonable to assume the introductory requirement of the prior crime being a serious or violent felony has no effect on the use of either sections 653f and 11418 as a disqualifier. Rather, the inclusion of the two statutes simply reflects the enactors' intent to also disqualify these persons from the benefits of Proposition 36.

Pleading a prior conviction as a "super strike" under Proposition 36

People v. Tennard (2017) 18 Cal.App.5th 476, 486, discusses the level of specificity required for the pleading of a prior conviction as a "super strike" for the purposes of an exclusion from the benefits of Proposition 36. "The language of section 667, subdivision (e)(2)(C) is clear and unambiguous and governs our interpretation of the statute. Subdivision (e)(2)(C) has *two* pleading and proof requirements. The first requires the prosecution to plead and prove that the defendant has *two or more* prior strikes. This is plainly necessary because subdivision (e)(2)(C) applies *only* if the defendant has two or more prior strikes *and* the current offense is not a strike. (§ 667, subd. (e)(2)(C).) The second pleading and proof requirement requires the prosecution to plead and prove

that 'any' of the exceptions to second strike sentencing eligibility listed in subdivision (e)(2)(C)(i) through (iv) apply. The question defendant raises requires us to determine the level of specificity that is required to plead that an exception to second strike sentencing eligibility applies. [¶] The plain language of section 667, subdivision (e)(2)(C) only requires the prosecution to 'plead and prove' that 'any' of the exceptions to second strike sentencing eligibility set forth in subparagraphs (i) through (iv) apply. Neither subdivision (e)(2)(C) nor any other part of section 667 requires the prosecution to *specifically* 'plead and prove' that an exception applies by using any particular language or by referencing the particular subparagraph of the exception or disqualifying factor. As noted, all of the exceptions are based either on the defendant's current conviction (§ 667, subd. (e)(2)(C)(i)-(iii)) or on specified super strike convictions (*id*., subd. (e)(2)(C)(iv))." (*Tennard, supra*, 18 Cal.App.5th at p. 486, italics in original.)

Timing of the prior conviction

To be disqualified from resentencing because of a prior conviction for a "super strike," the conviction must precede the conviction which resulted in the 25-year-to-life sentence. "[S]ection 1170.126 is written so that statutory eligibility determinations are made as of the date the defendant was sentenced to his or her indeterminate third strike life sentence. The current conviction is the conviction the inmate is currently serving a third strike indeterminate life sentence for, and prior convictions are those which occurred *prior* to the inmate's current conviction." (*People v. Spiller* (2016) 2 Cal.App.5th 1014, 1022.)

Note that the rule is different for similar relief under Proposition 47. There the prior conviction of a super strike will disqualify the defendant from relief so long as the conviction occurs prior to the ruling on the requested relief – even if the conviction occurs after the crime at issue. (*People v. Casillas* (2017) 13 Cal.App.5th 745.)

Out-of-state convictions and juvenile adjudications

Section 667, subdivision (e)(2)(C)(iv), excludes a defendant who has "suffered a prior serious or violent *felony conviction*, as defined in subdivision (d) of this section, for any of the following felonies" -- the "super strikes." The reference to "subdivision (d) of this section" obviously means section 667, subdivision (d). Section 667, subdivision (d), provides that "[n]otwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior *conviction of a serious or violent felony* shall be defined as" (1) an adult California conviction under sections 667.5, subdivision (c), and 1192.7, subdivision (c) [§ 667, subd. (d)(1)]; (2) an out-of-state conviction "for an offense that, if committed in California is punishable by imprisonment in the state prison . . . if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of" a

California serious or violent felony [§ 667, subd. (d)(2)]; and (3) designated juvenile adjudications [§ 667, subd. (d)(3)].

Since the definition of "conviction of a serious or violent felony" contained in section 667, subdivision (d), is incorporated by reference in section 667, subdivision (e)(2)(C)(iv), and since that definition specifically includes designated juvenile adjudications, it appears that a person who has been adjudicated for an offense listed in section 667, subdivision (d)(3), will be excluded from the benefits of Proposition 36. While juvenile "adjudications" and adult "convictions" are distinguished in many other contexts, for the purposes of the exclusion under section 667, subdivision (e)(2)(C)(iv), they are treated the same. Section 667, subdivision (d)(3), provides that "[a] prior juvenile adjudication shall constitute a *prior serious or violent felony conviction* for purposes of sentence enhancement if:

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

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

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

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

People v. Arias (2015) 240 Cal.App.4th 161, holds that a qualified juvenile adjudication will constitute a disqualifying prior conviction for the purposes of Proposition 36. The provisions of Welfare and Institutions Code, section 203, which specify that juvenile adjudications are precluded from being considered "convictions" "for any purpose," have no application to the Three Strikes law and Proposition 36. Generally in accord with *Arias* is *People v. Thurston* (2016) 244 Cal.App.4th 644. .

Use of section 1385

Section 1385 may not be used to dismiss disqualifying prior convictions to make a defendant eligible for resentencing under section 1170.126. (*People v. Brown* (2014) 230 Cal.App.4th 1502.) "Section 1170.126 grants a trial court the power to determine an inmate's eligibility to be resentenced under the Reform Act *only*

if the inmate satisfies the three criteria set out in subdivision (e) of the statute, as previously noted, and contains no provision authorizing a trial court to disregard the required criteria. (§ 1170.126, subd. (e).) Rather, the plain language of subdivision (e) clearly provides that an inmate must first satisfy each criteria set out in subdivision (e) of section 1170.126 *before* he or she can be resentenced under the Reform Act, and gives the trial court no discretion to depart from the three-step requirement. In other words, if the inmate does not satisfy one or more of the criteria, section 1170.126 grants the trial court *no power* to do anything but deny the petition for recall of sentence. [¶] . . . As the People note, the absence of discretionary authority in subdivision (e) of the statute shows the Legislature intended to withhold statutory power of a trial court to exercise its discretion in the furtherance of justice under section 1385 in determining a defendant's eligibility to be resentenced under the Reform Act. Clearly, the Legislature expressly authorized a trial court to exercise its discretion when determining whether granting relief would pose an unreasonable risk of danger to public safety as noted in section 1170.126, subdivisions (f) and (g). However, the plain language of subdivision (e) of the statute authorizes no such discretionary power to a trial court in deciding an inmate's eligibility under the Reform Act." (*Brow*n, *supra*, 230 Cal.App.4th at pp. 1511-1512, italics in original.)

Void resentencing

In *People v. Amaya* (2015) 239 Cal.App.4th 379, during an application for resentencing, the court was mistakenly advised by all counsel and the clerk that a gang enhancement had been previously stricken. The court considered the defendant eligible for relief and granted a resentencing in accordance with Proposition 36. It was later determined the enhancement had not been stricken. The trial court properly recalled the reduced sentence and re-imposed the original sentence. Because the defendant was ineligible for resentencing, the second judgment was "void on the record" and could be set aside at any time. (*Id.,* at pp. 386-387.)

4. Procedure for initial screening

(a) Referral to original sentencing judge

When a petition for resentencing is received by the court, it should be filed and transmitted to the original sentencing judge for initial review. Section 1170.126, subdivision (j), provides tdhat "[i]f the court that originally sentenced the defendant is not available to resentence the defendant, the presiding judge shall designate another judge to rule on the defendant's petition." In *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1300-1301, the court of appeal made it clear that section 1170.126, subdivision (b), requires that the

original sentencing judge must rule on the inmate's petition unless that right is waived.

What constitutes "unavailability" of a judge is open to some interpretation. The issue was discussed by the Supreme Court in *People v. Rodriguez* (2016) 1 Cal.5th 676, in the context of relitigating a motion to suppress evidence under section 1538.5, subdivision (p). The section requires the original judge to conduct the rehearing "if the judge is available." The presiding judge determined the original judge was unavailable because he had been moved to a calendar department in a different city since hearing the original motion. The Supreme Court reversed. The court acknowledged that presiding judges have considerable discretion in determining the availability of judges and how cases are assigned, but the discretion is not unlimited. "Although trial courts have discretion to determine whether a judge is available within the meaning of section 1538.5(p), that discretion must be meaningfully cabined to protect the statutory right of every defendant, if possible, to have the same judge decide any relitigated suppression motion. To that end, we find that mere inconvenience is not sufficient to render a judge unavailable for purposes of section 1538.5(p). (Cf. *People v. Arbuckle* (1978) 22 Cal.3d 749, 757, fn. 5 (*Arbuckle*) [explaining that 'a defendant's reasonable expectation of having his sentence imposed, pursuant to bargain and guilty plea, by the judge who took his plea and ordered sentence reports should not be thwarted for mere administrative convenience'].) [¶] This is not to say that reviewing courts are now free to second-guess judgment calls that are better left to the trial courts. Trial courts have considerable discretion to administer their logistical affairs, and rightly so: lodged in trial courts is likely the contextual knowledge and motivation to deploy judicial resources effectively, and to learn over time. But to adequately protect a defendant's statutory right under section 1538.5(p), we hold that a trial court must take reasonable steps in good faith to ensure that the same judge who granted the previous suppression motion is assigned to hear the relitigated motion. Only if the trial court has done so may it make a finding of unavailability. And the trial court must make such a finding on the record, so appellate review proves meaningful. (See *People v. Lewis* (2006) 39 Cal.4th 970, 1063–1064; cf. *Still v. Pearson* (1950) 96 Cal.App.2d 315, 318 ['when a judge other than the one who presided at the trial proceeds to hear the motion for a new trial, it is the best practice, in the interests of certainty and convenience, to cause a record to be made reciting the fact of the inability or absence of the judge who presided at the trial'].) Such a finding, unsupported by record evidence demonstrating the reasonable measures a trial court has taken to honor a defendant's section 1538.5(p) right, is an abuse of discretion." (*Rodriguez*, *supra*, 1 Cal.5th at pp. 690-691.)

The petition may be summarily denied without the petitioner's appearance if the petition fails to include the minimum requirements specified in section

1170.126, subdivision (d), if the petitioner is a second strike offender [section 1170.126, subdivision (c)], or if the petitioner's current felonies or past record disqualify him or her from resentencing under section 1170.126, subdivision (e). A proposed form for this order is in Appendix E.

(b) *Prima facie* determination

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

To properly rule on the petition, the court should request a copy of the petitioner's criminal record from the district attorney, the probation department, or CDCR. While most initial screenings may be accomplished with a review of the inmate's record, there may be circumstances where additional facts will be required. For example, it may not be possible from a review of the record alone to determine whether the inmate committed the current felony with the intent "to cause great bodily injury to another person." So long as the record review of the petition states a *prima facie* basis for granting relief, however, the court should grant the inmate a full qualification hearing where any additional evidence could be received on the issue of eligibility.

If the court intends to summarily deny relief based on unadjudicated factors, the court should afford the defendant a meaningful opportunity to address the issue. "As has been determined, the current matter does not call upon the trial court to consider new evidence in making its determination, which is limited to the record of conviction. Consequently, it is not essential for the court to hold a formal hearing. Considering that the record of conviction is 'set' when the trial court considers a petitioner's eligibility for resentencing, the petitioner would be well-advised to address eligibility concerns in the initial petition for resentencing. But if the petitioner has not addressed the issue and the matter of eligibility concerns facts that were not actually adjudicated at the time of the petitioner's original conviction . . . , the trial court should invite further briefing by the parties before finding the petitioner ineligible for resentencing." (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1341.)

The right of the petitioner to participate in the initial screening of a petition brought under section 1170.126 is discussed in *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 6-8: "[Section 1170.126] accords [a petitioner] the right to a *resentencing hearing* only upon a showing that he is *eligible*. It is not a right to a

hearing on the issue of eligibility, followed by the hearing on whether he would present a risk of danger to the public if resentenced. . . . [¶] [E]eligibility is *not* a question of fact that requires the resolution of disputed issues. The *facts* are limited to the record of conviction underlying a defendant's commitment offense; the statute neither contemplates an evidentiary hearing to establish these facts, nor any other procedure for receiving new evidence beyond the record of conviction. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1337, 1339 (*Bradford*).) What the trial court decides is a question of *law*: whether the facts in the record of conviction are the proper subject of consideration, and whether they establish eligibility. Therefore, this is not analogous to a hearing on a petition for habeas corpus. [¶] Finally, due process does not command a *hearing* on the threshold criteria that establish entitlement to resentencing. In a context more analogous than a petition for habeas corpus, it does not violate the due process rights of parties in a dependency proceeding for a juvenile court to refuse to hold *any* hearing on a motion for modification (Welf. & Inst. Code, § 388) unless there are allegations adequate to establish a prima facie showing of the necessary criteria of changed circumstances and benefit to the minor; nor is the court obliged to hold an *evidentiary* hearing even upon a prima facie showing, as opposed to entertaining argument as to whether the allegations establish the right to relief. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1463 [right of due process compels hearing only after prima facie showing of changed circumstances]; *In re E.S.* (2011) 196 Cal.App.4th 1329, 1339-1340 [due process does not require evidentiary hearing on motion]; *In re Heather P.* (1989) 209 Cal.App.3d 886, 891 [leaving to court the determination of prima facie showing does not violate due process].) [Footnote omitted.] [¶] Similar to the limited reach of due process in the context of modification petitions, we recently held that the parties to a section 1170.126 proceeding are entitled to a limited "additional procedural protection[]" of their right under due process to be heard (*Bradford*, *supra*, 227 Cal.App.4th at p. 1337.) The petitioner has a right to provide 'input' in the form of briefing 'if the petitioner has not addressed the issue [of eligibility in the petition] and the matter of eligibility concerns facts that were not actually adjudicated at the time of the petitioner's original conviction (as here)'; the People also have the right to submit a brief in response if the trial court sets a hearing on dangerousness (indicating that it made a preliminary determination of eligibility) in order to highlight facts in the record they assert establish ineligibility. (*Bradford*, *supra*, 227 Cal.App.4th at pp. 1340, 1341.)" (italics in original.)

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

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

(c) No plead and proof requirement

For a defendant to be excluded from the new sentencing provisions under sections 667 and 1170.12, the circumstances of the exclusion must be pled and proven by the prosecution. (§§ 667, subd. (e)(2)(C) and 1170.12, subd. (c)(2)(C).) There is no similar express pleading and proof requirement to disqualify an inmate from the resentencing provisions of section 1170.126. (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1315-1316; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332-1333; *People v. Guilford* (2014) 228 Cal.App.4th 651; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 801-803; *People v. Hicks* (2014) 231 Cal.App.4th 275; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1033; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1057-1063; *People v. Chubbuck* (2014) 231 Cal.App.4th 737 [no "plead and prove' requirement regarding a showing that the defendant "intended to cause great bodily injury to another person"].) As a practical matter, however, the prosecution has the burden of proving that the defendant should be excluded from resentencing.

(d) Right to counsel

There is no right to counsel unless and until the petitioner states a *prima facie* basis for relief. (See *In re Clark* (1993) 5 Cal.4th 750, 779 ["[I]f a petition attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns"] For a full discussion of the right to counsel at the initial screening of the petition, see discussion in Section IV(E), *infra*.

(e) Review of summary denial

For a discussion of the review of a summary denial of a petition for resentencing, see Section IV(G), *infra*.

C. The Qualification Hearing

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

1. The hearing officer

The petition must be heard by the judge who originally sentenced the defendant as a third strike offender. (§ 1170.126, subd. (b).) If for some reason the original judge is unavailable, the presiding judge must designate another judge to rule on the petition. The defendant may enter a waiver of the right to have the proceeding heard by the original sentencing judge, provided such a waiver is entered prior to any judicial decision on the petition. (*People v. Superior Court (Kaulick)*(2013) 215 Cal.App.4th 1279, 1300-1301.) Although *Kaulick* makes no mention of the prosecution's right to have the matter heard by the original judge, presumably both must join in the waiver to be effective.

What constitutes "unavailability" of a judge is open to some interpretation. The issue was discussed by the Supreme Court in *People v. Rodriguez* (2016) 1 Cal.5th 676, in the context of relitigating a motion to suppress evidence under section 1538.5, subd. (p). The section requires the original judge to conduct the rehearing "if the judge is available." The presiding judge determined the original judge was unavailable because he had been moved to a calendar department in a different city since hearing the original motion. The Supreme Court reversed. The court acknowledged that presiding judges have considerable discretion in determining the availability of judges and how cases are assigned, but the discretion is not unlimited. "Although trial courts have discretion to determine whether a judge is available within the meaning of section 1538.5(p), that discretion must be meaningfully cabined to protect the statutory right of every defendant, if possible, to have the same judge decide any relitigated suppression motion. To that end, we find that mere inconvenience is not sufficient to render a judge unavailable for purposes of section 1538.5(p). (Cf. *People v. Arbuckle* (1978) 22 Cal.3d 749, 757, fn. 5 (*Arbuckle*) [explaining that 'a defendant's reasonable expectation of having his sentence imposed, pursuant to bargain and guilty plea, by the judge who took his plea and ordered sentence reports should not be thwarted for mere administrative convenience'].) [¶] This is not to say that reviewing courts are now free to second-guess judgment calls that are better left to the trial courts. Trial courts have considerable discretion to administer their logistical affairs, and rightly so: lodged in trial courts is likely the contextual knowledge and motivation to deploy judicial resources effectively, and to learn over time. But to adequately protect a defendant's statutory right under section 1538.5(p), we hold that a trial court must take reasonable steps in good faith to ensure that the same judge who granted the previous suppression motion is assigned to hear the relitigated motion. Only if the trial court has done so may it make a finding of unavailability. And the trial court must make such a finding on the record, so appellate review proves meaningful. (See *People v. Lewis* (2006) 39 Cal.4th 970, 1063–1064; cf. *Still v. Pearson* (1950) 96 Cal.App.2d 315, 318 ['when a judge other than the one who presided at the trial proceeds to hear the motion for a new trial, it is the

best practice, in the interests of certainty and convenience, to cause a record to be made reciting the fact of the inability or absence of the judge who presided at the trial’].) Such a finding, unsupported by record evidence demonstrating the reasonable measures a trial court has taken to honor a defendant's section 1538.5(p) right, is an abuse of discretion.” (*Rodriguez*, *supra*, 1 Cal.5th at pp. 690-691.)

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

If the petition survives the initial screening procedure (discussed in Section IV(B), *supra*), the court should set the matter for a full qualification hearing. There is no time of hearing specified by section 1170.126. The hearing should be set within a "reasonable time." The inmate, the prosecution, and any victim have the right to notice of and appearance at any hearing held in connection with the qualification and resentencing procedure. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279; *People v. Manning* (2014) 226 Cal.App.4th 1133, 1144.)

The resentencing hearing is considered a "post-conviction release proceeding" under Article 1, section 28, subdivision (b)(7) of the California Constitution (Marsy's Law). (§ 1170.126, subd. (m).) As such, the victim is entitled to notice of and, if requested, participation in the qualification and resentencing proceedings. Even if the prosecution is stipulating to the resentencing, the court should assure that proper notice has been given to the victim. Section 28, subdivision (e) of the California Constitution defines “victim” as “a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term ‘victim’ also includes the person’s spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. The term ‘victim’ does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim.”

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

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

3. Qualification hearing: confirmation of eligibility

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

The scope of evidence admissible to prove or disprove the inmate's eligibility for resentencing is not defined by the statute. It is likely the court could consider any documentary evidence that is part of the "record of conviction:" "those record documents reliably reflecting the facts of the offense for which the defendant has been convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223.) Depending on the circumstances, the record of conviction can include the abstract of judgment, the section 969b prison packet, the charging document and plea form, transcripts of the inmate's plea, the factual basis given for the plea, preliminary hearing and trial transcripts, and appellate opinions. (For a full discussion of the law related to the record of conviction, see Couzens and Bigelow, "California Three Strikes Sentencing," The Rutter Group, § 4:5, pp. 4-14 - 4-26 (2013).) It is not clear, however, whether the court may consider live testimony on behalf of either the defense or prosecution. Such evidence is prohibited in the context of proving a strike. (*Reed*, *supra*, and *People v. Guerrero* (1988) 44 Cal.3d 343.) It is an open question whether live testimony will be permitted to prove or disprove the disqualifying element of a current or past conviction.

In determining whether the defendant committed a prior crime excluded from resentencing, the court may consider evidence beyond the fact of the actual conviction. In *People v. Estrada* (2017) 3 Cal.5th 661 (*Estrada*), the defendant was charged, among other crimes, with robbery and grand theft from a person, each with the allegation the defendant used a firearm; the crimes were based on a single incident. In exchange for a plea to grand theft person, the robbery and firearms allegations were dismissed. The defendant also admitted two prior strikes. After the passage of Proposition 36, the defendant petitioned the court for a reduction of the 25-year-to-life term he received on the grand theft person charge. The court hearing the motion denied the request based on a reading of the transcript of the preliminary hearing held on the underlying crime showing the defendant committed the theft with the use of a firearm. The Supreme Court affirmed.

"[W]e think section 1170.12, subdivision (c)(2)(C)(iii) is best read as excluding from resentencing "broadly inclusive categories of offenders who, during commission of their crimes—and regardless of those crimes' basic statutory elements—used a firearm, were armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1055.)" (*Estrada*, *supra*, 3 Cal.5th at p. 669.)

"[A] court determining whether a third strike offender is ineligible for resentencing under section 1170.12, subdivision (c)(2)(C)(iii), may consider facts connected to dismissed counts, but only if those facts also underlie a count to which the defendant pleaded guilty. That last qualifier is as crucial as any aspect of the rule: evidence of arming on which a court relies to deny recall of sentence must, of course, demonstrate that the inmate was armed '[*d*]*uring the commission of the current offense.'* (§ 1170.12, subd. (c)(2)(C)(iii), italics added.) By its own terms, this eligibility criterion plainly applies only to the offense or offenses that form the basis of the sentence sought to be recalled. (*Ibid*.; see also § 1170.126, subd. (e)(2) ['An inmate is eligible for resentencing if ... [¶] (2) [t]he inmate's *current sentence* was not imposed for....' (italics added)].) What this necessarily implies is that a finding of ineligibility pursuant to section 1170.12, subdivision (c)(2)(C)(iii) cannot be made on the basis of conduct that occurred other than *during* the offense of conviction." (*Estrada*, *supra*, 3 Cal.5th at p. 673.)

"To find that an inmate was armed with a firearm during the commission of the inmate's third strike offense, a court reviewing a Proposition 36 recall petition may rely on facts underlying counts dismissed pursuant to the inmate's plea agreement—so long as those facts establish the defendant was armed *during* his offense of conviction. This outcome leaves trial courts in a position to implement the crucial distinction Proposition 36 draws between violent and nonviolent offenders, and is consistent with the text, structure, and other indicia of statutory purpose. And such procedures do not violate an inmate's plea agreement, unless the plea agreement precludes a recall court from considering such facts." (*Estrada*, *supra*, 3 Cal.5th at p. 676.)

People v. Berry (2015) 235 Cal.App.4th 1417, held the court could not consider the firearm allegations in denying a petition under section 1170.126 because those facts were not a part of the record of the conviction of the crimes petitioner had admitted. (*Id.*, at pp. 1425-1428.) To the extent *Berry* conflicts with *Estrada*, it has been disapproved. (*Estrada*, *supra*, 3 Cal.5th at p. 675.)

The probation report is not a part of the record of conviction. It was error by the trial court to use the probation report in establishing the defendant was armed at the time of the crime. (*People v. Burns* (2015) 242 Cal.App.4th 1452.)

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

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

Appellate review of eligibility

If the prosecution disagrees with a trial court's determination of eligibility for resentencing, the proper remedy is to pursue a writ of mandate in the appellate court. (*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 988; *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1011 [acknowledging prosecutor properly challenged the trial court's eligibility determination by writ petition, prior to the resentencing hearing].) Such a writ petition constitutes a plain, speedy and adequate remedy to challenge that ruling, and consequently the failure to pursue it constitutes a waiver of that challenge. (*People v. Fond* (1999) 71 Cal.App.4th 127, 133-134 [prosecution waived its right to challenge an allegedly inadequate sentence by failing to file its own appeal].)

Pleading and proof

For a defendant to be excluded from the new sentencing provisions under sections 667 and 1170.12, the circumstances of the exclusion must be pled and proven by the prosecution. (§§ 667, subd. (e)(2)(C), and 1170.12, subd. (c)(2)(C).) There is no similar express pleading and proof requirement to disqualify an inmate from the resentencing provisions of section 1170.126. (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1315-1316; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332-1333; *People v. Guilford* (2014) 228 Cal.App.4th 651; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 801-803; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1033; *People v. Hicks* (2014) 231 Cal.App.4th 275; *People v. Chubbuck* (2014) 231 Cal.App.4th 737 [no "plead and

prove' requirement regarding a showing that the defendant "intended to cause great bodily injury to another person."].) As a practical matter, however, the burden likely will be on the prosecution to prove the defendant should be excluded from resentencing. First, the prosecution will have access to the necessary court records to establish the exclusion. Second, the legal system generally takes the position that if a party seeks the benefit of an exclusion, the burden of proving the exclusion is on the party seeing it. (See, e.g., *People v. Feno* (1984) 154 Cal.App.3d 719, 727-728.)

Burden of proof

The burden of proof as to dangerousness is that the *facts* leading to the conclusion of dangerousness must be proved by a preponderance of the evidence; the *decision* itself will be reviewed under the substantial evidence standard. (People v. Frierson (2017) 4 Cal.5th 225, 239: "The determination whether a defendant poses an unreasonable risk of danger to public safety is discretionary (§ 1170.126, subd. (f)), and several Courts of Appeal have properly concluded that '[t]he facts upon which the court's finding of unreasonable risk is based must be proven by the People by a preponderance of the evidence ... and are themselves subject to [appellate] review for substantial evidence.' (*People v. Buford* (2016) 4 Cal.App.5th 886, 901; see also *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075-1076; *Kaulick, supra,* 215 Cal.App.4th at pp. 1301-1305.) As *Kaulick* reasoned, 'it is the general rule in California that once a defendant is eligible for an increased penalty, the trial court, in exercising its discretion to impose that penalty, may rely on factors established by a preponderance of the evidence. [Citation.] As dangerousness is such a factor, preponderance of the evidence is the appropriate standard.' (*Id*. at p. 1305.) Defendant does not argue otherwise, and recognizes that 'to adjust for situations in which a dangerous defendant is deemed *eligible* for a sentence recall, for whatever reasons including shortcomings in the record of the prior, the recall court has discretion to decline resentencing to safeguard the public.' " (Italics in original.)

Dangerousness

The potential dangerousness of the petitioner is not a factor in the determination of eligibility for resentencing; it only becomes a factor in deciding whether an eligible petitioner in fact will be resentenced. "[W]e cannot endorse the trial court's apparent belief that the mandate requiring the Three Strikes Reform Act to be liberally construed to effectuate 'the protection of the health, safety, and welfare of the people of the State of California' (Voter Information Guide, *supra,* text of Prop. 36, § 7, at p. 110) means that all provisions defining an inmate's *eligibility* for resentencing under section 1170.126 must be construed against finding the inmate eligible. While we acknowledge that an important goal of the Three Strikes Reform Act is to prevent dangerous criminals

from being released from prison early, that concern is not directly implicated in the initial determination of an inmate's *eligibility* for resentencing. It is only after an inmate is deemed eligible under subdivision (e) of section 1170.126 that the trial court undertakes the required assessment of that inmate's *dangerousness* pursuant to subdivisions (f) and (g) of the statute. No eligible inmate who is determined by the court to 'pose an unreasonable risk of danger to public safety' (§ 1170.126, subd. (f)) will be entitled to resentencing." (*People v. Berry* (2015) 235 Cal.App.4th 1417, 1425; italics in original.)

No right to jury

The defendant has no right to a jury determination of his eligibility for resentencing. *Apprendi v. New Jersey* (2000) 530 U.S. 466, has no application to the retrospective nature of the petition for resentencing. (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1315; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331-1336; *People v. Guilford* (2014) 228 Cal.App.4th 651, 662-663; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 803-804; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1038-1039*; People v. Berry* (2015) 235 Cal.App.4th 1417, 1428; *People v. Lopez* (2015) 236 Cal.App.4th 518; see also *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1303.) The petitioner is not entitled to a jury determination of dangerousness. (*People v. Losa* (2014) 232 Cal.App.4th 789.)

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

If the petitioner does satisfy the statutory eligibility requirements, "the petitioner shall be sentenced" as a second strike offender, **"unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety."** (§ 1170.126, subd. (f); italics added.) The language in section 1170.126, subdivision (f), is strong: the petitioner "shall" be resentenced as a second strike offender "unless" there is the finding of dangerousness. The burden of proof of dangerousness is on the prosecution. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279; *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075-1076.)

Burden of proof

Appellate courts agree that the applicable burden of proof is preponderance of the evidence. *People v. Payne* (2014) 232 Cal.App.4th 579 (*Payne*), *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301-1305 (*Kaulick*); *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075-1076; and *People v. Buford* (2016) 4 Cal.App.5th 886, 898, hold the prosecution has the burden of proving dangerousness, and that it must be proved by a preponderance of the evidence.

The court in *Payne* clarified that only the *facts* leading to the conclusion of dangerousness must be proved by a preponderance of the evidence; the ultimate decision by a trial court that a defendant does pose an unreasonable risk of danger to public safety, however, is a discretionary determination.

As observed in *Kaulick, supra,* 215 Cal.App.4th at pages 1304-1305: "[T]he United States Supreme Court has already concluded that its opinions regarding a defendant's Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt do not apply to limits on downward sentence modifications due to intervening laws. (*Dillon v. United States* (2010) —— U.S. ——, 130 S.Ct. 2683, 2692, 177 L.Ed.2d 271 (*Dillon*).) At issue in *Dillon* was a modification to the sentencing guideline range for the offense of which the defendant was convicted. The law provided that a prisoner's sentence could be modified downward when the range had been lowered; however, the law provided that a sentence could only be lowered if consistent with applicable policy statements. Those policy statements, in turn, provided that a sentence could not be reduced below the minimum sentence of an amended sentencing range except to the extent that the original term was below the original range. The Supreme Court had already held that, in order to avoid constitutional problems, the federal Sentencing Guidelines were advisory, rather than mandatory. The issue in *Dillon* was whether the policy statement, which did not permit reducing a sentence below the amended range except to the extent the original term was below the original range, must also be rendered advisory. (*Id*. at p. 2687.) The Supreme Court concluded that it remained mandatory. This was so because the statute allowing resentencing when the sentencing range was lowered was, itself, not a plenary resentencing in the usual sense. Instead, the statute simply authorized a limited adjustment to an otherwise final sentence. (*Id*. at p. 2691.) The court stated, 'Notably, the sentence-modification proceedings authorized by [the statute] are not constitutionally compelled. We are aware of no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent Guidelines amendments. Rather [the statute] represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines. [¶] Viewed that way, proceedings under [this statute] do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt. Taking the original sentence as given, any facts found by a judge at a [modification downward] proceeding do not serve to increase the prescribed range of punishment; instead, they affect only the judge's exercise of discretion within that range.' (*Id*. at p. 2692.) Such decisions, stated the court, simply do not implicate Sixth Amendment rights. (*Ibid.*)"

Kaulick then concluded: "The language in *Dillon* is equally applicable here. The retrospective part of the Act is not constitutionally required, but an act of lenity

on the part of the electorate. It does not provide for wholesale resentencing of eligible petitioners. Instead, it provides for a proceeding where the original sentence may be modified downward. Any facts found at such a proceeding, such as dangerousness, do not implicate Sixth Amendment issues. Thus, there is no constitutional requirement that the facts be established beyond a reasonable doubt. [¶] Instead, we conclude the proper standard of proof is preponderance of the evidence. Evidence Code section 115 provides that, '[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.' There is no statute or case authority providing for a greater burden, and Kaulick has not persuaded us that any greater burden is necessary. In contrast, it is the general rule in California that once a defendant is eligible for an increased penalty, the trial court, in exercising its discretion to impose that penalty, may rely on factors established by a preponderance of the evidence. (*In re Coley* (2012) 55 Cal.4th 524, 557, 146 Cal.Rptr.3d 382, 283 P.3d 1252.) As dangerousness is such a factor, preponderance of the evidence is the appropriate standard." (*Kaulick*, *supra*, 215 Cal.App.4th at pp. 1304-1305, footnotes omitted.)

People v. Payne (2014) 232 Cal.App.4th 579, clarified that only the *facts* leading to the conclusion of dangerousness must be proved by a preponderance of the evidence. "To summarize, a trial court need not determine, by a preponderance of the evidence, that resentencing a petitioner would pose an unreasonable risk of danger to public safety before it can properly deny a petition for resentencing under the Act. Nor is the court's ultimate determination subject to substantial evidence review. Rather, its finding will be upheld if it does not constitute an abuse of discretion, i.e., if it falls within 'the bounds of reason, all of the circumstances being considered. [Citations.]' (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) The facts or evidence upon which the court's finding of unreasonable risk is based must be proven by the People by a preponderance of the evidence, however, and are themselves subject to our review for substantial evidence. If a factor (for example, that the petitioner recently committed a battery, is violent due to repeated instances of mutual combat, etc.) is not established by a preponderance of the evidence, it cannot form the basis for a finding of unreasonable risk. (See *People v. Cluff* (2001) 87 Cal.App.4th 991, 998 [trial court abuses its discretion when factual findings critical to decision find no support in record]; cf. *People v. Read* (1990) 221 Cal.App.3d 685, 689-691 [where trial court erroneously determined defendant was statutorily ineligible for probation, reviewing court was required to determine whether trial court gave sufficient other reasons, supported by facts of case, for probation denial].)" (*Payne*, *supra*, 232 Cal.App.4th at p. 488; footnote omitted.)

People v. Esparza (2015) 242 Cal.App.4th 726, adopts the "preponderance of the evidence standard of proof as established in *Kaulick*. "As the Kaulick court explained, the proper standard of proof is preponderance of the evidence.

'Evidence Code section 115 provides that, "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." There is no statute or case authority providing for a greater burden, and [defendant] has not persuaded us that any greater burden is necessary. In contrast, it is the general rule in California that once a defendant is eligible for an increased penalty, the trial court, in exercising its discretion to impose that penalty, may rely on factors established by a preponderance of the evidence. [Citation.] As dangerousness is such a factor, preponderance of the evidence is the appropriate standard.' (*Kaulick*, *supra*, 215 Cal.App.4th at p. 1305, fns. omitted.)" (*Esparza*, *supra*, 242 Cal.App.4th at p. 741.)

Esparza also concluded, however, the prosecution did not offer any evidence supporting the inference of dangerousness; defendant was granted a new hearing. (*Esparza*, *supra*, 242 Cal.App.4th at pp. 744-746; see discussion *infra*.)

"Considering the language of subdivisions (f) and (g) of section 1170.126, we conclude the People have the burden of establishing, by a preponderance of the evidence, facts from which a determination resentencing the petitioner would pose an unreasonable risk of danger to public safety can reasonably be made. The reasons a trial court finds resentencing would pose an unreasonable risk of danger, or its weighing of evidence showing dangerousness versus evidence showing rehabilitation, lie within the court's discretion. The ultimate determination that resentencing would pose an unreasonable risk of danger is a discretionary one. While the determination must be supported by facts established by a preponderance, the trial court need not itself find an unreasonable risk of danger by a preponderance of the evidence. [Citation omitted]" (*People v. Buford* (2016) 4 Cal.App.5th 886, 899.)

There is no presumption in favor of resentencing. (*People v. Garcia* (2016) 244 Cal.App.4th 224; *Buford supra*, 4 Cal.App.5th at pp. 901-902.)

The hearing

The court in *People v. Esparza* (2015) 242 Cal.App.4th 726, 745-746, discusses the nature of the hearing on dangerousness. "Defendant is entitled to a . . . resentencing hearing at which the prosecution must present evidence that *currently* defendant poses an unreasonable risk of danger to public safety. To do so, the prosecution must present substantial evidence that that is the case.[14] By definition, 'substantial evidence' requires *evidence* and not mere speculation. In any given case, one 'may *speculate* about any number of scenarios that may have occurred.... A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] ... A finding of fact must be an inference drawn from evidence rather than ... a mere speculation as to probabilities without

evidence." ' (Morris, supra, 46 Cal.3d at p. 21, disapproved on an unrelated point in In re Sassounian (1995) 9 Cal.4th 535, 543, fn. 5.) [¶] We make the following observations for the benefit of the trial court on remand. In discussing the 'some evidence' standard applicable in parole cases, the California Supreme Court has stated: 'This standard is unquestionably deferential, but certainly is not toothless, and "due consideration" of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness.' (In re Lawrence (2008) 44 Cal.4th 1181, 1210 (*Lawrence*).) [¶] Although we decline to decide how and to what extent parole cases inform the decision whether to resentence a petitioner under the Act or our review of such a decision, we believe that the proper focus is on whether the petitioner *currently* poses an unreasonable risk of danger to public safety. (*Cf.* In re Shaputis (2008) 44 Cal.4th 1241, 1254 (*Shaputis*); Lawrence, supra, 44 Cal.4th at p. 1214, .) Further, we believe that a trial court may properly deny resentencing under the Act based solely on immutable facts such as a petitioner's criminal history '*only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.]' (Lawrence, supra, at p. 1221.) ' "[T]he relevant inquiry is whether [a petitioner's prior criminal and/or disciplinary history], when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years [later]. This inquiry is ... an individualized one, and cannot be undertaken simply by examining the circumstances of [the petitioner's criminal history] in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citation.]" [Citation.]' (*Shaputis*, *supra*, at pp. 1254–1255.)" (*Esparza*, *supra*, 242 Cal.App.4th at pp. 745-746, italics in original.)

The hearing itself likely would be conducted in the same manner as an original sentencing proceeding. There is nothing in Proposition 36 that suggests the rules of evidence and procedure would be any different than traditional sentencing proceedings. Accordingly, there likely may be limited use of hearsay evidence, such as in probation reports. "In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing." (§ 1170(b).) At sentencing, the court is permitted to consider a broad range of information, including responsible unsworn and out-of-court statements concerning the defendant, provided, however, there is a substantial basis for believing the information is reliable. (*People v. Arbuckle* (1978) 22 Cal. 3rd 749, 754; *People v. Lamb* (1999) 76 Cal. App. 4th 664, 683.)

The petitioner in *People v. Flores* (2014) 227 Cal.App.4th 1070, challenged the phrase "unreasonable risk of danger to public safety," because of the alleged vagueness of the word "unreasonable." The challenge was rejected. "Surely a superior court judge is capable of exercising discretion, justly applying the public safety exception, and determining whether a lesser sentence would pose an unreasonable risk of harm to the public safety. (See e.g. *People v. Espinoza* (2014) 226 Cal.App.4th 635 [grant of relief where a lesser sentence would not impose an unreasonable risk of harm to the public safety].) [Footnote omitted.] This is one of those instances where the law is supposed to have what is referred to by Chief Justice Rehnquist as 'play in the joints.' (*Locke v. Davey* (2004) 540 U.S. 712, 718 [158 L.Ed.2d 1].) 'This is a descriptive way of saying that the law is flexible enough for the . . . trial court to achieve a just result depending upon the facts, law, and equities of the situation.' (*Advanced Mod.Sputtering, Inc. v. Superior Court* (2005) 132 Cal.App.4th 826, 835.)" (*Flores, supra,* 227 Cal.App.4th at p. 1075.)

No right to a jury determination of dangerousness

The petitioner has no right to a jury determination of his eligibility for resentencing. *Apprendi v. New Jersey* (2000) 530 U.S. 466, has no application due to the retrospective nature of the petition for resentencing. (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1315; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331-1336; *People v. Guilford* (2014) 228 Cal.App.4th 651, 662-663; *People v. Losa* (2014) 232 Cal.App.4th 789; *People v. Esparza* (2015) 242 Cal.App.4th 726, 737-740; *People v. Garcia* (2016) 244 Cal.App.4th 224; *People v. Myers* (2016) 245 Cal.App.4th 794; see also *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1303.)

Evidence of dangerousness

The scope of evidence that is admissible for the determination of dangerousness appears very broad. While a determination of the statutory eligibility for resentencing may be limited to the "record of conviction," nothing in Proposition 36 suggests any such limitation with respect to the issue of dangerousness. Presumably both parties will be permitted to offer live testimony relevant to this issue.

Under section 1170.126, subdivision (g), the court may consider the following to determine the dangerousness of the inmate:

> **(1)** The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes;

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

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

Whether an inmate is dangerous if resentenced will depend on a careful review of all of the inmate's circumstances. Some of the factors the court may wish to consider are:

- The actuarial risk rating of the inmate and classification score by CDCR. Because of the age of most of the petitioners, the risk score should be relatively low; if it is not, there may be an indication of dangerousness.

- The extent to which the inmate has a well-grounded re-entry plan and support services. (See discussion, *infra*, regarding the application of Postrelease Community Supervision.)

- The extent of any significant mental health issues, particularly those that will require continuing intervention and medication. In this regard, it may be useful for the court to appoint a qualified mental health professional under Evidence Code, section 730 to assist in this aspect of the review. While normally an inmate would have a medical privilege not to have psychological records disclosed, likely the privilege would be deemed waived by the filing of a petition under section 1170.126. Certainly the psychological history of an inmate can have a direct bearing on the issue of dangerousness.

- Information disclosed by a current review of the inmate's record of convictions. It may be important to know what crimes the inmate committed between the last strike offense and the crime resulting in the life commitment - the pattern of criminal conduct. In other words, was the intervening conduct insignificant or reflective of dangerousness?

- Where any victims particularly vulnerable?

- The extent to which there may be non-criminal evidence of the inmate's character or tendency to violence.

To assist in the determination of dangerousness, the court may obtain a supplemental probation report, but one is not required. (*People v. Franco* (2014) 232 Cal.App.4th 831.)

The court may, but is not obligated to, appoint a defense expert on the issue of current dangerousness. (*People v. Rodriguez* (2015) 233 Cal.App.4th 1403.)

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

Under section 1170.126, subdivision (f), however, the petition for resentencing must be granted unless the court "determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." Here, the prosecution must carry the burden of proving dangerousness. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279.) While both sections 1385 and 1170.126, subdivision (f), may involve a consideration of many of the same factors concerning the defendant (*e.g*, family ties, employment history, age, remoteness of the crime and prior strikes), including the defendant's dangerousness, the discretion of the court to refuse resentencing is more narrowly proscribed than under section 1385. While a defendant must prove he is "outside the spirit" of the Three Strikes law to obtain relief under section 1385, under section 1170.126, subdivision (f), the defendant is entitled to relief unless the court finds an unreasonable risk to public safety. Accordingly, the court's previous denial of a request for dismissal of a strike at the original sentencing does not mean the court should deny a request for resentencing without independently determining the defendant "poses an unreasonable risk of danger to public safety."

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

Presumably the exercise of the court's discretion on dangerousness will be subject to review for abuse of discretion. *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1306, fn. 29, suggests the decision to deny resentencing based on dangerousness "is somewhat akin to a decision denying an inmate parole." As such, a finding of dangerousness will be upheld so long as there is "some evidence" in support of the decision.

The court may not continue the hearing on the application for resentencing to give the petitioner an opportunity to prove that he is not a danger to public safety. "Nothing contained in the plain language of the Act expressly authorizes a court to continue or hold in abeyance a petition for resentencing for the purpose of reexamining the inmate's dangerousness. When we examine the procedural framework of the Act, we reach the exact opposite conclusion. It authorizes an inmate to file a single resentencing petition within two years of its effective date, November 7, 2012. These limitations indicate an intent to resolve these petitions within a finite time period. The plain statutory language provides that the court "shall" determine eligibility and "shall" resentence the inmate unless it determines resentencing the petitioner will pose an unreasonable risk of danger to public safety. This language indicates a duty by the court to make these determinations. The drafters of the Act could have created a statutory scheme to allow the court to retain jurisdiction to reevaluate the danger posed periodically or at some future time. They did not do so." (*People v. Superior Court (Burton)*(2015) 232 Cal.App.4th 1140, 1146-1147.) In accord is *People v. Superior Court (Williams)*(2015) 232 Cal.App.4th 1149 , 1156: "We do not disagree that, as the court did several times in this case, the court has authority to continue proceedings to obtain records, transport the inmate, accommodate counsel, etc., but this order was not made so that it could control its calendar and conduct a full hearing on the matter. Instead, the court ordered the matter in abeyance for the express purpose of determining whether Williams no longer poses a danger to society. It informed Williams that he was to do certain tasks, including continuing programming and mental health treatment in order to convince it that he was no longer a danger. The court does not have inherent authority to grant a continuance for whatever length of time it deems appropriate to reevaluate the inmate's dangerousness."

Current dangerousness

Although nothing in Proposition 36 expressly addresses the issue, *People v Payne* (2014) 232 Cal.App.4th 579, requires consideration of current dangerousness in the context of the exclusion in Proposition 36. "Although we decline to decide how and to what extent parole cases inform the decision whether to resentence a petitioner under the Act or our review of such a decision, we do agree with defendant that the proper focus is on whether the petitioner *currently* poses an unreasonable risk of danger to public safety. (Cf. *In re Shaputis* (2008) 44 Cal.4th 1241, 1254; *In re Lawrence* [(2008) 44 Cal.4th 1181,] 1214.) We also agree a trial court may properly deny resentencing under the Act based solely on immutable facts such as a petitioner's criminal history '*only* if those facts support the ultimate conclusion that an inmate continues to pose an unreasonable risk to public safety. [Citation.]' (*In re Lawrence*, *supra*, at p. 1221.) ' "[T]he relevant inquiry is whether [a petitioner's prior criminal and/or disciplinary history], when considered in light of other facts in the record, are such that they continue to be

predictive of current dangerousness many years [later]. This inquiry is ... an individualized one, and cannot be undertaken simply by examining the circumstances of [the petitioner's criminal history] in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citation.]" [Citation.]' (*In re Shaputis*, supra, 44 Cal.4th at pp. 1254-1255.)" (*Payne*, *supra*, 232 Cal.App.4th at pp. 601-602; italics in original; see also *People v. Rodriguez* (2015) 233 Cal.App.4th 1403.) *People v. Esparza* (2015) 242 Cal.App.4th 726, 746, also requires the prosecution to establish the defendant is *currently* dangerous if resentenced.

The requirement that the court consider only current dangerousness is not applicable when the defendant will remain in custody if the petition is granted. In that circumstance, the court must look to potential dangerousness when the defendant actually will be eligible for release and whether that release will be subject to a further review of dangerousness. *People v. Williams* (2018) 19 Cal.App.5th 1057, 1062-1063, a Proposition 36 case, discusses the issue: "In *People v. Johnson* (2015) 61 Cal.4th 674, our Supreme Court held that a defendant who is convicted of both a serious or violent felony and a felony that is not serious or violent is eligible for section 1170.126 resentencing on the felony that is not serious or violent. (*Johnson,* at p. 679.) In coming to this conclusion, the Supreme Court was mindful of the fact that petitioner would still be serving a life term even after resentencing. 'Because an inmate who is serving an indeterminate life term for a felony that is serious or violent will not be released on parole until the Board of Parole Hearings concludes he or she is not a threat to the public safety, resentencing with respect to another offense that is neither serious nor violent does not benefit an inmate who remains dangerous. Reducing the inmate's base term by reducing the sentence imposed for an offense that is neither serious nor violent will result only in earlier consideration for parole. If the Board of Parole Hearings determines that the inmate is not a threat to the public safety, the reduction in the base term and the resultant earlier parole date will make room for dangerous felons and save funds that would otherwise be spent incarcerating an inmate who has served a sentence that fits the crime and who is no longer dangerous.' (*Id.* at p. 695, 189 Cal.Rptr.3d 794, 352 P.3d 366.) [¶] This reasoning drives the analysis in this case as well. Determining whether resentencing a defendant poses an unreasonable risk of danger to society is necessarily a forward-looking inquiry. When determining whether resentencing poses an unreasonable risk of danger, the trial court must look to when a defendant would be released if the petition is granted and the defendant is resentenced. A defendant who would obtain immediate release if the petition is granted poses a different potential danger to society than a defendant who could be released only in his or her 70's. This applies with even greater force to a defendant who would still be serving a sentence greater than a human lifespan even if the petition was granted. For example, defendant's current term of 193 years to life is the equivalent of life

without parole since he cannot obtain parole until far beyond a human lifespan. Taking 25 years off this term would still leave a parole date beyond any possible life expectancy. If a defendant's term is still effectively life without parole after resentencing, then resentencing cannot pose an unreasonable risk to public safety."

Dangerousness and the transition plan

No one disputes that persons released from prison after many years of custody will likely have serious issues of re-integration into the community. How those transition services are to be provided is a matter of some dispute. The critical question is whether a court may deny resentencing if the inmate fails to establish a suitable re-entry plan, on the theory that without such a plan, the inmate is too dangerous to release. The level of support services on release certainly can have a direct bearing on the issue of dangerousness. It would seem contrary to the purpose of Proposition 36 to force a court to resentence an inmate in the absence of a suitable transition plan if to do so would create an unreasonable risk of danger to public safety.

Some courts have taken the position that these inmates will be covered by the Postrelease Community Supervision (PRCS) provisions of section 3451, subdivision (a). Such a position clearly is proper where after resentencing the inmate has remaining time to do on the sentence or there is a remaining period available for PRCS. The more difficult question is whether PRCS is available to persons who have completed their sentence, plus the three years of PRCS.

According to the law prior to the creation of PRCS, if a defendant served his entire prison term, plus the parole term, he was entitled to be released unconditionally. This rule comes from section 2009.5. Section 2009.5, subdivision (a), provides that custody credits apply against the "term of imprisonment." Section 2009.5, subdivision (c), specifies the "term of imprisonment" includes any parole period. Once the entire term of imprisonment is satisfied, the defendant was entitled to be released from any custody or supervision. (*In re Sosa* (1980) 102 Cal.App.3d 1002.)

Sections 3451 and 3000.08, however, may provide a different rule now that there is PRCS. Section 3451, subdivision (a), provides: "*Notwithstanding any other law* and except for [designated persons], all persons released from prison on and after October 1, 2011, or, whose sentence has been deemed served pursuant to Section 2900.5 after serving a prison term for a felony shall, upon release from prison and for a period not exceeding three years immediately following release, be subject to community supervision provided by a county agency designated by each county's board of supervisors which is consistent with evidence-based practices, including, but not limited to, supervision policies,

procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under postrelease supervision." (italics added.) Section 3000.08, subdivision (a), identifies those inmates who will remain under the jurisdiction of CDCR when they are released on parole. Section 3000.08, subdivision (b), which applies to everyone else, provides "*[n]otwithstanding any other provision of law*, all other offenders released from prison shall be placed on postrelease supervision pursuant to " sections 3450, *et seq*. (italics added.)

Clearly these statutes at least mean that supervision now is with the counties under PRCS, irrespective of any other statute that specifies supervision is to be provided by CDCR. The question is whether the phrase is broad enough to include *whether* the defendant is to be supervised. Since section 3000.08 deals exclusively with *who* is to provide supervision, it seems the intent of that statute is simply to make absolutely clear that as to certain inmates, CDCR will no longer be responsible for any post-prison supervision. The intent of section 3451, subdivision (a), is less clear, particularly as to whether its provisions will be subject to the over-lay created by *Sosa*.

On the other hand, the phrase "notwithstanding any other provision of law" is unambiguous and direct. It is a phrase that carries great weight in the interpretation of statutes. There are a number of strong policy reasons why the Legislature may wish to have *all* inmates released to county supervision after serving a lengthy term in state prison. Certainly it is not open to question that the Legislature has the authority to create the requirement if it so chose.

Some courts are requesting an inmate's voluntary participation in PRCS. There is little question that an inmate could voluntarily agree to PRCS after an informed waiver. The waiver should be accompanied with an explanation that the inmate will have a three-year term of supervision, that he may be incarcerated up to 180 days for each violation, that he may be subject to flash incarceration of up to 10 days for each violation at the discretion of the probation officer, and that he will be subject to standard conditions of supervision including search and seizure and treatment. The bigger question is whether the court may deny resentencing if the inmate does not agree to the supervision. The answer to this question will likely depend on how the court approaches the issue. It likely would be improper to deny resentencing if the inmate is otherwise suitable for resentencing even without supervision. It likely would be proper, however, for a court to deny resentencing if the court concludes the inmate needs supervision to be not dangerous and there is no viable means for providing such supervision, absent the inmate's voluntary participation.

The Three Strikes Project of Stanford Law School has created a resource list for re-entry services, at least for some of the metropolitan counties. The website may be accessed at www.reentry.Prop36.org.

5. The effect of Proposition 47

Proposition 47 potentially affects the Three Strikes law in a number of respects. First, persons serving second strike sentences for crimes that are made misdemeanors under this act may petition for resentencing. In contrast, Proposition 36 limits its resentencing provisions to persons serving third strike sentences. This is subject, of course, to the court's determination of whether the petitioner will pose an unreasonable risk of danger to public safety if resentenced.

Second, Proposition 47 allows qualified third strike offenders to be resentenced as misdemeanants. While Proposition 36 only permits resentencing as a second strike offender, Proposition 47 requires that qualified persons are to receive a misdemeanor sentence, without any consideration of a further prison term either as a second strike or non-strike offender. Again, the court may deny the petition if the person poses an "unreasonable risk of danger to public safety," as that phrase is defined in the more restrictive provisions of Proposition 47.

If the defendant had been sentenced as a strike offender under the Three Strikes law, but is resentenced as a misdemeanant, custody credits should be recalculated using the traditional formula under section 2933 (50% credit), not the more restrictive formula specified by section 1170.12, subdivision (a)(5) (20% credit).

Third, there was a question whether Proposition 47 amends Proposition 36 in a manner that allows a greater number of third strike offenders to be resentenced as second strike offenders. As originally enacted by the voters, Proposition 36 allows a court to refuse resentencing of any person if to do so would create an "unreasonable risk of danger to public safety." Because Proposition 36 did not further define that phrase, courts are given broad discretion to determine what degree of danger a particular petitioner may pose. Proposition 47 limits the court's ability to deny a petition based on dangerousness to those cases where a defendant is at risk of committing a "super strike." The initiative imposes its more restrictive definition of "unreasonable risk of danger to public safety" *wherever that phrase is "used throughout this Code*." (§ 1170.18, subd. (c).) There is a question whether the phrase means the entire Penal Code, including section 1170.126 for resentencing of third strike offenders, or whether it will be limited to petitions for resentencing under section 1170.18. If Proposition 47's definition applies to resentencing under Proposition 36, in determining whether

a third strike offender poses an unreasonable risk if resentenced, the court is limited to determining whether there is an unreasonable risk that the petitioner will commit any of the designated violent felonies – the "super strikes," specifically: specified violent sex offenses or any sex offense requiring registration as a sex offender; murder, attempted murder, or solicitation to commit murder; assault with a machine gun on a police officer; possession of a weapon of mass destruction; or any serious or violent felony punishable by death or life imprisonment. (See Appendix V for a complete list of offenses.) Unless the court determines the petitioner is likely to commit one of the specified offenses, Proposition 36, if amended by Proposition 47, does not permit the court to consider the risk of the person committing other serious or violent crimes.

The issue was resolved by the Supreme Court in *People v. Valencia* (2017) 3 Cal.5th 347. The court rejected the application of the Proposition 47 definition to Proposition 36 based on the following reasons: "First, the phrase '[a]s used throughout this Code' in section 1170.18, subdivision (c), when considered in the context of both section 1170.18 and other provisions of Proposition 47 as a whole, renders the entirety of section 1170.18, subdivision (c) ambiguous as to its potential application to the resentencing criteria for the Three Strikes Reform Act. Second, the ballot materials for Proposition 47 supplied no notice to voters that the measure intended to amend the resentencing criteria of the Three Strikes Reform Act and that three strike inmates previously convicted of serious or violent felonies could be released as a consequence. Third, despite creating detailed procedures for the resentencing of low-level felons to misdemeanants, Proposition 47 provided no similar procedural guidance for the resentencing of three strike inmates under its definition of 'unreasonable risk of danger to public safety,' which further detached any perceived connection with the Three Strikes Reform Act. Finally, under the circumstances of this matter, it is unreasonable to assign dispositive significance to the legal presumptions we normally apply to voters who approve an initiative in order to interpret the phrase '[a]s used throughout this Code.' Those presumptions, even if applicable, would not alter our conclusion that the statutory language is ambiguous and that this ambiguity should be resolved by construing section 1170.18, subdivision (c) not to apply to petitioners under other provisions of the Penal Code such as the Three Strikes Reform Act. Furthermore, as we will explain, neither the initiative's text nor its supporting materials describe any intention to amend the criteria for the resentencing of recidivist serious or violent felons, and both the Attorney General, who is required by law to summarize ballot measures, and the Legislative Analyst, who is required by law to provide and explain to voters a measure's potential impacts, did not interpret the phrase '[a]s used throughout this Code' as referring to the sentencing criteria for the Three Strikes Reform Act. Given these circumstances, it is unreasonable to assume or presume that voters, with greater acumen than the legal professionals of the offices of the Attorney

General and Legislative Analyst, somehow discerned a connection with the Three Strikes Reform Act. Thus, those legal presumptions provide no assistance in determining whether such a connection existed." (*Valencia*, *supra*, 3 Cal.5th at p. 356.)

People v. Esparza (2015) 242 Cal.App.4th 726, also concludes Proposition 47 does not amend the definition of dangerousness in Proposition 36. "Plainly, if considered solely as a matter of grammatical construction, Proposition 47's definition of 'unreasonable risk of danger to public safety' undoubtedly is tied to the words 'As used throughout this Code.' However, such a literal construction is not to be adopted if it conflicts with the voters' intent shown in the official ballot pamphlet. (*People v. Briceno* (2004) 34 Cal.4th 451, 459; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1033–1034, .) Nothing in the official ballot pamphlet for Proposition 47 hints at any impact on the procedure for resentencing Three Strike inmates." (*Esparza*, at p. 736.) "Before we constrain a court considering whether to release a former three strikes offender back to the streets, which we would do if we accepted defendant's arguments, we would need the most compelling proof that the voters intended what we see as an unreasonable and counterintuitive result. Defendant has not satisfied that burden on appeal." (*Id.*, at p. 737.)

No retroactive application

People v. Chaney (2014) 231 Cal.App.4th 1391, holds Proposition 47's new definition of "unreasonable risk of danger to public safety" does not apply to Proposition 36 petitions for resentencing decided prior to November 5, 2014. "'No part of [the Penal Code] is retroactive, unless expressly so declared.' (§ 3.) The California Supreme Court 'ha[s] described section 3, and its identical counterparts in other codes (e.g., Civ. Code, § 3; Code Civ. Proc., § 3), as codifying "the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application."' (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*).) 'In interpreting a voter initiative, we apply the same principles that govern our construction of a statute.' (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006.)" (*Chaney*, at p. 1396.) The court expressly rejected any application of *In re Estrada* (1965) 63 Cal.2d 740. "Expanding the *Estrada* rule's scope of operation here to the definition of 'unreasonable risk to public safety' in Proposition 47 in a petition for resentencing under the Act would conflict with 'section 3['s] default rule of prospective operation' where there is no evidence in Proposition 47 that this definition was to apply retrospectively to petitions for resentencing under the Act and would be improper given that the definition of 'unreasonable risk to public safety' in Proposition 47 does not reduce punishment for a particular crime. For these reasons, we hold that the definition of

'unreasonable risk to public safety' in Proposition 47 does not apply retroactively to a defendant such as the one here whose petition for resentencing under the Act was decided before the effective date of Proposition 47." (*Chaney*, *supra*, 231 Cal.App.4th at p. 1398.)

The Supreme Court granted review in *Chaney* to examine whether Proposition 47 modifies the definition of dangerousness in Proposition 36, and whether the decision applies retroactively. *Chaney* was joined with the decision in *Valencia*, above. Because it found Proposition 47 did not amend Proposition 36, the court found no reason to decide the retroactivity issue and dismissed the appeal.

Meaning of "unreasonable risk of danger to public safety"

The phrase "unreasonable risk of danger to public safety" does not exist in any other context in California law. The requirement of a court to consider the potential risk of future criminal behavior, however, does arise in various circumstances. Under the Sexually Violent Predator Law (Welf. & Inst. Code, §§ 6600, *et seq*.), for example, to prove that a person is an SVP, it must be shown that because of a defendant's mental disorder, it is "likely that he or she will engage in sexually violent criminal behavior." (Welf. & Inst. Code, §§ 6600, subd. (a), 6601, subd. (d).) The Supreme Court has concluded that "the phrase '*likely* to engage in acts of sexual violence' (italics added), as used in section 6601, subdivision (d), connotes much more than the mere *possibility* that the person will reoffend as a result of a predisposing mental disorder that seriously impairs volitional control. On the other hand, the statute does not require a precise determination that the chance of reoffense is *better than even*. Instead, an evaluator applying this standard must conclude that the person is 'likely' to reoffend if, because of a current mental disorder which makes it difficult or impossible to restrain violent sexual behavior, the person presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community." (*People v. Superior Court (Ghilotti)*(2002) 27 Cal.4th 888, 922.) The court expressly rejected a requirement that the potential of committing a future sexually violent offense was "more likely than not." (*Id*. at pp. 923-924.)

6. Amendment of the pleadings and retrial of the petitioner

As indicated in section 1170.126, subdivision (i), the petitioner may waive his or her appearance for the resentencing, "provided that the accusatory pleading is not amended at the resentencing, and that no new trial or retrial of the individual will occur." That quoted phrase is the only time Proposition 36 mentions the possibility the petitioner may face amended charges and a retrial because of the request for resentencing. There is no risk of reinstating charges for a defendant convicted after a jury trial. Principals of double jeopardy would

bar the retrial of any aspect of the case. There may be a risk, however, for petitioners who were sentenced as a result of a plea bargain. It is common for the prosecution to dismiss certain felony charges or enhancements if the defendant admits to a charge that will be sentenced as a third strike. If the case comes back for a resentencing as a second strike offense, the prosecution may argue it has been denied the benefits of the previous bargain such that all dismissed charges and allegations should be put back into play.

People v. Collins (1978) 21 Cal.3d 208 is instructive. There, the defendant entered into a plea bargain wherein he was allowed to plead to one count and 14 other counts were dismissed. Between the time of the plea and sentencing, the Legislature eliminated the crime defendant had admitted. After determining the conviction must be reversed, the Supreme Court turned to the status of the 14 dismissed charges. "Critical to plea bargaining is the concept of reciprocal benefits. When either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made. Thus, we held in *People v. Delles* (1968) 69 Cal.2d 906, 910, that a judgment contrary to the terms of a plea bargain may not be imposed without affording the defendant an opportunity to withdraw his guilty plea. (See also Pen. Code, § 1192.5; *People v. Johnson* (1974) 10 Cal.3d 868.) And we held in *In re Sutherland* (1972) 6 Cal.3d 666, 672, that when the defendant withdraws his guilty plea or otherwise succeeds in attacking it, counts dismissed pursuant to a plea bargain may be restored. (See also *People* v. *Kirkpatrick* (1972) 7 Cal.3d 480, 487; *In re Crumpton* (1973) 9 Cal.3d 463, 469; *People v. Hill* (1974) 12 Cal.3d 731, 769." (*Collins*, *supra*, 21 Cal.3d at pp. 214-215.) The court thereafter permitted a limited refilling of some of the charges, but in a manner not to permit a term longer than the one provided in the original plea agreement. (*Id*. at pp. 216-217.) *Collins* is consistent with the restriction in section 1170.126, subdivision (h), which prohibits the imposition of a term longer than the original sentence. In this context it should be noted that an indeterminate sentence is longer than any determinate sentence.

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

D. Order of the Court on Resentencing

1. If resentencing is granted

If the court grants the resentencing, the court should state the full new sentence to be served, together with any statement of reasons supporting any sentencing choices. A proposed form of order is in Appendix G. The court is free to select any term on the triad for crimes sentenced under the Determinate Sentencing Law. The sentence should be a standard second strike sentence, taking into account all crimes of which the defendant is convicted, any applicable conduct and status enhancements, and any special rules regarding consecutive and concurrent sentencing. In no event may the defendant be resentenced to a term longer than the original sentence. (§ 1170.126, subd. (h).) In comparing the length of the new sentence to the old, the court should remember that the minimum 25-year term of the original sentence, which is an indeterminate life sentence, is always longer than a determinate sentence.

In determining the new sentence, the trial court may consider all charges properly before the court, even enhancements previously stricken. In *People v. Garner* (2016) 244 Cal.App.4th 1113, the defendant received a 25-years-to-life third strike sentence, but the original sentencing judge struck the punishment for three prior prison terms. On resentencing of the defendant under Proposition 36, the court imposed a second strike sentence on the defendant, and added one year for each of the prior prison terms. The appellate court affirmed. "When a sentence is subject to 'recall' under section 1170, subdivision (d), the entire sentence may be reconsidered. A case so holding reasoned that this was true because: 'When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme.' (People v. Hill (1986) 185 Cal.App.3d 831, 834, ; see People v. Burbine (2003) 106 Cal.App.4th 1250, 1257–1258, .) [¶] Proposition 36, too, provides for a 'recall of sentence' upon a timely petition. (§ 1170.126, subd. (b).) We see no reason why a 'recall' of sentence under Proposition 36 should not be treated as akin to a 'recall' of sentence under section 1170, subdivision (d). Presumably, the voters were aware of the meaning of the term 'recall' as used in criminal sentencing, and of judicial decisions applying that term. (See, e.g., Estate of McDill (1975) 14 Cal.3d 831, 837–839.) By filing his Proposition 36 petition, defendant expressed a desire to receive less than a life sentence, undermining the basis for the trial court's prior exercise of lenity. He cannot do that and at the same time prevent the trial court from exercising discretion to reconsider all other aspects of the sentence." (*Garner*, *supra*, 244 Cal.App.4th at p. 1118; footnote omitted.)

The holding in *Garner* formed the basis of the court's decision in *People v. Hubbard* (2018) 27 Cal.App.5th 9 (*Hubbard*), where the defendant appealed the

trial court's refusal to consider a motion under section 1385 to dismiss a prior strike and consider resentencing of the violent felony convictions. In holding that the court must consider *all* aspects of the original sentence, *Hubbard* observed: "In *Garner*, the defendant was convicted of receiving stolen property and admitted three prior prison terms and four strikes. (*Garner, supra*, 244 Cal.App.4th at p. 1115.) The trial court originally imposed a sentence of 25 years to life for the receipt of stolen property conviction and struck one strike and the punishment for the prior prison terms. (*Id.* at pp. 1115-1116.) The defendant successfully petitioned for recall of sentence under Proposition 36. (*Garner*, at p. 1116.) After finding that it retained discretion over all aspects of defendant's sentence, the trial court imposed a six-year term for the receipt of stolen property conviction and three consecutive one-year terms for the prior prison terms. (*Ibid*.) On appeal, we affirmed the trial court's decision, reasoning that a 'recall' of sentence under Proposition 36 must be treated the same as a recall of sentence under section 1170, subdivision (d). (*Garner*, at p. 1118.) As we explained, ' "[w]hen a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme." ' (*Ibid.*; see *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1257-1258 [the ' "trial court is entitled to consider the entire sentencing scheme," ' upon a remand for resentencing, given the ' "interlocking nature" ' and 'inherently integrated nature' of felony sentencing for a multiple-count conviction].) This "full resentencing rule" as applied by *Garner* was recently cited with approval by our Supreme Court in *People v. Buycks* (2018) 5 Cal.5th 857, 893-895, in determining that, when a person is eligible for resentencing under section 1170.18, subdivision (a), the trial court must 'resentence the defendant generally and must therefore reevaluate the continued applicability of any enhancement based on a prior felony conviction.' [¶] Our remand to the trial court directed the trial court to determine whether defendant was eligible for resentencing under section 1170.126. Even though defendant's eligibility for resentencing was based solely on the reckless evasion conviction, just as in *Garner*, once the trial court 'recalled' his sentence under Proposition 36, the trial court was 'entitled to consider the entire sentencing scheme.' (*Garner*, *supra*, 244 Cal.App.4th at p. 1118.) Despite the People's contentions, *Johnson* does not change our analysis, since the court's limited holding addressed eligibility for resentencing, and did not purport to limit the trial court's well-settled ability to consider all aspects of the original sentence at resentencing. (*Johnson*, *supra*, 61 Cal.4th at p. 679 ['we hold ... that the presence of a conviction of a serious or violent felony does not disqualify an inmate from resentencing with respect to a current offense that is neither serious nor violent'].)" (*Hubbard*, *supra*, 27 Cal.App.5th at pp. 12-13.)

Aggravating and mitigating circumstances

In making the selection of the appropriate sentence from the triad for determinate crimes, the court likely will be able to consider any facts up to the point of resentencing, including facts related to the defendant's time in prison. The court may obtain a supplemental probation report, but one is not required. (*People v. Franco* (2014) 232 Cal.App.4th 831.) Section 1170.126 gives no statutory direction regarding what the court may or may not consider. The existing statutory procedure most analogous to section 1170.126 is the recall of a sentence under section 1170, subdivision (d). There, the court may use any evidence up to the point of the resentencing in setting the new term, even facts arising after the original sentencing. The issue was discussed by our Supreme Court in *Dix v. Superior Court* (1991) 53 Cal.3d 442. "[We cannot] accept the premise that section 1170(d) precludes consideration of circumstances which arose after the original sentencing. Section 1170(d) imposes no such express limitation on the court's powers. On the contrary, the statute simply provides that the court may recall its original sentence within 120 days, or upon recommendation of the Board or the Director, and may resentence" as if [the defendant] had not previously been sentenced .... " (Italics added.) The inference arises that the factors the court may consider are no more limited than if the resentencing were the original sentencing. [¶] This view comports with principles generally applicable to resentencing law. For example, it is well settled that when a case is remanded for resentencing after an appeal, the defendant is entitled to "all the normal rights and procedures available at his original sentencing" (*People v. Foley* (1985) 170 Cal.App.3d 1039, 1047; see also, e.g., *Van Velzer v. Superior Court* (1984) 152 Cal.App.3d 742, 744, including consideration of any pertinent circumstances which have arisen since the prior sentence was imposed (e.g., *People v. Flores* (1988) 198 Cal.App.3d 1156, 1160-1162). (*Dix, supra,* 53 Cal.3d at p. 460.) "In sum, we see no reason to conclude that section 1170(d), contrary to its terms, limits the reasons why a trial court may exercise its statutory authority to recall and resentence. We hold that section 1170(d) permits the sentencing court to recall a sentence for any reason which could influence sentencing generally, even if the reason arose after the original commitment. The court may thereafter consider any such reason in deciding upon a new sentence. After affording the victim his right to attend sentencing proceedings and express his or her views (§ 1191.1), the court may then impose any new sentence that would be permissible under the Determinate Sentencing Act if the resentence were the original sentence." (*Id*., at p. 463, footnote omitted.)

It is important to observe that section 1170.126, subdivision (g), mentions consideration of the inmate's post-sentencing conduct in connection with the determination of dangerousness. Thus, it also would be consistent with the new

statute to use such information in fashioning a new sentence once the court determines resentencing is proper.

The ability of the court to resentence the inmate is limited. If the court determines resentencing is appropriate, section 1170.126, subdivision (f), specifies the inmate "shall be resentenced pursuant to paragraph (1) of subdivision (e) of section 667 and paragraph (1) of subdivision (c) of section 1170.12. . . ." In other words, the inmate is to be resentenced as a second strike offender. This is not a situation where the inmate is procedurally back to the time of the original sentencing where the court had the option to grant relief under section 1385 and place the defendant on probation. The plain language of the statute suggests the court is to resentence the inmate as a second strike offender using all of the elements of the original sentence, but without the ability to impose a 25-year to life sentence.

Recalculation of custody credits

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

New abstract of conviction

The court should direct the preparation of a new Abstract of Conviction. The petitioner thereafter should be remanded to the custody of the sheriff for return to CDCR on the amended abstract, to serve any remaining term and a period on parole or PRCS.

Transition services

In an effort to augment any transition services available to inmates granted relief under section 1170.126, the Legislature added section 667.2:

(a) The Legislature finds and declares that assisting offenders released pursuant to Proposition 36, adopted at the November 6, 2012, statewide general election, with their transition back into communities will increase the offenders' likelihood of successful reintegration.

(b) Subject to the availability of funding for and space in the programs and services, the Department of Corrections and Rehabilitation may provide programs and services, including, but not limited to, transitional housing, mental health, and substance abuse treatment to an offender who is released from the department's custody and satisfies both of the following conditions:

(1) The offender is released pursuant to any of the following provisions, as they were amended or added by Sections 2 to 6, inclusive, of Proposition 36, as adopted at the November 6, 2012, statewide general election:

(A) Section 667.
(B) Section 667.1.
(C) Section 1170.12.
(D) Section 1170.125.
(E) Section 1170.126.

(2) The offender is not subject to either of the following:

(A) Parole pursuant to Article 3 (commencing with Section 3040) of Chapter 8 of Title 1 of Part 3.
(B) Postrelease community supervision pursuant to Title 2.05 (commencing with Section 3450) of Part 3.

(c) (1) The Department of Corrections and Rehabilitation, in consultation with the Administrative Office of the Courts, shall establish a referral process for offenders described in subdivision (b) to participate in programs and receive services that the department has existing contracts to provide.

(2) The Administrative Office of the Courts shall inform courts of the availability of the programs and services described in this section.

If the sentence has been fully served

Proposition 36 does not directly address whether an inmate released because of resentencing must be placed on PRCS or parole. Certainly if there is remaining

time to serve on a sentence, the inmate would be required to complete whatever period of parole or PRCS would otherwise apply. The greater question is the status of the inmate who has enough custody credits to satisfy any term ordered as a result of the resentencing, plus any required post-release supervision. That issue is addressed in *People v. Espinoza* (2014) 226 Cal.App.4th 635, at least as to persons who are required to serve a period on PRCS. *Espinoza* holds that section 3451, subdivision (a), is unambiguous: "*Notwithstanding any other law* and except for [designated persons], all persons released from prison on and after October 1, 2011, or, whose sentence has been deemed served pursuant to Section 2900.5 after serving a prison term for a felony shall, upon release from prison and for a period not exceeding three years immediately following release, be subject to community supervision provided by a county agency designated by each county's board of supervisors which is consistent with evidence-based practices, including, but not limited to, supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under postrelease supervision." (§ 3451, subd. (a), italics added; *Espinoza*, *supra*, 226 Cal.App.4th at p. 637.) The court expressly rejected any application of *In re Sosa* (1980) 102 Cal.App.3d 1002, which holds that excess custody credits reduce any applicable *parole* period. *Espinoza* observed: "PRCS serves an important public interest to 'improve public safety outcomes' and facilitate 'successful reintegration back into society.' (§ 3450, subd. (a)(5); see *People v. Torres* (2013) 213 Cal.App.4th 1151, 1158.) Both the community and appellant will benefit from PRCS. The trial court said that the '[S]tate of California actually doesn't want Mr. Espinoza to return to custody. . . . To take so many years of incarceration and then fling the doors open and say, well, good luck, hope it all works out is likely to just result in a disaster.' We are hopeful that PRCS reduces the chance of disaster." (*Espinoza*, *supra*, 226 Cal.App.4th at pp. 641-642.) Generally in accord with *Espinoza* is *People v. Tubbs* (2014) 230 Cal.App.4th 578. *Tubbs* also holds that CDCR is not the only agency with the authority to determine whether a discharged defendant should be placed on PRCS; the court also has such authority in the context of ruling on a request for resentencing under section 1170.126. (*Id*. at pp. 586-587.)

People v. Superior Court (Rangel)(2016) 4 Cal.App.5th 410, also holds excess custody credits may not be used to reduce any period of community supervision. *Rangel* was based entirely on *People v. Morales* (2016) 63 Cal.4th 399, which, in a Proposition 47 context, concluded excess credits cannot be used to reduce a post-release supervision period.

If the inmate qualifies for immediate release on PRCS, the court should order the inmate returned to the custody of CDCR for setting of conditions of PRCS and immediate release.

Espinoza did not directly address persons released on parole after resentencing. According to the law prior to realignment, if a defendant served his entire prison term, plus the parole term, he was entitled to be released unconditionally. This rule comes from section 2009.5. Section 2009.5, subdivision (a), provides that custody credits apply against the term of imprisonment: "In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution, all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, credited to the period of confinement pursuant to Section 4019, and days served in home detention pursuant to Section 1203.018, shall be credited upon his or her term of imprisonment, or credited to any fine, including, but not limited to, base fines, on a proportional basis, that may be imposed, at the rate of not less than thirty dollars ($30) per day, or more, in the discretion of the court imposing the sentence. *If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of imprisonment shall be deemed to have been served*." (italics added.) Section 2009.5, subdivision (c), specifies the "term of imprisonment" includes any parole period. Once the entire term of imprisonment is satisfied, the defendant was entitled to be released from any custody or supervision. (*In re Sosa* (1980) 102 Cal.App.3d 1002.)

Until the parole issue is resolved, when the defendant has fully served the prison term and any applicable period of parole, the court may wish to order the defendant released from custody, to report to the local state parole office within two business days. If the parole office determines there is a need for parole, it can raise the issue with the court. At least the defendant will not be in custody while the matter works its way through the courts.

2. If resentencing is denied

If the court denies the request for resentencing, the court should remand the defendant to the custody of the sheriff to redeliver him to CDCR under the original sentence. If the defendant has waived his appearance, a simple denial of the petition would be sufficient. In either case, no new Abstract of Conviction would be required. A form of order is suggested in Appendix G.

E. The Right to Counsel

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

1. Preparation of the petition and initial screening

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

2. The qualification hearing

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

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

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

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

3. The resentencing

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

F. Successive Petitions

It is not clear whether the inmate has the ability to file successive petitions under section 1170.126. The answer may depend in part on the circumstances of the denial of the earlier petitions. If the petition was denied at the initial screening because of some technical deficiency, likely the inmate would have the ability to file a new petition to correct the deficiency. The more difficult question is whether the inmate could file a new petition after a denial on the merits of the application. If the resentencing proceedings are analogous to proceedings for a writ of habeas corpus, the answer may be governed by *In re Clark* (1993) 5 Cal.4th 750, 767-768: "It has long been the rule that absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected. (See *In re Terry* (1971) 4 Cal.3d 911, 921, fn. 1, ; *In re Horowitz* (1949) 33 Cal.2d 534, 546, ; *In re De La Roi* (1946) 28 Cal.2d 264, 275, ; *In re Miller* (1941) 17 Cal.2d 734, 735, .) The court has also refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment. (See *In re Horowitz, supra,* 33 Cal.2d 534, 546–547, ; *In re Drew* (1922) 188 Cal. 717, 722, .) The rule was stated clearly in *In re Connor* [(1940)] 16 Cal.2d 701, 705: 'In this state a defendant is not permitted to try out his contentions piecemeal by successive proceedings attacking the validity of the judgment against him.' [¶] These procedural bars to habeas corpus relief have been termed 'discretionary,' however (see *In re Terry, supra,* 4 Cal.3d 911, 921. fn. 1; *In re Bevill* (1968) 68 Cal.2d 854, 863, fn. 9), and have been described as a 'policy' of the court. (See *In re Horowitz, supra,* 33 Cal.2d 534, 546.) And, while *In re Horowitz, supra,* 33 Cal.2d 534, *In re Connor, supra,* 16 Cal.2d 701, 705, and *In re Drew, supra,* 188 Cal. 717, condemned piecemeal presentation of claims, none expressly noted the problem of belated presentation of claims that may not have been identified, but with due diligence should have been known to the petitioner and presented in an earlier petition. On occasion, the merits of successive petitions have been considered regardless of whether the claim was raised on appeal or in a prior petition, and without consideration of whether the claim could and should have been presented in a prior petition. (See *In re Walker* [(1974)] 10 Cal.3d 764, ; *In re Crumpton* (1973) 9 Cal.3d 463, 467, ; *In re Terry, supra,* 4 Cal.3d 911; *In re Bevill, supra,* 68 Cal.2d 854.)"

People v. Valencia (2021) 64 Cal.App.5th 641, did not resolve the issue of whether successive petitions were permitted by Proposition 36. The court held, however, that the petitioner's good behavior since the denial of petitioner's first petition was not

"good cause" for filing a petition beyond the statutory two-year limit. "Good cause" generally is based on a delay caused by something beyond the petitioner's control.

G. Constitutional Challenge to Disqualifying Prior Conviction

The defendant may not bring a motion under *People v. Sumstine* (1984) 36 Cal.3d 909 in the context of a motion under section 1170.126 to challenge the constitutionality of a disqualifying prior conviction because of the failure of the court to obtain a proper *Boykin/Thal* waiver. (*People v. Clark* (2017) 8 Cal.App.5th 863.)

H. Appellate Review

Appellate courts were in conflict over the issue of the proper vehicle to review the summary denial of a petition for resentencing under Proposition 36. The primary issue was whether a summary denial is appealable or whether the aggrieved party must proceed by writ. The conflict has been resolved by the Supreme Court in *Teal v. Superior Court* (2014) 60 Cal.4th 595. The summary denial of a petition for resentencing under section 1170.126 is an appealable order under section 1237, subdivision (b).

Standard of review

The denial of resentencing based on dangerousness is reviewed under a mixed standard. "The facts or evidence upon which the court's finding of unreasonable risk is based must be proven by the People by a preponderance of the evidence . . . and are themselves subject to our review for substantial evidence. If a factor (for example, that the petitioner recently committed a battery, is violent due to repeated instances of mutual combat, etc.) is not established by a preponderance of the evidence, it cannot form the basis for a finding of unreasonable risk. (See *People v. Cluff* (2001) 87 Cal.App.4th 991, 998 [trial court abuses its discretion when factual findings critical to decision find no support in record]; cf. *People v. Read* (1990) 221 Cal.App.3d 685, 689-691 [where trial court erroneously determined defendant was statutorily ineligible for probation, reviewing court was required to determine whether trial court gave sufficient other reasons, supported by facts of case, for probation denial].)" (*People v. Payne* (2014) 232 Cal.App.4th 579, 597; footnote omitted.)

The decision by a trial court finding a defendant presents an unreasonable risk of danger to public safety, however, is reviewed under the "abuse of discretion" standard. "Defendant argues the trial court's decision regarding dangerousness should be reviewed for substantial evidence. We disagree. The plain language of subdivisions (f) and (g) of section 1170.126 calls for an exercise of the sentencing court's discretion. " 'Discretion is the power to make the decision, one way or the other.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary,

capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125; see *People v. Williams* (1998) 17 Cal.4th 148, 162 [abuse-of-discretion review asks whether ruling in question falls outside bounds of reason under applicable law and relevant facts].)" (*Payne*, *supra* 232 Cal.App.4th at p. 591; footnote omitted.) In accord with *Payne* is *People v. Myers* (2016) 245 Cal.App.4th 794.

If the prosecution disagrees with a trial court's determination of eligibility for resentencing, the proper remedy is to pursue a writ of mandate in the appellate court. (*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 988; *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1011 [acknowledging prosecutor properly challenged the trial court's eligibility determination by writ petition, prior to the resentencing hearing].) Such a writ petition constitutes a plain, speedy and adequate remedy to challenge that ruling, and consequently the failure to pursue it constitutes a waiver of that challenge. (*People v. Fond* (1999) 71 Cal.App.4th 127, 133-134 [prosecution waived its right to challenge an allegedly inadequate sentence by failing to file its own appeal].)

Appeal by the People

People v. Montellano (2019) 39 Cal.App.5th 148 (*Montellano*), holds a trial court's preliminary determination of a defendant's eligibility for resentencing is not appealable under section 1238, subdivision (a)(5).

> As explained above, a trial court's adjudication of a petition for resentencing under section 1170.126 requires a two-step process. In the first step, defendant bears the burden of demonstrating eligibility. If the defendant satisfies his or her burden, the burden then shifts to the prosecution, in the second step, to demonstrate that the defendant is unsuitable for release. Resentencing, however, occurs only *after the second step is completed* and only if the trial court determines that the defendant does not pose an unreasonable risk to public safety.
>
> Here, the trial court completed only the first step in that process by finding defendant eligible for resentencing under the terms of section 1170.126. But, at that point in the adjudication process, defendant was not automatically entitled to resentencing. Instead, his three-strikes sentence remained in full force and effect, and would continue to control the terms and conditions of his incarceration during the entire time the resentencing process was pending completion.
>
> Only if the trial court determines a defendant is suitable for resentencing, is a defendant entitled to a second-strike sentence and a modification to the judgment necessarily occurs. Therefore, it is only at that point in the process—

when the length of the defendant's three-strike sentence is directly and immediately impacted—that the People's substantial rights are affected under section 1238, subdivision (a)(5) and the District Attorney is empowered to appeal. (See *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1295, 155 Cal.Rptr.3d 856 [because a resentencing order under section 1170.126 'is simply a modification of the original sentence,' and not a new judgment, 'it is appealable under ... section 1238, subdivision (a)(5) as a postjudgment order affecting the substantial rights of the People'].)

Accordingly, we conclude that because the trial court's preliminary eligibility determination did not, by itself, entitle defendant to a second-strike sentence, that ruling did not necessarily affect the substantial rights of the People by directly and immediately altering the judgment, its enforcement, or defendant's relationship to it. The trial court's order was therefore not directly appealable under section 1238, subdivision (a)(5). (*Montellano*, *supra*, 39 Cal.App.5th at pp. 156-157.)

APPENDIX A: FULL TEXT OF PROPOSITION 36

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

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

PROPOSED LAW

THREE STRIKES REFORM ACT OF 2012

SECTION 1. Findings and Declarations:

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

This act will:

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

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

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

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

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

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

667. (a)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) The stay of execution of sentence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) The stay of execution of sentence.

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

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

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

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

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

(B) The prior offense is

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

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

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

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

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

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

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

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

(ii) twenty-five years or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1170.126.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 7. Liberal Construction:

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

SECTION 8. Severability:

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

SECTION. 9. Conflicting Measures:

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

SECTION. 10. Effective Date:

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

SECTION 11. Amendment:

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

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

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

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

APPENDIX B: RESOURCES AVAILABLE FROM CDCR

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Data is as of October 17, 2012

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

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

APPENDIX D: PROPOSED PETITION FOR RESENTENCING

IN THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF _____

IN THE MATTER OF THE PETITION OF

No.

_____,
Petitioner.

PETITION FOR RESENTENCING
(Pen. Code, § 1170.126)

TO THE ABOVE-ENTITLED COURT:

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

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

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

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

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

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

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

5. My current mailing address is:

Name: _____
Address: _____
_____
_____
_____

CDCR No. _____

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

Signed on the date indicated below at _____, California.

Dated: _____ _____
Petitioner

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

IN THE MATTER OF THE PETITION OF

No.

_____,
Petitioner.

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

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

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

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

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

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

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

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

☐ 7. Other reason(s):

Dated: _____ _____

Judge of the Superior Court

APPENDIX F: PROPOSED WAIVER OF PERSONAL APPEARANCE BY PETITIONER

IN THE MATTER OF THE PETITION OF

No.

_____,
Petitioner

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

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

RIGHT OF PERSONAL APPEARANCE

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

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

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

Signed on the date indicated below at _____, California.

Dated: _____ _____

Petitioner

APPENDIX G: PROPOSED ORDER RE HEARING ON REQUEST FOR RESENTENCING

IN THE MATTER OF THE PETITION OF

No.

_____,
Petitioner.

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

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

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

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

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

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

☐ 5. Other orders:

Dated: _____ _____
Judge of the Superior Court

APPENDIX H: TABLE OF CRIMES THAT WILL QUALIFY FOR THIRD STRIKE SENTENCING

[Table created by Hon. John "Jack" Ryan, Orange County Superior Court (Ret.)]

If the current offense is not a serious or violent felony (SF; VF) or other designated offense, or allegation, (667(e)(2)(C)/1170.12(c)) the defendant shall be sentenced as if he or she had only one prior serious or violent felony conviction. Three strike sentencing will apply when any of the following has been pled and proved.

Offense	*Description*	*Authority*
Any felony	Punishable by death or life imprisonment	SF; VF
Any felony	*Personal* use of a firearm. 12022.3(a) 12022.5 12022.53 12022.55	SF; VF; 667(e)(2)(C)(iii); 1170.12(c)(2)(C)(iii)
Any felony	*Personal* use of a deadly weapon. 12022(b)	SF; 667(e)(2)(C)(iii); 1170.12(c)(2)(C)(iii)
Any felony	P*ersonal* infliction of GBI, on a non-accomplice 12022.7 12022.8 12022.9	SF; VF
Any felony	*Personally* armed with a firearm. 12022(a)(1), (c) 12022.3(b) *Personally* armed with a deadly weapon. 12022.3(b) *Personally* intended to cause great bodily injury.	667(e)(2)(C)(iii); 1170.12(c)(2)(C)(iii)
Any attempt	To commit a serious felony, except an assault.	SF
Any felony	Gang crime enhancement, 186.22(b)	SF
Any felony with a prior conviction for a serious or violent felony punishable in California by life imprisonment or death.		667(e)(2)(C)(iv)(VIII); 1170.12(c)(2)(C)(iv)(VIII)
Any felony with a prior serious or violent felony conviction for:		
	187, Murder, or attempt 191.5, Vehicular manslaughter while intoxicated, or attempt.	667(e)(2)(C)(iv)(IV); 1170.12(c)(2)(C)(iv)(IV)

Offense	*Description*	*Authority*
	207, [kidnap to ... §261, 262, 264.1, 286, 288, 288a, or 289.]*	667(e)(2)(C)(iv)(I); 1170.12(c)(2)(C)(iv)(I)
	209, kidnap to violate §261, 262, 264.1, 286, 288, 288a, or 289.	
	220, assault to violate 261, 262*, 264.1, 286, 288, 288a, or 289.	
	261(a)(2), (6), Rape by force, threat to retaliate.	
	262(a)(2), (4), Spousal rape by force, threat to retaliate.	… (iv)(II)
	264.1, Rape in concert by force or violence	
	269, Aggravated sexual assault of a child.	667(e)(2)(C)(iv)(I); 1170.12(c)(2)(C)(iv)(I)
	286(c)(1), sodomy with child <14 + 10 years age differential.	
	286(c)(2)(A), Sodomy by force.	
	286(c)(2)(B), Sodomy by force upon child <14	
	286(c)(2)(C), Sodomy by force upon child >14	
	286(c)(3), Sodomy with threat to retaliate.	… (iv)(III)
	286(d)(1)), Sodomy in concert by force…., threat to retaliate.	667(e)(2)(C)(iv)(I); 1170.12(c)(2)(C)(iv)(I)
	286(d)(2), Sodomy in concert by force upon child <14	
	286(d)(3), Sodomy in concert by force upon child >14	… (iv)(II)
	288(a), Lewd act upon a child under the age of 14	667(e)(2)(C)(iv)(I); 1170.12(c)(2)(C)(iv)(I)
	288(b)(1), Lewd act upon a child by force…	
	288(b)(2), Lewd act by caretaker by force…	
	288a(c)(1), Oral copulation upon a child <14 + 10 years…	
	288a(c)(2)(A), Oral copulation by force…	
	288a(c)(2)(B), Oral copulation by force… force upon child <14.	
	288a(c)(2)(C), Oral copulation by force… force upon child >14.	… (iv)(II)
	288a(d), Oral copulation in concert by force.	
	288.5(a), Continuous sexual abuse of a child with force…	… (iv)(VI)
	289(a)(1)(A), (j), Sexual penetration by force, etc.	
	289(a)(1)(B), Sexual penetration upon a child <14 by force…	… (iv)(V)
	289(a)(1)(C), Sexual penetration upon a child >14 by force…	…(iv)(VII)

Offense	*Description*	*Authority*
	289(a)(2)(C), Sexual penetration by threat to retaliate. 289(j), sexual penetration upon a child <14 + 10 years… 245(d)(3) ,Assault with a machine gun on a peace officer or firefighter 653f, Solicitation to commit murder. 11418(a)(1), Possession of a weapon of mass destruction	
*	Kidnap, as defined in Pen C §207 does not include attempts to commit a defined sex offense. Pen C § 220 specifies *rape* as a designated offense. It does not use a section number, 261 (rape) or 262 (spousal rape).	
Penal Code		
136.1	Intimidation of victim or witness	SF
182(a) / Ser.Fel.	Conspiracy to violate a serious felony	SF
186.22(a)	Gang crime	SF
186.22(a)/136.1	Intimidating a victim or witness in violation of Pen C §186.22(a)	VF
187	Murder	VF
187 & 664	Murder in perpetration or attempt to 261/286/288/288(a)/289.	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
187 & 664	Murder; attempt murder	SF
191.5	Vehicular manslaughter while intoxicated. Pen C §1192.8(a).	SF
192(a)	Voluntary manslaughter. Pen C §1192.8(a).	SF; VF
192(c)(1)	Vehicular manslaughter. Pen C §1192.8(a).	SF
192.5(a)	Vehicular (*vessel*) manslaughter w/ gross negligence; Pen C §1192.8(a).	SF
192.5(b)	Vehicular (*vessel*) manslaughter w/out gross negligence; Pen C §1192.8(a).	SF
192.5(c)	Vehicular (*vessel*) manslaughter without gross negligence; Pen C §1192.8(a).	SF
203	Mayhem	SF; VF
205	Aggravated mayhem	SF; VF
206 (*as actor*)•	Torture (*Personal infliction of great bodily injury. GBI is an element*)	SF; VF
207	Kidnap to 261/286/288/288(a)/289/220 sex	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)

Offense	*Description*	*Authority*
207(b)	Kidnap to child molest	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
207-209.5	Any Kidnaping	SF; VF
208(d)	Kidnap to rape/oral cop./sodomy/foreign	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
209	Aggravated Kidnap to 261/286/288/288(a)/289/220	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
211	Robbery	SF; VF
215	Carjacking	SF; VF
217.1(b)	Attempted murder of a public official	VF
220	Assault to commit rape or robbery. *Robbery is not in 220*	SF
220	Assault to commit mayhem, rape, sodomy, oral copulation, or any violation of §264.1, 288, or 289.	VF; 667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
236.1(b), (c)	Human trafficking with intent to effect a sex crime; inducing a minor to engage in a commercial sex act. (See, Prop.35.)	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
243(d)???	Battery with the *personal* infliction of serious bodily injury.	SF
243.4	Sexual Battery[5]	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
244	Throwing acid or flammable.	SF
245(a)(1) 245(a)(2) 245(a)(3) 245(a)(4) 245(b)	Assault with a deadly weapon. Assault with a firearm. Assault with a machine gun; assault weapon. Assault with force likely to cause GBI (depending on facts) Assault with a semiautomatic firearm.	SF 667(e)(2)(C)(iii); 1170.12(c)(2)(C)(iii)
245(c); (d)	Any assault on a peace officer or firefighter	SF
245.2	Assault with a deadly weapon on public transit personnel	SF
245.2 *dw*	Assault with on transportation personnel . . .	SF
245.3 *dw*;	Assault with on a custodial officer	SF
245.5(a-c)	Assault with a deadly weapon on a school employee	SF
246	*S*hooting at an inhabited dwelling, etc.	SF
246.3	*Personal* discharge of a firearm in a grossly negligent manner. *People v Leslie* (1996) 47 CA4th 198	SF
247(a), (b)	*Personally* shooting at an unoccupied plane; uninhabited dwelling house, etc.	SF
261	Rape. *Pen C §1192.7(c)(3) applies to all theories of rape.*	SF; 667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
261(a)(2); (a)(6),	Rape by force; threat to retaliate	VF
261.5(d)	Unlawful sexual intercourse with a minor <16, by a person	667(e)(2)(C)(ii);

Offense	*Description*	*Authority*
	21 years or older.	1170.12(c)(2)(C)(ii)
262	Spousal rape	SF; 667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
262(a)(1); (a)(4)	Spousal rape by force…; threat to retaliate.	VF
264.1	Rape, spousal rape, sexual penetration in concert	SF; VF
264.1	Rape or 289(a) in concert	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
266c	inducing consent by fraud	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
266h(b)	Pimping, prostitute < 16	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
266i(b)	Pandering, prostitute < 16	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
266j	Procurement of child	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
267	Abducting a child for prostitution	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
269	Aggravated sexual assault of a child < 14	VF; 667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
272	Contributing…involving a lewd act	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
286	Sodomy, except for §§ 286(b)(1), 286(e)	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
286(c)(1), (c)(2)(A-D), (c)(3); (d)	Sodomy (age differential, force, etc., Victim <14 w/force, minor by force or fear, threat to retaliate; sodomy in concert.	VF
286(c)(2)	Sodomy by force or fear	SF
288	Child molest.	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
288(a), (b)	Any lewd act on a child under the age of 14.	SF
288(a), (b)	Any lewd act in (a) or (b)	VF
288.2(a)	Felony distribution of harmful matter/minor	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
288.2(b)	Felony distribution of harmful matter/minor by e-mail, etc.	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
288.3	Arranging meeting with a minor for a lewd act. etc.	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
288.5	Continuous sexual abuse	SF; VF; 667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
288.7(a), (b)	Unlawful intercourse, sodomy; oral copulation, sexual penetration	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)

Offense	*Description*	*Authority*
288a	Oral copulation, except for §§ 288a(b)(1), 288(e)	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
288a(c)(1)	Oral copulation upon a child <14. *P v, Murphy* (25 C4th 136.	SF
288a(c); (d)	Any oral copulation by force, fear, etc.,; in concert	VF
289	Sexual Penetration	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
289(a)(1)	Sexual penetration by force, fear, etc.	SF
289(a), (j)	Any sexual penetration defined in (a), (j),	VF
311.1	Material depicting a child in sexual conduct	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
311.10	Advertising obscene matter depicting minors	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
311.2(b),(c),(d)	Obscene matter/minors	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
311.3	Sexual exploitation/child	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
311.4	Use of minor in distribution of obscene matter	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
422	Criminal threats.	SF
4500	Assault by a life prisoner	SF
4501 *dw*	Assault with a deadly weapon by a prisoner (*n/a force likely...*)	SF
4503	Hostage by a prison inmate	SF
451 451(a); (b)	Any arson Arson causing gbi; inhabited structure	SF VF
451.5	Aggravated arson.	SF
452(a)	*Personally* causing a fire that caused great bodily injury	SF; VF
455 *arson*	Attempted arson. *People v Flores* (1995) 39 CA4th 1811	SF
459* 459*, occ.	Any first degree burglary. Any first degree burglary while occupied.	SF VF
487 (*firearm*)	Grand theft involving a firearm.	SF
518 / 186.22	Extortion in violation of 186.22.	VF
647(a), *former*	Loitering at toilet to solicit a lewd act	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
647.6	Child annoyance	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
653f(c)	Solicit another to commit forcible rape /288(a)(c) /264.1 /288 /289	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
664 / 187	Attempted murder	SF; VF

Offense	*Description*	*Authority*
664 / Sex	Attempt to commit a mandatory registerable sex offense	667(e)(2)(C)(ii); 1170.12(c)(2)(C)(ii)
664 /serious felony	Any attempt to commit a serious felony, except assault	SF
11418(b), (c)	Terrorist activity, using weapon of mass destruction.	SF; VF
12034(c), (d)	Shooting from a vehicle. Renumbered (26100(b), (c)) 1-1-12	SF
12303.3	Exploding a destructive device with intent to injure person or property. Renumbered (18710) 1-1-12	SF
12308/ 18745	Exploding a destructive device with intent to murder	SF; VF
12309/ 18750	Exploding a destructive device causing bodily.	SF; VF
12310(a), (b) / 18755	Exploding a destructive device causing great bodily injury or mayhem	SF; VF
18710	Exploding a destructive device with intent to injure person or property. *People v Armstrong* (1992) 8 CA4th 1060	SF
18745	Exploding a destructive device with intent to murder	SF; VF
18750	Exploding a destructive device causing bodily injury.	SF; VF
18755	Exploding a destructive device causing great bodily injury or mayhem	SF; VF
26100(b), (c)	Shooting from a vehicle.	SF
Health and Safety Code		
11351 / 11370.4	Possession for sale of a narcotic with an excessive quantity allegation or a conspiracy to …	667(e)(2)(C)(i); 1170.12(c)(2)(C)(i)
11351.5 / 11370.4	Possession for sale of cocaine base with an excessive quantity allegation or a conspiracy to …	667(e)(2)(C)(i); 1170.12(c)(2)(C)(i)
11352 / 11370.4	Sale, etc., of a narcotic with an excessive quantity allegation or a conspiracy to …	667(e)(2)(C)(i); 1170.12(c)(2)(C)(i)
11353(c) / 11370.4	*Furnishing, etc.*, a minor w/heroin, cocaine base, or cocaine	SF
11378 / 11379.8	Possession for sale of a controlled substance with an excessive quantity allegation or a conspiracy to …	667(e)(2)(C)(i); 1170.12(c)(2)(C)(i)
11378.5 / 11379.8	Possession for sale of a PCP with an excessive quantity allegation or a conspiracy to …	667(e)(2)(C)(i); 1170.12(c)(2)(C)(i)
11379 / 11379.8	Sale, etc., of a controlled substance with an excessive quantity allegation or a conspiracy to …	667(e)(2)(C)(i); 1170.12(c)(2)(C)(i)
11379.5 / 11379.8	Sale, etc., of PCP with an excessive quantity allegation or a conspiracy to …	667(e)(2)(C)(i); 1170.12(c)(2)(C)(i)

11380	*Furnishing, etc.,* a minor w / PCP or methamphetamine or a precursor	SF
Vehicle Code		
2800.3	Evading an officer, intentionally *using the vehicle as a dw; or personally* causing serious bodily injury/death. (*People v Bow* (1993) 13 CA4th 1551, 1558; Pen C §1192.8(a)..) Serious injury is similar to GBI. *see §243(d), (f)(5); People v Moore* (1992) 10 CA4th 1868.)	SF
23104(b)	Reckless driving with *intentional use as dw or personally* causing GBI w/ prior. *People v Bow* (1993) 13 CA4th 1551; Pen C §1192.8(a)..	SF
23153	DUI, with *intentional use as dw or personally* causing GBI. See §1192.8(b-c); *Bow*; Pen C §1192.8(a).	SF
Welfare & Institutions Code		
1768.8(b)	*Assault with personal use of a deadly weapon* by CYA inmate on non-inmate.	SF