Appellate Advocacy College 2000

Lecture

Sentencing Issues in Criminal Appeals

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THE SENTENCING SUMMARY

"BASE TERM"

The *base term* is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed. *(Rule 405(b).)*

"PRINCIPAL TERM"

The principle term is the greatest term of imprisonment imposed for any of the specific crimes, including any term imposed for specific enhancements. Enhancements are not added onto subordinate non-violent felonies for which a consecutive term is imposed. Subordinate terms are added to the principal term at one-third the middle term for violent and non-violent felonies, and the specific enhancements are added to violent felonies at one-third the middle term. (PC § 1170.1(a).)

THE "AGGREGATE TERM-OF IMPRISONMENT"

The *aggregate term of imprisonment is* the sum of the principal term, the subordinate term and any additional term imposed pursuant to Penal Code section 667, 667.5, 667.6 or 12022.1 and Health and Safety Code section **11370.2. (PC§1170.1(a).)**

SELECTING THE TERM

The sentencing judge shall select the upper, middle, or lower term on each count for which defendant has been convicted when a sentence of imprisonment is imposed or the execution of a sentence of imprisonment suspended. *(Rule 420(a).)*

"MIDTERM PRESUMPTION"

The court *shall order imposition of the middle term* unless there are circumstances in aggravation or mitigation of the crime. (PC *§1170(b); Rule* 420(a).)

STANDARD OF PROOF

Circumstances in aggravation and mitigation are proved by a *preponderance of the evidence.* The upper or lower term is justified only if, after considering all relevant facts, the circumstances in aggravation outweigh those in
mitigation or the circumstances in mitigation outweigh those in aggravation. The relevant facts are included in the record, probation report, other reports and statements properly received, statements in aggravation or mitigation and any further evidence introduced at the sentencing hearing. *(Rule 420(b).)*

REASONS FOR SENTENCE CHOICE

The court shall *state the reasons for its sentence choice* on the record at the time of sentencing. (PC§1170(c).)
A "sentence choice" is the selection of any disposition of the case which does not amount to a dismissal, acquittal, or grant of a new trial. *(Rule 405(o).)*

Sentence choices that generally require a statement of reasons include: (1) granting probation; (2) imposing a prison sentence and thereby denying probation; (3) declining to commit to the Youth Authority an eligible juvenile found amenable to treatment, (4) selecting a term other than the middle statutory term for either an offense or an enhancement; (5) imposing consecutive sentences; (6) imposing full consecutive sentences under section 667.6(c). rather than consecutive terms under section 1170.1 (a), when the court has that choice; (7) striking or staying the punishment for an enhancement; (8) imposing both weapons and injury. enhancements for a single court under section 1170.1(e); (9) waiving a restitution fine and (10) not committing an eligible defendant to the California Rehabilitation Center. *(Rule 406(b).)*

If the court is required to give reasons for a sentence choice it shall state in simple language the primary factor or factors that support the exercise of discretion or, if applicable, state it has no discretion. The statement need not be in the language of these rules and shall be delivered orally on the record. *(Rule 406(a).)*

REASONS FOR AGGRAVATED OR MITIGATED TERM

The court shall set forth on the record the *facts and reasons* for imposing the aggravated or mitigated term. **(PC § 1170(b).)**

The reasons for selecting the aggravated or mitigated term shall be stated orally on the record and shall include a *concise statement of the ultimate facts* which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected. *(Rule 420(e).)*

STIPULATED SENTENCES

It is an adequate reason for a sentence or other disposition that defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection to it. The agreement and lack of objection shall be recited on the record. *(Rule 412(a).)*

WAIVING SECTION 654 CLAIMS

By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record. *(Rule* 412(b).)

"DUAL USE OF FACTS"

The court may not impose the aggravated term by using the fact of any enhancement upon which sentence is imposed pursuant to sections 667.5, 1170.1, 12022, 12022.4 12022.5, 12022.53, 12022.55, 12022.6, 12022.7, 12022.9, or any other section. (PC § 1170(b).)

A fact charged and found as an enhancement may be used as a reason for imposing the aggravated term only if the court has discretion to strike the punishment for the enhancement and does so, and use of the fact to aggravate rather than enhance is adequate reason for striking the additional term of imprisonment regardless of the effect on the total term. *(Rule 420(c).)*

A fact that is an element of the crime shall not be used to impose the upper term. *(Rule 420(d).)*

Any circumstances in aggravation may be considered in deciding whether to impose consecutive rather than concurrent sentences except (i) a fact used to impose the upper term, (ii) a fact used to otherwise enhance defendant's prison sentence or *(iii)* a fact that is an element of the crime. *(Rule 425(b).)*

"AGGRAVATION" OR "CIRCUMSTANCES IN AGGRAVATION"

Aggravation* or *circumstances in aggravation means facts which justify the imposition of the upper prison term referred to in section 1170(b). *(Rule 405(d).)*

Facts Relating To *THE CRIME*
(whether or not charged or chargeable as enhancements)

421 (a)(1) - The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness or callousness.

421 (a)(2) - The defendant was armed with or used a weapon at the time of the commission of the crime.

421 (a)(3) - The victim was particularly vulnerable.

421 (a)(4) - The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

421 (a)(5) - The defendant induced a minor to commit or assist in the commission of the crime.

421 (a)(6) - The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury or in any other way illegally interfered with the judicial process.

421(a)(7) - The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentence s are being imposed.

421 (a)(8) - The manner in which the crime was carried out indicates planning, sophistication or professionalism.

421 (a)(9) - The crime involved an attempted or actual taking or damage of great monetary value.

421 (a)(10) - The crime involved a large quantity of contraband.

421 (a)(111) - The defendant took advantage of a position of trust or confidence to commit the offense.

Fact Relating To *THE DEFENDANT*

421 (b)(1) - The defendant has engaged in violent conduct which indicates a serious danger of society.

421 (b)(2) - The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.

421 (b)(3) - The defendant has served a prior prison term.

421 (b)(4) - The defendant was on probation or parole when the crime was committed.

421 (b)(5) - The defendant's prior performance on probation or parole was unsatisfactory.

LEGISLATED CIRCUMSTANCES IN AGGRAVATION

PC § 243.4(h) The defendant "was an employer and the victim was an employee of the defendant" and is convicted of felony sexual battery.

PC §422.75(c) - The defendant personally used a firearm, in the commission or attempted commission of a crime committed because of the victim's race, color, religion, nationality, country of origin, ancestry, disability or sexual orientation when imposing the enhancements prescribed by sections 422.75(a) and 422.75(b).

PC §1170.7 - Robbery or attempted robbery for the purpose of obtaining any controlled substance was committed against a pharmacist, pharmacy employee or other person lawfully possessing controlled substances.

PC §1170.71 - The defendant used obscene matter to induce a minor to engage in lewd acts where defendant violates Penal Code section 288.

PC §1170.72- - That the minor was 11 years of age or younger where defendant is convicted of a specified controlled substance offense or a specified controlled substance enhancement is found true.

PC §1170.73 - The quantity of controlled substance involved where defendant violates Health and Safety Code section 11377, 11378 or 1178.5.

PC §1170.74 - The controlled substance is the crystalline form of methamphetamine where defendant violates Health and Safety Code section 11377, 11378, 11379 or 11379.6.

PC §1170.75 - The defendant committed a felony because of the victim's race, color, religion, nationality, country of origin, ancestry, disability, gender or sexual orientation (except where the court imposes the additional punishment under section 422.75 or defendant has been convicted of an offense subject to section 1170.8).

PC §1170.76 - Dependant committed or attempted to commit a violation of 243.4, 245, 273.5, or 273.55 and is or has been a member of the household of a minor or the victim, or the appellant is a blood relative, it shall be a circumstance is aggravation.

PC §1170.78 - Defendant committed arson against the owner or occupant of the property or structure burned in retaliation for eviction or any other legal action.

PC §1170.8(a) - A robbery or assault with a deadly weapon or by force likely to produce great bodily injury was committed against a person in a place of worship.

PC §1170.8(b) - A defendant convicted of arson or possession of combustible materials intentionally burned or intended to bum a place of worship.

PC §1170.81 - That defendant knew or reasonably should have known the intended victim of an attempted crime punishable by life was a police officer engaged in his duties.

PC §1170.82 - Upon conviction of Health and Safety Code sections 11352, 11360, 11379 or 11379.5 that the defendant knew or reasonably should have known the person to whom he sold, furnished, administered or gave away the controlled substance was pregnant or in psychological treatment for a mental disorder or for substance abuse at the time of the offense or had been previously convicted of a violent felony defined in section 667.5(c).

PC §1170.84 - That defendant tied, bound or confined the victim of a serious felony.

PC §1170.85(a) - A felony assault or battery was committed to prevent or dissuade a person who is or may become a witness from testifying or providing information to law enforcement or the prosecution in a criminal or juvenile court proceeding.

PC §1170.85(b) - The victim was particularly vulnerable or unable to defend himself due to age or significant disability.

PC § 1170.86 Upon conviction of section 220, 261, 261.5, 264.1, 266 or 269 the fact the offense was committed withing a school zone, against a pupil currently in school, shall be considered an aggravation.

PC §1170.89 - That defendant knew or had reason to believe the firearm was stolen in imposing the upper term for a section 12021.5, 12022, 12022.2, 12022.3, 12022.4. 12022.5, 12022.55 or 12280 enhancement related to possession of, being armed with, use of or furnishing or supplying a firearm.

H&S § 11373(b) - Willful failure to complete a court ordered education and treatment program (other than for inability to pay) when sentencing any subsequent section 11353, 11354 or 11380 violation.

"MITIGATION" OR "CIRCUMSTANCES IN MITIGATION'

Mitigation or *circumstances in mitigation* means facts which justify the imposition of the lower of three authorized prison terms or facts which justify the court in declining to impose an enhancement when the court has discretion not to impose it. (Rule 405(e).)

Facts Relating To *THE CRIME*

423(a)(1) - The defendant was a passive participant or played a minor role in the crime.

423(a)(2) - The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

423(a)(3) - The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

423(a)(4) - The defendant participated in the crime under circumstances of coercion or duress or his conduct was partially excusable for some other reason not amounting to a defense.

423(a)(5) - The defendant with no apparent predisposition to do so was induced by others to participate in the crime.

423(a)(6) - The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

423(a)(7) - The defendant believed he had a claim or right to the property taken or for some other reason mistakenly believed his conduct was legal.

423(a)(8) - The defendant was motivated by a desire to provide necessities for his family or himself.

423(a)(9) - The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

Facts Relating To *THE DEFENDANT*

423(b)(1) - The defendant has no prior record or an insignificant record of criminal conduct considering the recency and frequency of prior crimes.

423(b)(2) - The defendant was suffering from a mental or physical condition that significantly reduced his culpability for the crime.

423(b)(3) - The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

423(b)(4) - The defendant is ineligible for probation and but for the ineligibility would have been granted probation.

423(b)(5) - The defendant made restitution to the victim.

423(b)(6) - The defendant's prior performance on probation or parole was good.

"REASONABLY RELATED" CRITERIA

The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of *additional criteria reasonably related to the decision being made.* Any such additional criteria shall be stated on the record by the sentencing judge. *(Rule 408(a).)*

"SPECIFIC" ENHANCEMENTS

An *enhancement is* an *additional term of imprisonment added to the base term* which merely fixes an additional penalty and does not define a

crime or offense. *(Rule 405(c).) A specific enhancement* relates to the facts of the offense and attaches to a particular count. *(People v. Tassell (1984) 36 Cal.3d 77.)*

PC §186.11 (a) - Defendant commits two or more- related felonies, a material element of which is fraud or embezzlement, which involved a pattern of related felony conduct involving the taking of more than $500,000 and is convicted of two or more felonies in a single criminal prosecution. [2, 3 *or 5 years]*

PC §186.22(b)(1) - Defendant commits or attempts a felony 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 member. [1, 2 or 3 years]

PC §422.75(a) - Defendant commits or attempts a felony because of the victim's race, color, religion, nationality, country of origin, ancestry, disability or sexual orientation. [1, 2 or 3 years]

PC §422.75(b) - Defendant commits or attempts a felony against the property of a public agency or private institution because that property is identified or associated with a person or group of an identifiable race, color, religion, nationality, country of origin, ancestry, gender, disability or sexual orientation. [1, 2 or 3 years]

PC §422.75(c) - Defendant commits or attempts a felony because of the victim's race, color, religion, nationality, country *of* origin, ancestry, gender, disability or sexual orientation while acting in concert personally or by aiding and abetting. [2, 3 or 4 years]

PC §451.1(a) - Defendant is convicted of felony arson in violation of section 451 under specified conditions. [3, 4 or 5 years]

PC §452.1 (a) - Defendant is convicted of felony unlawfully causing a fire in violation of section 452 under specified conditions. [1, 2 or 3 years]

PC §667.8(a) - Defendant kidnapped the victim in violation of section 207 for the purpose of committing a felony violation of section 261, 262, 264.1, 286, 288a or 289. [9 years]

PC 667.8(b) - Defendant kidnapped a victim under the age of fourteen in violation of section 207 for the purpose of committing a felony violation of section 286(c), 288 or 288a(c). [15 years]

PC §667.83 - Defendant is convicted of a felony violation of section 207, 261, 264.1, 273a, 273d, 286, 288, 288a or 289 committed against a child under the age of 18 years and the offense was committed as part of a ceremony, rite or similar observance. [3 years]

PC §667.85 - Defendant is convicted of violating section 207 and kidnapped or carded away any child under the age of fourteen years with the intent to permanently deprive the parent or legal guardian of custody of the child. [5 years]

PC §667.9(a) - Defendant is convicted of specified felony against a person age 65 or older, under the age of 14 or blind, a paraplegic or a quadriplegic. [I year (for each violation)]

PC §667.9(b) - Defendant is convicted of specified felony against a person age 65 or older, under the age of 14 or blind, deaf, developmentally disabled, a paraplegic or a quadriplegic and has suffered a prior conviction for a specified offense. [2 years (for each violation and in addition to a section 667 enhancement)]

PC §667.10 - Defendant is convicted of unlawful penetration in violation of section 289 against person age 65 - or older, 14 or younger or blind, deaf, developmentally disabled, a paraplegic or a quadriplegic, and has suffered a prior conviction for unlawful penetration. 12 years (for each violation)]

PC §667.15(a) Defendant exhibits child pornography prior to or during the commission or attempted commission of a violation of section 288. [1 year]

PC §667.15(b) - Defendant exhibits child pornography prior to or during the commission or attempted commission *of* a violation of section 288.5. [2 years]

PC §667.16 - Defendant is convicted of felony violation of section 470, 487 or 532 as part of a plan or scheme to defraud in connection with the offer or performance of repairs for damage caused by a natural disaster. [1 year]

PC §674(a) - Defendant is a primary care provider who is convicted of a felony violation of section 261, 285, 2869 288, 288a or 289 upon a minor entrusted to his care. [2 years (in addition to any other required or authorized enhancement)]

PC §674(b) - Defendant is a primary care provider who is convicted of a felony violation of section 261, 285, 286, 288, 288a or 289 upon a minor entrusted to his care while acting in concert. [3 years (in addition to any other required or authorized enhancement)]

PC §12021.5(a) - Defendant caries a loaded or unloaded firearm on his person or vehicle during the commission or attempted commission of any

street gang crime described in subdivision (a) or (b) of section- 186.22. (1, 2, or 3 years)

PC §12021.5(b) - Appellant carries a loaded or unloaded firearm together with a detachable shotgun magazine, a detachable pistol magazine, etc. during the commission or attempted commission of a street gang crime described in subdivisions (a) or (b) of section 186.22. (2, 3, or 4 years)

PC §12022(a)(1) - Any principal is armed with a firearm. [1 year (unless arming is an element of the offense)]

PC §12022(a)(2) - Any principal is armed with an assault weapon or machine gun. [3 years]

PC §12022(b)(1) - Defendant uses a deadly or dangerous weapon. [1 year (unless use is and element of the, offense)]

PC §12022(b)(2) - Defendant uses a deadly or dangerous weapon in committing carjacking or attempted carjacking.
[1, 2 " 3 years]

PC §12022(c) - Defendant is personally armed with a firearm during the commission or attempted commission Of a violation of Health and Safety Code section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5 or 11379.6. [3, 4 or 5 years]

PC §12022(d) - Any principal who knows another principal is personally armed with a firearm during the commission or attempted commission of a violation of Health and Safety Code section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5 or 11379.6. [1, 2 or 3 years]

PC §12022.1 - Defendant is convicted of felony while released from custody on bail or own recognizance pending trial on an earlier felony. [2 years (added to secondary offense unless defendant acquitted of primary offense)]

PC §12022.2(a) - Defendant possesses ammunition designed primarily to penetrate metal or armor while armed with a firearm. [3, 4 or 10 years]

PC §12022.2(b) - Defendant wears a body vest in the commission or attempted commission of a violent offense defined in section 12021.1 (b). [1, 2 or 5 years]
PC §12022.3(a) - Defendant uses a firearm of other deadly weapon when violating section 261, 262, 264.1, 286, 288, 288a. or 289. [3, 4 or 10 years]

PC §12022.3(b) - Defendant is armed with a firearm of other deadly weapon when violafing section 261, 262, 264. 1, 286, 288, 288a or 289. [1, 2 or 5 years]

PC §12022.4 - Defendant furnishes or offers to furnish a firearm to another during the commission or attempted commission of a felony to aid and abet or enable that person in committing the crime. [1, 2 or 3 years]

PC §12022.5(a)(1) - Defendant personally uses a firearm. [3, 4 or 10 years (unless use is an element of the offense)]

PC §12022.5(a)(2) - Defendant personally uses a firearm in committing carjacking or attempted carjacking. [4, 5 or 10 years]

PC §12022.5(b)(1) - Defendant discharged a firearm at an occupied motor vehicle causing great bodily injury or death. [5, 6 or 10 years]

PC §12022.5(b)(2) - Defendant personally uses an assault weapon or machine gun. [5, 6 or 10 years]

PC §12022.5(c) - Defendant personally uses a firearm in the commission or attempted commission of a violation of Health and Safety Code section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5 or 11379.6. [3, 4 or 10 years]

NOTE. Subdivision (d) provides the additional terms are applicable in cases of assault with a firearm under section 245(a)(2), assault with a deadly weapon which is a firearm under section 245 or murder if the killing was perpetrated by means of shooting a firearm from a motor vehicle intentionally at another person outside of the vehicle with the intent to inflict great bodily injury or death.

PC § 12022.53(b) For specific enumerated felonies, listen in subdivision (a), any person who used a firearm shall be punished by an additional term of 10 years.

PC §12022.53(c) For specific enumerated felonies, listen in subdivision (a), any person who discharges a firearm in the commission of a subdivision (a) offense shall be punished by an additional term of 20 years.

PC §12022.53(d) For specific enumerated felonies, listen in subdivision (a), any person who discharges a firearm and causes GBI or death, shall be punished by an additional term of 25 years to life.

PC §12022.55 - Defendant intends to inflict great bodily injury or death and causes such injury or death of a person other than an occupant of a

motor vehicle as a result of discharging a firearm from a motor vehicle. [5, 6 or -10 years]

PC §12022.6(a) Defendant takes, damages or destroys property of value in excess of $50,000. [l year]

PC -§12022.6(b) Defendant takes, damages or destroys property of value in excess of S150,000. [2 years]

PC §12022.6(c) Defendant takes, damages or destroys property of value in excess of $1,000,000. [3 years]

PC §12022.6(d) Defendant takes, damages or destroys property of value in excess of $2,500,000. [4 years]

NOTE. Section 12022.6 provides the additional terms are applicable if the aggregate losses to the victims for all felonies charged in the accusatory pleading exceed the amount specified and arise from a common scheme or plan.

PC §12022.7(a) - Defendant personally inflicts great bodily injury. [3 *years (unless infliction is an element of the offense)]*

PC §12022.7(b) - Defendant inflicts great bodily injury causing the Victim to become comatose due to brain injury or suffer paralysis of a permanent nature. [5 years]

PC §12022.7(c) - Defendant personally inflicts great bodily injury on a person 70 years of age or older. [5 years (unless infliction is an element of the offense)]

PC §12022.7(d) - Defendant personally inflicts great bodily injury under circumstances involving domestic violence. [3, 4 or 5 years]

PC §12022.75 - Defendant administers a controlled substance listed in Health and Safety Code section 11054, 11055, 11056, 11057 or 11058 against the victim's will by force, violence or fear of immediate and unlawful bodily injury to the victim or another person. [3 years]

PC §12022.8 - Defendant inflicts great bodily injury in violating section 261(a)(2), 261(a)(3), 261(a)(6), 262(a)(1), 262(a)(4), 264.1, 288(b), 289(a) or sodomy or oral copulation by force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another as provided in section 286 or 288a. [5 years (for each violation)]

PC §12022.85 - Defendant violates section 261, 261.5, 262, 286 or 288a with knowledge he has acquired AIDS or carries the antibodies. [3 years (for each violation)]

PC §12022.9(a) - Defendant intentionally inflicts injury resulting in the termination of a pregnancy. [5 years]

PC §12022.9(b)(1) - Defendant is convicted of violating section 12034 and victim suffers paralysis or paraparesis of a major body part, including the entire hand or foot, as a result of personally, willfully and maliciously discharging the firearm. [4 years]

PC §12022.9(b)(2) - Defendant is convicted of violating section 246 and victim suffers paralysis or paraparesis of a major body part, including the entire hand or foot, as a result of personally, willfully and maliciously discharging the firearm. [4 years]

PC §12022.95 - Defendant is convicted of violating section 273a who under circumstances or conditions likely to produce great bodily harm or death willfully causes or permits a child to suffer or inflicts unjustifiable pain6r injury that results in death or having the care or custody of a child under circumstances likely to produce great bodily harm or death willfully causes or permits that child to be injured or harmed and that injury results in death. [4 years]

H&S §11356.5(a)(1) - Defendant induces another to possess for sale, transport, sell or distribute a specified controlled substance or PCP, and the value of the substance exceeds $500,000. [1 year]

H&S §11356.5(a)(2) - Defendant induces another to possess for sale, transport, sell or distribute a specified controlled substance or PCP, and the value of the substance exceeds $2,000,000. [2 years]

H&S §11356.5(a)(3) - Defendant induces another to possess for sale, transport, sell or distribute a specified controlled. substance or PCP, and the value of the substance exceeds $5,000,000. [3 years]

H&S § 11370.4(a)(1) - Defendant is. convicted of violating or conspiring to violate section 11351, 11351.5 or 11352 with respect to a substance containing heroin, cocaine base or cocaine exceeding 1 kilogram in weight. [3 years]

H&S §11370.4(a)(2) - Defendant is convicted of violating or conspiring to violate section 11351, 11351.5 or 11352 with respect to a substance containing heroin, cocaine base or cocaine, exceeding 4 kilograms in weight. [5 years]

H&S §11370.4(a)(3) -Defendant is convicted of violating or conspiring to violate section 11351, 11351.5 or 11352 with respect to a substance containing heroin, cocaine base or cocaine exceeding 10 kilograms in weight. [10 years]

H&S §11370.4(a)(4) - Defendant is convicted of Violating or conspiring to violate section 11351, 11351.5 or 11352 with respect to a substance containing heroin, cocaine base or cocaine exceeding 20 kilograms in weight. [15 years]

H&S §11370.4(a)(5) - Defendant is convicted of violating or conspiring to violate section 11351, 11351.5 or 11352 with respect to a substance containing heroin, cocaine base or cocaine exceeding 40 kilograms in weight. [20 years]

H&S §11370.4(a)(6) - Defendant is convicted of violating or conspiring to Violate section 11351, 11351.5 or 11352 with respect to a substance containing heroin, cocaine base or cocaine exceeding 80 kilograms in weight. [25 years]

H&S §11370.4(b)(1) - Defendant is convicted violating or conspiring to violate section 11378, 11378.5, 11379 or 11379 wfth respect to a substance containing methamphetamine, amphetamine or PCP and its analogs exceeding 1 kilogram by weight or 30 liters by liquid volume. [3 years]

H&S §11370.4(b)(2) - Defendant is convicted violating or conspiring to violate section 11378, 11378.5, 11379 or 11379 with respect to a substance containing methamphetamine, amphetamine or PCP and its analogs exceeding 4 kilogram by weight or 100 liters by liquid volume. [5 years]

H&S §11370.4(b)(3) - Defendant is convicted violating or conspiring to violate section 11378, 11378.5, 11379 or 11379 with respect to a substance containing methamphetamine, amphetamine or PCP and its analogs exceeding 10 kilogram by weight or 200 liters by liquid volume. [10 years]

H&S §11370.4(b)(4) - Defendant is convicted violating or conspiring to violate section 11378, 11378.5, 11379 or 11379 with respect to a substance containing methamphetamine, amphetamine or PCP and its analogs exceeding 20 kilogram by weight or 400 liters by liquid volume. [15 years]

H&S §11379.8(a)(1) - Defendant is convicted of a violation of or conspiracy to violate section 11379.6(a) with respect to a substance containing amphetamine, methamphetamine or PCP exceeding 1 pound in weight or 3 gallons by liquid volume. [3 years]

H&S §11379.8(a)(2) - Defendant is convicted of a violation of or conspiracy to Violate section 11379.6(a) with respect to a substance containing -amphetamine, methamphetamine or PCP exceeding 3 pounds in weight or .10 gallons by liquid-volume. [5 years]

H&S §11379.8(a)(3) - Defendant is convicted of a violation of or conspiracy to violate section 11379.6(a) with respect to a substance containing amphetamine, methamphetamine or PCP exceeding 10 pounds in weight or 25 gallons by liquid volume. [10 years]

H&S §11380.5(a)(1) - Defendant is convicted of selling or possessing for sale heroin, cocaine, cocaine base, methamphetamine or PCP upon the grounds of a public park or ocean-front beach. [1 year (except if any other additional punishment is imposed pursuant to section 11353.1, 11353.5, 11353.6, 11353.7 or 11380. 1)]

SELECTING THE ENHANCEMENT TERM

When defendant is subject to an enhancement for which three possible terms are specified *the middle term shall be imposed* unless there are circumstances in aggravation or mitigation or, under statutory discretion, the judge strikes the additional term. *(Rule 428(b).)*

CONSECUTIVE SENTENCES

"SUBORDINATE TERM"

The *subordinate term is* the term of imprisonment for felonies for which a consecutive sentence is imposed pursuant to Penal Code section 1170.1. (PC § 1170. 1 (a).)

"Regular Felonies"

The subordinate term for each consecutive offense which is not a "violent felony" is *one-third of the middle term* of imprisonment *excluding enhancements.* (PC §1170.1(a).)

"Violent Felonies"

The subordinate term for each consecutive offense which is a "violent felony" is *one-third of the middle term* of imprisonment prescribed plus *one-third of any enhancement.* (PC §1170.1(a).)

The *violent felonies* are (1) murder or voluntary manslaughter, (2) mayhem, (3) rape as defined in paragraph (2) or (6) of subdivision (a) of section 261 or paragraph (1) or (4) of subdivision (a) of section 262, (4) sodomy by force, violence, duress, menace, or fear of immediate and unlawful

bodily injury on the victim or another person, (5) oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, (6) lewd acts on a child under the age of 14 years as defined in section 288, (7) any felony punishable by death or imprisonment in the state prison for life, (8) any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in section 1202-2.5 or 12022.55, (9) any robbery perpetrated in an inhabited dwelling house, vessel, as defined in section 21 of the Harbors and Navigation Code, which is inhabited and designed for habitation, an inhabited floating home as defined in subdivision (d) of section 18075.55 of the Harbors and Navigation Code, inhabited trailer coach, as defined in the Vehicle Code, or in the inhabited portion of any other building, wherein it is charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of section.12022, in the commission of that robbery, (10) arson, in violation of subdivision (a) of section 451, (11) the offense defined in subdivision (a) of section 289 where the act is accomplished against the Victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, (12) attempted murder, (13) a violation of section 12308, (14) kidnapping, in violation of subdivision (b) of section 207, (15) kidnapping, as punished in subdivision (b) of section 208, (16) continuous sexual abuse of a child, in violation of section 288.5 and (17) carjacking, as defined in subdivision (a) of section 215, if it is charged and proved that the defendant personally used a dangerous or deadly weapon as provided in subdivision (b) of section 12022 in the commission of the carjacking. (18) any robbery of the first degree; (19) a violation of section 264.1 (PC §667.5(c).)

Kidnappings

When a consecutive term is imposed for *two or more* violations of section 207 involving both *separate victims* the aggregate term shall be calculated as in subdivision (a), except the subordinate term for each subordinate kidnaping shall be one-third the middle term and full term for each specific enhancement to those subordinate terms. *(PC § 1170. 1(b).)*

Witness Intimidation

The subordinate term where defendant is convicted of violating section 139(b) is 100% of the middle term. *(PC § 1170.13(a).)*

Offense Against Witness And Another Felony

Where defendant stands convicted of any felony and of a violation of section 136.1 or 137 which was committed against a victim, witness or potential witness or a person who was about to give material information pertaining to the first felony, or 653f which was committed to dissuade a witness or potential witness to the first felony the subordinate term for each section 136.1, 137 or 653f violation consists of 100% *of the middle term* and 100% *of any enhancement* imposed pursuant to sections 12022, 12022.5, 12202.53, 12022.55,or 12022.7 *(PC §1170.15.)*

Robberies

Where defendant stands convicted of one or more robberies where defendant used a dangerous or deadly weapon, each is not a violent felony, the aggregate term shall be calculated per 11701(a), except the subordinate term for each subordinate robbery is one-third the middle term of the offense and enhancement within 12022(b). *(PC § 1170.95.)*

CRITERIA AFFECTING DECISION TO IMPOSE CONSECUTIVE RATHER THAN CONCURRENT SENTENCES

425(a)(1) - The crimes and their objectives were predominantly independent of each other.

425(a)(2) - The crimes involved separate acts of violence or threats of violence.

425(a)(3) - The crimes were committed at different times or separate places, rather than being committed so dose in time and place as to indicate a single period of aberrant behavior.

425(b) - Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except (i) a fact used to impose the upper term, (ii) a fact used to otherwise enhance defendant's prison sentence and (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences.

PRESUMPTION OF CONCURRENCY

The terms of imprisonment shall run concurrently if the court fails to determine how the terms of imprisonment on the second or subsequent judgment shall run. (PC §669.)

"GENERAL" ENHANCEMENTS

An *enhancement is* an *additional term of imprisonment added to the base term* which merely fixes an additional penalty and does not define a

crime or offense. *(Rule 405(c).) A general enhancement* relates to the offender and is added once to the aggregate term of imprisonment. *(People v. Tassell (1984) 36 Cal.3d 77.)*

PRIOR CONVICTIONS

PC §422.75(e) - Each prior felony conviction on charges brought and tried separately where it was found defendant committed or attempted a felony because of the victim's race, color, religion, nationality, country of origin, ancestry, disability or sexual orientation where a section 422.75 enhancement is imposed. [1 year]

PC §667(a)(1) - For each prior conviction of a "'serious felony" in this state or of any offense committed in another jurisdiction which includes all the elements of any serious felony on charges separately brought and tried unless the punishment imposed under another provision of law would result in a longer term of imprisonment where defendant is convicted of a serious felony. [5 years]
The serious felonies are (1) murder or voluntary manslaughter, (2) mayhem, (3) rape, (4) sodomy by force, violence, duress, menace, threat of great bodily injury or fear of immediate and unlawful bodily injury on the victim or another, (5) oral copulation by force, violence, duress, menace, threat of great bodily injury or fear of immediate and unlawful bodily injury on the victim or another, (6) lewd or lascivious acts on a child under the age of 14 years, (7) any felony punishable by death or imprisonment for life, (8) any offier felony in which defendant personally inflicts great bodily injury on any person other than an accomplice or any felony in which defendant personally uses a firearm, (9) attempted murder, (10) assault with intent to commit rape or robbery, (11) assault with a deadly weapon or instrument on a peace officer, (12) assault by a life prisoner on a noninmate, (13) assault with a deadly weapon by an inmate, (14) arson, (15) exploding a destructive device, or any explosive with intent to injure, (16) exploding a destructive device or any explosive causing great bodily injury or mayhem, (17) exploding a destructive device or any explosive with intent to murder, (18) burglary of an inhabited dwelling house or trailer coach or inhabited portion of any other building, (19) robbery or bank robbery, (20) kidnapping, (21) holding of a hostage by a person confined in state prison, (22) facing false imprisonment as described in section 210.5, (23) attempt to commit a felony punishable by death or imprisonment for life, (24) any felony in which defendant personally used a deadly or dangerous weapon, (25) selling, furnishing, administering, giving or offering to sell, furnish, administer or give heroin, cocaine, PCP or any methamphetamine-related drug or any precursor of methamphetamine to a minor, (26) any unlawful penetration where the act is accomplished against the victim's will be force, violence, duress, menace or fear of immediate and unlawful bodily injure on the victim or another, (27) grand theft involving a firearm, (28) carjacking, (29) any violation of section 288.5, (30) any violation of section 244, (31) assault with a deadly weapon or instrument on a firefighter, (32) any violation of section 264.1, (33) any violation of section 12022.53, (34) any attempt to commit a crime listed in this subdivision other than an assault, (35) any conspiracy to commit an offense described in paragraph (25) as it applies to section 11370.4 of the Health and Safety Code where the defendant conspirator was substantially involved in the planning, direction or financing of the underlying offense.

PC §667.51 (a) - For each prior conviction of sections 261, 264.1, 285, 286, 288, 288a, 288.5 or 289 or any offense committed in another jurisdiction that includes all of the elements of any such offense where defendant is convicted of violating section 288, provided that no additional term shall be imposed for any prison term served prior to a period of 10 years in which defendant remained free of both prison custody and the commission of an offense which results in a felony conviction. [5 years]

PC §667.6(a) - Defendant is convicted of violating paragraph (2), (3), (6) or (7) of subdivision (a) of section 261, paragraph (1), (4) or (5) of subdivision (a) of section 262, section 264.1, section 288(b), section 288.5, section 289(a), section 286(k), section 288a(k), or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person and has been convicted previously of any of those offenses, except no enhancement may be imposed for any conviction occurring prior to a period of 10 years in which defendant remained free of both prison custody and the commission of an offense which results in a felony conviction. [5 years]

H&S §11370.2(a) - Defendant is convicted of violating or conspiring to violate section 11351, 11351.5 or 11352 for each prior felony conviction of or each prior felony conviction of conspiracy to violate section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5 or 11383, whether or not the prior conviction resulted in a term of imprisonment. [3 years *(fully and separately and in addition to a 667.5 enhancement)]*

H&S §11370.2(b) - Defendant is convicted of violating or conspiring to violate section 11378.5, 11379.5, 11379.6, 11380.5 or 11383 for each prior felony conviction of or each prior felony conviction of conspiracy to violate section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5 or 11383, whether or not the prior conviction resulted in a term of imprisonment. [3 years *(fully and separately and in addition to a 667.5 enhancement)*]

H&S §11370.2(c) - Defendant is convicted of violating or conspiring to violate section 11378 or 11379 with respect to **substance containing** amphetamine or methamphetamine for each prior felony conviction of or each prior felony conviction of conspiracy to violate section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5 or 11383, whether or not the prior conviction resulted in a term of imprisonment. [3 years (*fully and separately and in addition to a 667.5 enhancement)]*

PRIOR PRISON TERMS

PC §667.5(a) - Defendant is convicted of a "violent felony" and has served a prior separate prison term for a violent **felony, except** no enhancement may be imposed for a prior separate prison term served prior to a period of 10 years in which the person remained free of both prison custody and the commission of an offense which results in a felony conviction. [3 years]

PC §667.5(b) - Defendant is convicted of any felony and has served a prior separate prison term for any felony, except no enhancement may be imposed for a prior separate prison term served for a conviction occurring prior to a period of 5 years in which the person remained free of both prison custody and the commission of an offense which results, in a felony conviction. [1 year]

PC §667.6(b) - Defendant is convicted of violating paragraph (2), (3), (6) or (7) of subdivision (a) of section 261, paragraph (1), (4) or (5) of subdivision (a) of section 262, section 264.1, section 288(b), section 288.5, section 289(a), section 286(k), section 288a(k), or of committing sodomy or oral copulation in violation of Section 286 or 28aa by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person and has served two or more prior prison terms for any such crime, except no enhancement may be imposed for any prison term served prior to a period of 10 years in which defendant remained free of both prison custody and the commission of an offense which results in a felony conviction. [10 years *(for each prison term served)]*

STRIKING THE ADDITIONAL PUNISHMENT
FOR SENTENCE ENHANCEMENTS

The court may strike the additional punishment for the enhancements provided in Penal Code sections 186.10(c), 186.22, 422.75, 667.15, 667.5, 667.8, 667.83, 667.85, 12022, 12022.1, 12022.2, 12022.4, 12022.6, 12022.7, 12022.75, and 12022.9 and Health and Safety Code sections 11370.2, 11370.4, or 11379.8 of the Health and Safety Code if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment. (PC §§ 186.22(d), 422.75(h); H&S 11370.4(e), 11379.8(d); Rule 428(a).)

PRISON CRIMES

Where defendant is convicted of one or more felonies committed while confined in a state prison or subject to reimpdsonment for escape from prison custody, whether in the same or different proceedings, and the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment, for all convictions to be served consecutively shall *commence from the time defendant would otherwise have been released from prison.* If the new offenses are consecutive with each other, the principal and subordinate terms are calculated as provided in section 1170.1 (a). This subdivision shall be applicable in cases of convictions of more than one offense in the same or different proceeding. *(PC § 1170. 1 (c).)*

ALTERNATE SENTENCING PROVISIONS

ARSON

Makes “aggravated arson” punishable by imprisonment for 10 *years to life* without eligibility for release on parole until 10 calendar years have elapsed. (PC 451.5 and 452.1.)

ASSAULT ON CHILD CAUSING DEATH

Prescribes imprisonment for 25 *years to life* where a defendant having care or custody of a child under eight years of age assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury resulting in the child's death. (PC § 273ab.)

ATTEMPTED MURDER

Prescribes **imprisonment for life** *with the possibility of parole* where defendant knows or reasonably should know the victim of an attempted murder is a peace officer or firefighter engaged in the performance of his duties. (PC 664(e).)

DRUG OFFENSES

Subject to a 10-year washout period, prescribes a term of life *imprisonment without parole for 17 years* (or the term imposed for the underlying offenses and enhancements if greater) where defendant is convicted of violating Health and Safety Code section 11353, 11353.5, 11361, 11380 or 11380.5 and has served two or more prior separate prison terms or CYA commitments for any such violation. (PC §667.75.)
GREAT BODILY INJURY

Subject to a 10-year washout period, prescribes a term of *life imprisonment without parole for 20 years* (or the term imposed for the undedying offenses and enhancements if greater) where defendant is convicted of a felony in which great bodily injury was inflicted or force likely to produce great bodily injury was used and has served two prior separate prison terms or CYA commitments for specified felonies. (PC §667.7(a)(1; 667.7(b).)

KIDNAPING

Makes kidnapping to facilitate a carjacking punishable by imprisonment in state prison for life with possibility of parole. (PC § 209.5.)

MURDER

Makes second degree murder perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside the vehicle with intent to inflict great bodily harm punishable by imprisonment in state prison for **20 years to life.** (PC § 190(d).)

SECTION 66.7 HABITUAL CRIMINALS

(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 alI 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 serous and/or violent felony offenses.

Subdivision (c)

When “defendant has been convicted of a felony" and “has one or more prior felony convictions" each of the following apply:

(c)(1) - no aggregate term limitation for consecutive sentencing

(c)(2) - no probation for current or prior offense

(c)(3) - no washout period

(c)(4) - state prison only; *no* diversion or CRC

(c)(5) - postsentence credits “shall not exceed one-fifth" and "shall not accrue until the defendant is physically placed in state prison

(c)(6) - consecutive sentences are mandatory for the present felonies where defendant stands convicted of “more than one felony count not committed on the same occasion, and not arising from the same set of operative facts"

(c)(7) - the sentence for “each conviction” must be consecutive to the sentence imposed “for any other conviction" where defendant stands convicted of "more than one serious or violent felony” as described in paragraph (6) (i.e., .not committed on the same occasion, and not arising from the same set of operative facts"),

(c)(8) - the sentence imposed pursuant to subdivision (e) (i.e., the penalty for the second or third strike) "will be imposed consecutive to any other sentence which the defendant is already serving"

Subdivision (d)

Defines "prior conviction of a felony" as follows:

(d)(1) - any offense in Penal Code section 667.5(c) or 1192.7(c) unless the sentence imposed automatically made the crime a misdemeanor; that probation was granted or defendant committed as an MDSO or to CRC is irrelevant; there is no requirement the priors be "brought and tried separately” (which means defendant may accumulate two "strikes in a single proceeding)

(d)(2) - a conviction in another jurisdiction for any offense that if committed in California is punishable be imprisonment in state prison if it includes all the elements of a felony defined in section 667.5(c) or 1192.7(c)

(d)(3) - a prior juvenile adjudication if (1) defendant was "l 6 years of age or older" when he committed the offense, (2) the offense is listed in Penal Code sections 667.5(c) or 1192.7(c) or Welfare and Institutions Code section 707(b), (3) defendant was "found to be a fit and proper subject to be dealt with under the juvenile court law" and (4) defendant was "adjudged a ward of the juvenile court' because he "committed an offense listedin subdivision (b) of Section 707"

Subdivision (e)

Provides the following "shall apply where a defendant has a prior felony conviction" and will be "in addition to any other enhancement or punishment provision" which may apply:

(e)(1) - if one prior felony conviction, the determinate term or minimum indeterminate term "shall be twice the term otherwise provided for the current felony conviction."

(e)(2)(A) - if two or more prior felony convictions, the term for the current offense is "an indeterminate term of life, imprisonment" with the minimum term of the indeterminate sentence computed as the greater of:

(e)(2)(A)(i) - "three times the term otherwise provided" for each current felony conviction.

(e)(2)(A)(ii) - 25 years

(e)(2)(A)(iii) - the term determined pursuant to section 1170 "for the underlying conviction, including any enhancement," or prescribed by section 190 (punishment for murder) or 3046 (person sentenced to life term)

(e)(2)(B) - this term "shall be served consecutive to any other term of imprisonment for which a consecutive sentence may be imposed by law" and "shall not be merged therein but shall commence from the time the person would otherwise have been released from prison."
Subdivision (f)

The prosecutor "shall plead and prove each prior conviction" unless he moves 'to dismiss or strike" an allegation "in furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction."

Subdivision (g)

Prior felony convictions "shall not be used in plea bargaining."

Subdivision (h)

All statutory references are to statutes as they existed on June 30, 199V

Penal Code § 1170. 12. 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 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 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 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, the court shall impose the sentence for each conviction consecutive to the sentence for any other convicdon for which the defendant may be consecutively sentenced in the manner prescribed by law.
(8) Any sentence imposed pursuant to this sedon 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 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 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 conviction is a prior 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 conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another judsdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior 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 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 prior felony conviction:

(1) If a defendant has one prior felony conviction 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 a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(I) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior 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.

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

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficiient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

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

Addition approved by the voters at the November 8, 1994, general election (Prop 184 §1), effective November 9, 1994.

Note: Prop 184, approved by the voters at the November 8, 1994 general election, provides:

SEC. ***2. All references to existing statutes are to statutes as they existed on June 30, 1993.***

SEC. 3. If any provision of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SEC. ***4. The provisions of this measure 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.***

REPORTED THREE STRIKES OPINIONS AS OF APRIL 07, 2000[1]

By Gary M. Mandinach

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1/ Case names and citations, when they appear in bold, are new additions to the outline.

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

22. A JUVENILE ADJUDICATION QUALIFIES AS A STRIKE IF IT IS AN OFFENSE LISTED IN WELFARE AND INSTITUTIONS CODE SECTION 707, SUBDIVISION

(B) AS WELL AS PENAL CODE SECTION 1192.7. HOWEVER, IN A MULTIPLE COUNT PETITION, IF THE MINOR IS FOUND TO BE A WARD FOR ONE OFFENSE THAT IS A SECTION 707, SUBDIVISION (B) OFFENSE AND ONE IS NOT A 707, SUBDIVISION (B) OFFENSE, THEN THE MINOR QUALIFIES FOR TWO STRIKES AND NOT MERELY ONE.

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

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

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

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

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

PENDING CASES BEFORE THE CALIFORNIA SUPREME COURT

1. DID THE COURT VIOLATE THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY WHEN IT DISMISSED THE JUROR BECAUSE OF ITS BELIEF THAT THE JUROR WAS ENGAGING IN JURY NULLIFICATION?

2. WHETHER OFFENSES ARE COMMITTED BASED ON THE SAME OCCASION OR SAME SET OF OPERATIVE FACTS WHEN THE CRIMES COMMITTED WHERE AT DIFFERENT LOCATIONS, BUT WITHIN 20 MINUTES OF EACH OTHER?

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

4. CAN THE PROSECUTION AMEND THE INFORMATION TO ADD STRIKES AFTER THE JURY HAS COMPLETED THE GUILT PHASE AND HAS BEEN DISCHARGED?

5. IS THERE STRUCTURAL ERROR WHEN THE TRIAL COURT FAILS TO PROVIDE THE DEFENDANT WITH A JURY TRIAL ON HIS PRIORS?

6. IS THE DEFENDANT ENTITLED TO PRESENTENCE CREDITS ON HIS/HER INDETERMINATE TERM WHICH WAS IMPOSED SOLELY DUE TO HIS THREE STRIKE SENTENCE WHERE THE CREDITS WOULD HAVE BEEN AWARDED ON AN DETERMINATE TERM?

COURT OF APPEAL OPINIONS

1. DOUBLING SUBORDINATE COUNTS
2. DUAL USE IN TWO STRIKE CASES
3. EX POST FACTO
4. THE MARCH 7, 1994 ARGUMENT
5. PRIORS COMMITTED BEFORE 1982 AND/OR 1977
6. CREDITS
7. PENAL CODE SECTION 17(b) ISSUES
8. THREE STRIKE SENTENCING CALCULATIONS
9. MANDATORY CONSECUTIVE V. CONCURRENT SENTENCES
10. PENAL CODE SECTION 1385 AND RELATED ISSUES
11. D.A.'s POWER TO STRIKE PRIOR AFTER THE ALLEGATION IS FOUND TRUE
12. VAGUENESS
13. JUDICIAL NOTICE
14. PLEA BARGAIN ISSUES
15. CRUEL AND/OR UNUSUAL ARGUMENTS
16. URGENCY LEGISLATION ARGUMENTS
17. PROVING PRIORS AT PRELIMINARY HEARING
18. BROUGHT AND TRIED SEPARATELY/RECIDIVIST ARGUMENTS
19. OUT OF STATE PRIORS AND STRIKES AFTER THE INITIATIVE
20. DUE PROCESS/EQUAL PROTECTION AND ASCENDING/DESCENDING RECIDIVISM

21. SEPARATION OF POWERS--THE LEGISLATURE USURPING THE DA'S POWER

22. EXPUNGED PRIORS ARE STILL STRIKES

23. A JUDGE CAN BE DISQUALIFIED FROM RULING ON PRIORS

24. THREE STRIKES SENTENCE APPLIES OVER OTHER SENTENCING SCHEMES

25. DOUBLE JEOPARDY ISSUES

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

27. GROSSLY NEGLIGENT DISCHARGE OF A FIREARM QUALIFIES AS A STRIKE

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

29. PRIOR CONVICTION FOR CAR JACKING "WITH A PERSONAL FIREARM USE" QUALIFIES AS A STRIKE

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

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

32. THE COURT NEED NOT GIVE JURY NULLIFICATION INSTRUCTIONS

33. WHEN IS A PRIOR A PRIOR?

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

35. INDETERMINATE TERM CALCULATION IN A TWO STRIKE CASE

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

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

38. ENHANCEMENTS ARE NOT ADDED AT 1/3 THE MIDDLE TERM IN THREE STRIKE CASES

39. CAN THE CRIMINAL STREET GANG ENHANCEMENT BE ADDED TO MORE THAN ONE COUNT IN A SINGLE INFORMATION?

40. LAW OF THE CASE ISSUES

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

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

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

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

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

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

47. WAIVER

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

49. WHEN TAKING A PLEA TO PRIORS THAT WILL AMOUNT TO A STRIKE, A DEFENDANT MUST BE TOLD OF THE PENAL CONSEQUENCES OF HIS ADMISSION UNDER THE THREE STRIKE LAW.

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

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

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

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

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

55. STRIKING A USE ENHANCEMENT AS PART OF A PREVIOUS PLEA BARGAIN DOES NOT PREVENT THE FACTS OF THAT CASE TO SHOW THAT THE DEFENDANT "PERSONALLY USED A FIREARM" WITHIN THE MEANING OF SECTION 1192.7, SUBDIVISION (C)(8); THEREFORE, A STRICKEN ALLEGATION CAN BECOME A STRIKE

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

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

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

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

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

CASES DECIDED BY THE SUPREME COURT AFTER GRANT OF REVIEW

1. PENAL CODE SECTION 1385 ISSUES:

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

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

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

As a result of the modified footnote 13, it is clear that there is no dual jurisdiction. When the matter is in the appellate courts, ask for a remand to the superior court for that court to make its discretionary determination under section 1385, subdivision (a). If appeal is no longer available (e.g., remittitur has issued, or the court has dismissed the appeal, see People v. Couch (1996) 48 Cal.App.4th 1053, [see # 14 (d) under plea bargain issues]), then the "Romero writ" should be filed in the superior court in the appropriate case. (See People v. Fuhrman (1997) 16 Cal.4th 930.) If you do not have a copy of the "Romero writ" that was prepared by this office, and you desire one, please call and it can be sent to you.

b. People v. Garcia (1999) 20 Cal.4th 490, the Supreme Court maintained its consistent set of rulings providing the trial court with the discretion to strike a strike. Here the High Court stated that the trial court had the discretion to strike a strike as to other or subordinate counts while not striking the same strikes on the principle count. In other words, in a three strike case, if the court has the legal right to sentence the defendant to 100 plus years to life, based on four counts, but determines that the sentence would be sufficient if it imposed a 25 to life term, it now has the right to strike the strikes as to counts 2-4, but impose a three strike sentence as to count 1. This theoretically will give the defendant the chance of getting out of prison before the grim reaper takes him/her of natural or unnatural causes.

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

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

3. AMENDING THE INFORMATION TO ADD PRIORS AFTER DEFENDANT PLED

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

4. OUT OF STATE PRIORS AND STRIKES AFTER THE INITIATIVE

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

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

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

issue, present as much mitigation as humanly possible--let your mind wonder and be creative given the fact that the discretionary floor is not set by this case.

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

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

7. EX POST FACTO

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

   b. People v. Tran **DEPUBLISHED 99 LOS ANGELES DAILY JOURNAL D.A.R. 2563;** (1998) 67 Cal.App.4th 1320, the Third District also held that there is a violation of both the federal and state ex post facto clause prohibitions when a restitution fine is imposed within the meaning of section 1202.45, if the crimes were committed be fore the effective date of the statute August 3, 1995 – these crimes were committed before that period, therefore a violation since a restitution fine is a form of punishment. The Court of Appeal distinguished People v. McVickers (1992) 4 Cal.4th 81, which held that a statue requiring an AIDS blood test for certain convictions did not violate ex post facto principles, and served a legitimate governmental interest. The Tran court also found that it mattered little that the restitution fine had been stayed.

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

   a. People v. Samayoa (1997) 15 Cal.4th 795, the High Court held that, consistent with its previous ruling in People v. Alvarez (1996) 14 Cal.4th 155, and one from the Court of Appeal in People v. Williams (1995) 40 Cal.App.4th 446, 457-458, the death penalty

law has not been superseded by the three-strikes law wherein the death penalty is not imposed and the provisions of section 667, subdivision (e) are imposed.

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

a. People v. Davis (1997) 15 Cal.4th 1096. The Supreme Court, in a 4-3 split, ruled that there does not have to be an express finding of fitness for a juvenile adjudication to qualify as a strike within the meaning of section 667, subdivision (d)(3)(C), it may be implied. The court specifically did not state what type of juvenile priors would qualify as strikes, leaving open the question of whether the felony must be within sections 1192.7, subdivision (c), 667.5, subdivision (c) or Welfare and Institutions Code section 707, subdivision (b). The noted exception between the code sections is that residential burglary is not a Welfare and Institutions Code section 707, subdivision (b) offense. This question was answered in People v. Garcia (1999) 21 Cal.4th 1; see infra # 22 this section.

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

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

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

minimum term. Therefore, that effectually puts an end to this issue. It is now formally considered dead.

11. MANDATORY CONSECUTIVE V. DISCRETIONARY CONCURRENT SENTENCES

a. People v. Hendrix (1997) 16 Cal.4th 508, held that the trial court has discretion to impose a concurrent sentence wherein the defendant has two or more prior felony convictions, and then commits serious or violent felonies against multiple victims on the same occasion. The court found that the language in section 667, subdivision (c)(6), which indicates that concurrent sentences can be imposed when the acts are based on "the same set of operative facts" and occur on the "same occasion", is incorporated into subdivision (c)(7) by reference. The court found that the difference between subdivisions (c)(6) and (7) is that in subdivision (c)(7), the trial court must impose the sentences for these offenses which are not committed on the same occasion, consecutive to each other and "consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner proscribed by law." (I.e., that would include a misdemeanor sentence.) The High Court rejected the prosecution's contention that subdivision (c)(6) and (7) only apply to "two strike" cases. The court specifically did not address the meaning of "same set of operative facts" or "same occasion". Additionally, Justice George noted that the majority opinion does not address the issue of whether section 654 applies, or whether the fact that the crimes were committed against multiple victims would not prohibit multiple punishment, even though the acts were committed on the same occasion and arose out of the same set of operative facts. These issues were answered in People v. Deloza (1998) 18 Cal.4th 585, infra, next.

b. People v. Deloza (1998) 18 Cal.4th 585. The High Court determined that the phrase "not committed on the same occasion", as used in section 667, subdivisions (c)(6)(7), was given, as I had urged the court, the plain meaning, that is, a degree of temporal and spacial proximity to the current offenses. The court also found, as we stated in the briefing, and contrary to the position taken by the Court of Appeal opinions penned by Justices Turner and Epstein and there other colleagues, that section 654 is totally inapplicable to the situation where multiple victims are involved. The court did not define the phrase "same set of operative facts." See also section 15 of Court of Appeal opinions for Justice Mosk's concurring opinion and comments on cruel and unusual punishment.

12. BROUGHT AND TRIED SEPARATELY/RECIDIVIST ARGUMENTS

a. People v. Fuhrman (1997) 16 Cal.4th 930, held that even though all of the convictions which qualified as appellant's strikes were brought and tried together, each of the convictions qualified as strikes. The court found that the brought and tried separately language is found exclusively in section 667, subdivision (a)(1) and not within

subdivisions (b) through (i). That subdivision (a)(1) is not within the three-strikes law, and therefore it simply does not apply. The court never addressed the concept of sequential sentencing, nor the public policy briefing behind the habitual offender statutes that was briefed for the court. Simply this issue is now dead.

13. NO REMAND IN SILENT RECORD CASES

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

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

a. Monge v. California (1998) 615 U.S. __, [141 L.Ed2d 615, 118 S.Ct. __], in a 5-4 opinion the High Court held that the double jeopardy clause does not apply to noncapital sentencing proceedings, thereby upholding the opinion of the California Supreme Court, infra. The majority failed to make the ruling established in Bullington v. Missouri (1981) 451 U.S. 430, applicable to a sentencing proceeding in a noncapital case. The court held that a sentencing proceeding is not an offense within the meaning of the double jeopardy clause, and that an enhanced sentence is not viewed as either new jeopardy or an additional penalty for the earlier crimes, but as a stiffened penalty for the new offense. The dissenting opinions provide that the enhancements that the defendant was subjected to constituted an element of the new offense and therefore was subject to double jeopardy protections.

b. People v. Monge (1997) 16 Cal.4th 826. In what can only be called an unbelievable opinion, as demonstrated by the dissenting opinion written by Justice Werdeger and joined in by Justices Mosk and Kennard, the plurality majority ruled that the

prohibition against double jeopardy does not bar a retrial on a prior conviction allegation (e.g. an enhancement), in a non-death penalty case, even though the trier of fact found the evidence insufficient to support a true finding on the enhancement. The majority made this finding based on both the federal and state constitutions. The court expressed no opinion whether due process protections would preclude the prosecution from retrying the prior conviction allegation.

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

a. People v. Williams (1998) 17 Cal.4th 148. Quite simply, the Supreme Court found that the Court of Appeal did not err when it reviewed the trial court's ruling to strike a strike under an abuse of discretion standard. That standard being whether the superior court's order fell outside the bounds of reason under the applicable law and relevant facts. However, the Supreme Court did not uphold the Court of Appeal's ruling which supplanted a different sentence for that of the trial court. It ordered the matter remanded to the trial court for the defendant to be allowed to withdraw his plea as the trial court's ruling was "ineffective". The trial court's comments to appellant, before he entered his plea, that it was willing to consider striking one of the strikes, definitely influenced his decision to plead straight up, and as a result, he was entitled to withdraw the plea rather than have the Court of Appeal reinstate the stricken strike, and impose a 25 to life sentence. Specifically note footnote 6, which indicates that the Court of Appeal can, on its own, raise the question whether the trial court abused its discretion, even if the prosecution did not object in the trial court, and even if the prosecution is bared from raising it for the first time on appeal. This could lead to many unanticipated adverse consequences; therefore, with the client that has a long record like Mr. Williams, you better have a long discussion with him or her before proceeding with an appeal when the trial court has stricken a strike, and you are in a district and/or division that is prone to reviewing a sentence in a manner similar to Second District, Division 5.
I would argue, based on footnote 7, that the Court of Appeal must remand the matter back to the superior court to allow the defendant to place on the record any other evidence that would support the striking of the strike. This evidence must be new and different from that which was presented at the first motion to strike, and which the Court of Appeal found was an abuse of discretion.

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

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

a. People v. Rodriguez (1998) 17 Cal.4th 253. The Supreme Court ruled, consistent with its prior ruling in In re Cortez (1971) 6 Cal.3d 78, and within the parameters of section 977, subdivision (b)(1), that the defendant has a right to be personally present when an appellate court "remands" a sentence back to the trial court. The High Court held that the defendant has a right to be present at this hearing, just as he had a right to be at the initial sentencing hearing, unless he waived that appearance pursuant to section 977, subdivision (b)(1). The Supreme Court expressly distinguished this situation from the silent record case in People v. Fuhrman (1997) 16 Cal.4th 930, where the court held that the appellate court did not have to remand the matter back to the trial court, that appellant's only remedy was to file a Romero writ, and the defendant did not have to be personally present.

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

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

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

a People v. Woodell (1998) 17 Cal.4th 448. The High Court held that the appellate court opinion which, affirms a conviction, is part of the record of conviction and may be considered in determining whether that conviction was for a serious felony within the meaning of Penal Code section 667. The Supreme Court concluded that there was no valid reason to limit the record of conviction to the trial court proceedings. The High Court stated that noticing an appellate opinion for the limited purpose of proving the

existence of the conviction does not require consideration of the facts beyond those necessarily adjudicated in the prior proceeding. The Supreme Court also gave short shrift to appellant's argument that the statements in the opinion were in large part hearsay, and therefore inadmissible. The High court held that the Court of Appeal opinion can be considered for a nonhearsay purpose to establish the basis for the conviction, and may also be admitted within the meaning of Evidence Code section 1280, as an official record.

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

a People v. Lloyd (1998) 17 Cal.4th 658. Appellant pleaded to a second degree robbery and the trial court made adverse finding as to the three strikes allegations. Prior to pleading open to the court, he was informed by his counsel that "there might be some decisions [i.e., referring to People v. Superior Court (Romero) (1996) 13 Cal.4th 497] by the higher courts which would change the way in which priors are imposed. Prior to the Supreme Court deciding Romero, the court imposed sentence, but stated that it did not believe that it had the power to strike a strike. Appellant then filed a notice of appeal. While the appeal was pending, the High Court decided Romero. Thereafter, the prosecution moved to dismiss appellant's appeal, and the Court of Appeal complied, for appellant's failure to secure a certificate of probable cause within the meaning of Penal Code section 1237.5 and California Rules of Court, Rule 31(d). This court held that, the aforementioned sections indicate that when appellant personally files a written statement, under oath, showing reasonable grounds for proceeding, and the superior court then executes a certificate of probable cause, the appeal should not proceed. (People v. Panizzon (1996) 14 Cal.4th 68, 75.) One exception to this general rule is that a certificate of probable cause is not needed if the basis for the appeal is premised solely on the ground occurring after entry of the plea, and which do not challenge the plea's validity. (Id.)

Given the fact that a notice of appeal is to be construed liberally, (CRC, rule 31(b)), the court found the notice of appeal sufficient even though the notice of appeal did not use the magic terms of the statute, but merely indicated that defendant was appealing from the "sentence." Here, the court found that the appeal did not challenge, "in substance" the validity of the plea, as it did in Panizzon, supra [wherein the appeal was also only challenging appellant's sentence, but as part of a plea bargain]. This court found that appellant's pleading open, was not a plea bargain and that the basis for the appeal was not "fact bound", but based solely on a "question of law", whether the trial court could, on its own motion strike a strike.

20 A PREVIOUSLY STAYED CONVICTION CAN BE USED AS A STRIKE

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

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

a People v. Barella (1999) 20 Cal.4th 216, the Supreme Court held that, the trial courts failure to advise appellant of his limits on his ability to earn conduct credits and that he must serve 4/5th of the total sentence before he is eligible for parole is not a violation of Boykin/Tahl/Bunnell line of cases. (See Bunnell v. Superior Court (1975) 13 Cal.3d 592.) This holding is now in line with People v. Cortez (1997) 55 Cal.App.4th 426 decided by the Fifth District. The High court analogized to the United States Supreme Court's ruling in Hill v. Lockhart (1985) 474 U.S. 52, 55-56, wherein the court ruled that a defendant's parole eligibility date is not a direct consequence of which a defendant must be apprized before he enters a plea. That the credit limitation contained within the Three Strikes law is the functional equivalent of a parole eligibility date, and that neither the California nor federal constitutions require that the defendant be advised of this prior to his entering a plea.

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

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

(b), but it is a serious felony under section 1192.7, subdivision (c); therefore, the sustained petition for burglary is not a strike. However, if the defendant had a sustained petition for a robbery with a gun use, and a burglary, and both counts were found true within one petition, then both of the offenses qualify as strikes. Therefore, depending on the particular offense(s), a juvenile sustained petition may qualify as multiple strikes or no strikes.

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

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

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

a People v. Nguyen (1999) 21Cal.4th 197, the Supreme Court held that, consistent with virtually every published Court of Appeal decision on the matter, in a "two-strike" case, the subordinate term(s) of the determinate portion of the sentence, are doubled at one-third the middle term and are not doubled at full term within the commonly know principles of section 1170.1.

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

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

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

a People v. Thomas (1999) 21 Cal.4th 1121, the Supreme Court held that a defendant who is subject to a life term under the three-strikes law, is not limited to the 15% limitation on presentence credits, when the underlying crime, would not in and of itself, subject appellant to a life sentence. This case relied on the rationale first set forth in People v. Henson (1997) 57 Cal.App.4th 1380, which made explicitly clear that the limitation on presentence credits is limited to the crime as originally charged, rather than the ultimate sentence that the defendant received. The High Court concluded that a strike defendant is entitled to presentence credits under section 4019. However, the court holds open the question, in footnote 3, whether a three strike defendants are entitled to presentence conduct credits when he solely has an indeterminate term, and not the mixed determinate and indeterminate term as in this case.

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

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

PENDING CASES BEFORE THE CALIFORNIA SUPREME COURT

1 DID THE COURT VIOLATE THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY WHEN IT DISMISSED THE JUROR BECAUSE OF ITS BELIEF THAT THE JUROR WAS ENGAGING IN JURY NULLIFICATION?

a People v. Williams (REVIEW GRANTED, February 25, 1998.) (SO66106.)

2 WHETHER OFFENSES ARE COMMITTED BASED ON THE SAME OCCASION OR SAME SET OF OPERATIVE FACTS WHEN THE CRIMES COMMITTED WHERE AT DIFFERENT LOCATIONS, BUT WITHIN 20 MINUTES OF EACH OTHER?

a People v. Lawrence REVIEW GRANTED, reported on February 26, 1999, in 1999 Los Angeles Daily Journal D.A.R. 1874, (S070271). This is the second time that this case has been granted review. Initially it was a grant and hold behind Deloza, and then it was transferred back to the Court of Appeal in light of that decision. Now, on a People's appeal, after the Court of Appeal once again found that the crimes committed where based on the same set of operative facts and where committed on the same occasion, they grant review to determine the parameter of the same set of operative facts.

b People v. Aguayo REVIEW GRANTED, February 24, 1999, in 1999 (S071483) from an unpublished opinion. The issue concerns the meaning of the phrase "same set of operative facts" for purposes of determining whether consecutive sentencing is mandatory within the meaning of section 667, subdivision (c)(6).

3 DOES A NON-FORCIBLE SEXUAL OFFENSE AGAINST A MINOR UNDER 14 CONSTITUTE A STRIKE?

a People v. Montes REVIEW GRANT February 24, 1999 (S075759); (1998) 67 Cal.App.4th 1372, modified 69 Cal.App.4th 909a, the Second District, Division 4, held that violations of section 286 and 288a are not strikes as they do not have the requisite intent to arouse. This opinion is contrary to the opinion in the one strike case of People v. Murphy (1998) 67 Cal.App.4th 1205, in that case the Third District held that both section 286, and 288a are strikes within the meaning of section 1192.7, subdivision (c)(6). The Montes court held that the requisite intent was found in a violation of section 289, subdivision (j), and appellant conceded the fact that the conviction for this offense satisfied the elements of section 288, which is a strike within the meaning of section 1192.7, subdivision (c)(6). This court merely disagrees with appellant's argument, which was supported with the holding in People v. Mena (1988) 206 Cal.App.3d 420, which found that if the name of the crime is not specifically mentioned, even if the conduct may be the same, the legislature new how to name specific crimes as violent, they did not do so with sections 286, 288a or 289,

subdivision (j), therefore, they did not intend that they become serious felonies. Obviously, if you are not in the Second District, use Mena and its rationale.

b People v. Murphy REVIEW GRANT February 24, 1999 (S075263) (1998) 67 Cal.App.4th 1205, the Third District, held that a defendant who is subject to the three strikes law can also be subject to the one strike law within the meaning of section 667.71. Therefore, if the court is sentencing under both the three strikes law and the one strike law, the court must triple the 25 to life imposed under the one strike law when imposing sentence under the provisions of 667, subdivision (e)(2)(A)(i) of the three strikes law. Furthermore, this Court of Appeal states that the defendant can receive multiple life sentences under the one strike law for current multiple offenses.

c People v. Davis REVIEW GRANT August 25, 1999 (S079736) formerly cited at (1999) 71 Cal.App.4th 1492, grant and hold behind Murphy, supra, on the interplay between the three strikes law and felony sex offenses sentenced under section 667.61.

4 CAN THE PROSECUTION AMEND THE INFORMATION TO ADD STRIKES AFTER THE JURY HAS COMPLETED THE GUILT PHASE AND HAS BEEN DISCHARGED?

a People v. Tindall REVIEW GRANTED, REPORTED IN 99 DAILY JOURNAL D.A.R. 9731, ON SEPTEMBER 17, 1999; formerly at (1999) 72 Cal.App.4th 188, the Second Appellate District, Division 2 held that the prosecution can amend the information to add strikes even after the jury has been dismissed following a guilty verdict in the guilt phase of the proceedings. The Court of Appeal held that unless (1) prejudice can be shown, or (2) that trial tactics would have been altered, then the amendment is permitted. Other factors to be considered are: (1) the reason for the late amendment, (2) was the defendant surprised by the amendment, (3) whether the prosecution's initial failure to file the strikes affected a plea bargain, (4) whether other felony convictions had been charged, and (5) whether the jury had been discharged. The defendant was facing only 4 years before the addition of the strike priors.

5 IS THERE STRUCTURAL ERROR WHEN THE TRIAL COURT FAILS TO PROVIDE THE DEFENDANT WITH A JURY TRIAL ON HIS PRIORS ?

a In re Epps (1999) REVIEW GRANTED November 22, 1999, reported in 99 Daily Journal D.A.R. 11597 (S082110) formerly cited at, 73 Cal.App.4th 1332, the Second District Court of Appeal, Division 4, held that a defendant, in light of People v. Kelii (1999) 21 Cal.4th 452, is entitled to a hearing to determine whether the priors actually exist and if the court denies a jury trial altogether, it must be reversed as it would be structural error. However, they will be able to retry the matter as a result of Monge v. California (1998) 615 U.S. _, [141 L.Ed2d 615, 118 S.Ct. _].

b People v. Gonzalez REVIEW GRANT AND HOLD BEHIND EPPS. November 23, 1999 reported in 99 Daily Journal D.A.R. 11703 (S081855). Formerly cited at (1999) 73 Cal.App.4th 885, the Second Appellate District, Division 2, held, in a trial on his priors, the defendant has a right to have a jury determine (1) Is there a prior conviction; (2) When did it occur; (3) Was the defendant sentenced to prison based on the conviction and/or was the defendant incarcerated in prison; and (4) How long has the defendant been out of custody since suffering the conviction.

c People v. Allen (S083835) REVIEW GRANT AND HOLD BEHIND PEOPLE V. EPPS; formerly at (1999) 75 Cal.App.4th 996, the Fourth Appellate District, Division 1 held, that pursuant to People v. Kelii (1999) 21 Cal.4th 452, appellant did have a right to a jury trial on his priors; however, given the fact it is a statutory right, and not a constitutional right (see People v. Vera (1997) 15 Cal.4th 580), it was harmless error to deny appellant his jury trial right. As the Court of Appeal noted, the procedure outlined in Kelii, has left very little for the jury to do in the context of an alleged prior conviction.

d People v. Matthews (S083619) REVIEW GRANT BEHIND EPPS; formerly at (1999) 75 Cal.App.4th 1027, the Fourth Appellate District, Division 2 held, in spite of the directive from the Supreme Court in Kelii, supra, this court held that the language of Kelii, pertaining to what the jury will determine other after the court determines the issue of identity pursuant to section 1025, subdivision (c), is dicta, and they do not have to follow it.

e People v. Ramirez (S083906) REVIEW GRANT AND HOLD BEHIND EPPS; formerly at (1999) 75 Cal.App.4th 1165, the Second Appellate District, Division 5 held, that pursuant to People v. Kelii (1999) 21 Cal.4th 452, appellant did have a right to a jury trial on his priors; however, given the fact it is a statutory right, and not a constitutional right (see People v. Vera (1997) 15 Cal.4th 580), it was harmless error to deny appellant his jury trial right. There is a long discussion on the meaning of **"**structural error**"**, which if found, would have led to a reversal per se. But, following the lead of Justice Werdeger in Vera, supra, this court does not find the denial of a jury trial, which was replaced by a court trial to be structural error, therefore, we are left with a harmless error analysis. As a result, under Watson, the conviction will not be reversed unless it appears reasonably probable that the defendant would have received a more favorable result had the error not occurred. Not so in this case.

6 IS THE DEFENDANT ENTITLED TO PRESENTENCE CREDITS ON HIS/HER INDETERMINATE TERM WHICH WAS IMPOSED SOLELY DUE TO HIS THREE STRIKE SENTENCE WHERE THE CREDITS WOULD HAVE BEEN AWARDED ON AN DETERMINATE TERM?

a In re Cervera (2000) REVIEW GRANTED November 23, 1999 (S075310); formerly at (1999) 74 Cal.App.4th 766, the Fourth District Court of Appeal, Division 3, held that a defendant is not entitled to section 2933 credits on the indeterminate portion of his sentence. The defendant was sentenced to 25 to life based on the third strike, and was also sentenced to a determinate 12 years based upon 2 five-year priors, and 2 prior prison terms. Footnote 5, indicates that appellant does earn credits on the determinate term which are applied to reduce that portion of the term, which must be served prior to starting the indeterminate term pursuant to section 669. However, the Court of Appeal's analysis seems to be faulty at least in one respect. It states that appellant does not earn credits on his life term. However, even if the credits are not accrued on a daily basis as they are with a determinate term, they are calculated and awarded to appellant once a release date is set by the Board of Prison Terms.

COURT OF APPEAL OPINIONS

1 DOUBLING SUBORDINATE COUNTS:

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

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

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

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

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

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

2 DUAL USE IN TWO STRIKE CASES:

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

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

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

d People v. Sipe (1995) 36 Cal.App.4th 468. Sipe also rejects "dual use" and section 654 arguments based on the rational of People v. Bruno (1987) 191 Cal.App.3d 1102, 110-1107. (S048035) REVIEW DENIED.

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

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

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

h People v. Coronado (1995) 12 Cal.4th 145, the High court finally ruled in this "dual use" case. They found that it is just fine to use the same deuce conviction to elevate the misdemeanor to a felony and to add the section 667.5, subdivision (b) enhancement. The court specifically found that since not all deuce priors necessarily or commonly will result in a state prison commitment, there is no violation of dual use or section 654 in this case. They also found that a violation of a specific statute necessarily or commonly will result in a violation of a general statute when the elements are the same. Since not all deuce priors necessarily result in prison terms, the court found there was no problem to use both in this case. NOW USING THAT LOGIC, SHOULD WE NOT WIN IN STRIKE CASES WHEN THE USE OF A SECTION 667, SUBDIVISION (A) STRIKE PRIOR ACTS AS BOTH THE STRIKE AND TO ADD THE 5 YEAR YEARS TO THE SENTENCE? Answer, no; see People v. Dotson (1997) 16 Cal.4th 547.

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

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

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

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

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

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

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

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

n People v. Yarborough (1996) 65 Cal.App.4th 1417, the Fifth District held that there was not a dual use violation within the meaning of People v. Edwards (1976) 18 Cal.3d 796. In Edwards, the Supreme Court stated that when a prior conviction constitutes an element of criminal conduct which otherwise would be noncriminal, the minimum sentence may not be increased because of the indispensable prior conviction. Edwards had a prior conviction for selling marijuana, and a new conviction for possession of a weapon by an ex-con. The possession of a weapon would other wise be noncriminal but fore the prior conviction. Here, the court states that appellant's current conviction for failing to register, based upon the prior conviction for a sexual assault, was not noncriminal and therefore distinguished Edwards. However, one could argue that but for the prior sexual assault conviction, Yarborough would not have had to register, and

therefore, the rule in Edwards should still apply. We will see if the Supreme Court grants review to clarify Edwards, at least within this context.

o People v. Tillman (1999) 70 Cal.App.4th 710, First Appellate District, Division 2 held that the use of a prior offense to justify an element of the offense for failing to register, and to double the current offense, may be dual use, but the intent of the legislature in enacting the three strikes legislation is a clear expression that it intended to eliminate the rule set forth in People v. Edwards (1976) 18 Cal.3d 796. Edwards had stated that a single fact cannot be used to establish an element of an offense and to enhance a sentence. The Court of Appeal goes through the history of Edwards, setting aside those cases such as People v. Yarborough (1996) 65 Cal.App.4th 1417, as finding distinction without a difference from Edwards. To that end, the case has some very good language, Justice Kline however comes to the same conclusion as the prior cases, that dual use is not precluded, but this time based on the intent of the legislature to not based on following Edwards.

3 EX POST FACTO APPLICATION:

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

4 THE MARCH 7, 1994 ARGUMENT:

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

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

Additionally, Green can be interpreted to limit serious or violent felonies to those which were classified as such at the time of the prior conviction. (Id., at p. 9054.) In other words, if the conviction for the felony occurred prior to the enactment of sections 667.5 or 1192.7, then one can argue that it cannot be classified a serious or violent felony now.

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

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

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

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

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

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

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

5 PRIORS COMMITTED BEFORE 1982 AND/OR 1977

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

b People v. Turner (1995) 40 Cal.App.4th 733, Second District Division 5, holds similarly to Jones, supra, that a conviction for a crime that would have been a serious or violent felony had it been committed after the passage of 1192.7, or 667.5, can still be determined to be strike priors. The court reasoned that: (1) based on the rationale

stated in Gonzales v. Superior Court (1995) 37 Cal.App.4th 1302, 1305-1311, that the "determination clause" of subdivision (d)(1) of section 667 requires the sentencing court to determine whether, as of the date of the prior conviction the prior was a felony or misdemeanor--and that it does not require a separate determination that the prior was a serious or violent felony. Why not, isn't that what the statute says? (2) that the language in People v. Green (1995) 36 Cal.App.4th 280, 283, that the court must look to "determine if a prior conviction was serious or violent at the time of conviction", was "obiter dictum", as the prior offense in Green, did not occur until 1987.

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

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

6 CREDITS:

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

b People v. Williams (1996) 49 Cal.App.4th 1632, the Sixth Appellate District held that: (1) the 20 percent limitation on credits does apply to the enhanced term--it relies on the rationale of Brady, supra; (2) however, the court found that the 20 percent limitation on credits does not apply to "offenses" that occurred prior to the enactment of the strikes legislation. Note specifically the language in section 677, subdivision (c)(5), which indicates that the limitation will be limited to the time for the "new offense."

c People v. Culpepper (1995) 32 Cal.App.4th 237. **DEPUBLISHED.** The three strikes law does not create disparate treatment in the award of credits to similarly situated groups. The Supreme Court in Jenkins, supra, also rejected the equal protection

argument pertaining to the credits issues, specifically disapproving any conflicting language in In re Diaz (1993) 13 Cal.App.4th 1755.

d People v. McCain (1995) 36 Cal.App.4th 817. The Fourth District, Division 1, also rejects the equal protection argument pursuant to Jenkins (1995) 10 Cal.4th 234, 243-248, which overruled In re Diaz (1993) 13 Cal.App.4th 1755 to the extent mentioned above. Jenkins held that recidivist murderers must be sentenced under the terms of the recidivist statute, section 667.7 and not under 190, and that there was no equal protection violation as a result. They find therefore, that a defendant only gets 20% credits pursuant to Brady, supra.

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

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

g. People v. Applin (1995) 40 Cal.App.4th 404, the Fifth District holds that the three strike law does not violate equal protection in awarding less credits to recidivists. The court rejects the contention that second strike offenders are treated less harshly; they find that they do not receive more credits than other offenders within the meaning of section 2931, subdivision (b). As applied to three strike offenders, Applin notes that pre-sentence credits applied to an indeterminate term will only serve to advance the parole eligibility date, not the actual time of release. This is a partial response to the Attorney General's argument that a third striker does not get any pre-trial custody credits. (Accord, People v. Stofle (1996) 45 Cal.App.4th 417 [support the proposition that the credits are not given until appellant serves at a minimum of 25 years on his life sentence, but that a defendant is entitled to them once he is given a parole date]; see also In re Sosa (1980) 102 Cal.App.3d 1002, 1003-1006; In re Ballard (1981) 115 Cal.App.3d 647, 648-650.)

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

i. People v. Spears (1995) 40 Cal.App.4th 1683, the Fifth Appellate District, concurred with the rationale of Jenkins, and found no equal protection violation as the defendant

in this matter was being compared to a non-recidivist, thereby negating one of the primary elements of the equal protection analysis. This argument can now be put into the officially dead category.

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

k. People v. Cortez (1997) 55 Cal.App.4th 426, the Fifth Appellate District ruled that the court was not required to advise appellant before his plea that his prison credits were limited to 20% due to the three strikes provisions, and that his ability to earn conduct credits was limited by the three strikes legislation. The court rejected appellant's contentions that the plea was involuntary and not intelligently made absent the proper advisements. Appellant had relied on People v. Tabucchi (1976) 64 Cal.App.3d 133, wherein the Court of Appeal held that under the indeterminate sentencing provisions, appellant had pled to 5 years to life, and was not informed of the special parole limitation at the time of his plea. This case is now consistent with People v. Barella (1999) 20 Cal.4th 216.

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

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

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

limited to the 15% limitation on presentence credits. This case is consistent with People v. Thomas (1999) 21 Cal.4th 1121.

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

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

7. PENAL CODE SECTION 17(b) ISSUES:

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

b. People v. Vessell (1995) 36 Cal.App.4th 285. The court has the power to reduce a "wobbler" from a felony to a misdemeanor under section 17, subdivision (b)(3).

Second District Division 2 also affirmed the court's power to give an indicated sentence as distinguished from a plea bargain; as indicated sentences are not prohibited by the three strikes ban against plea bargaining.

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

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

e. People v. Carranza (1996) 51 Cal.App.4th 528, the Sixth Appellate District ruled that the prosecution has the right to appeal a sentence that may be unauthorized pursuant to section 1238, subdivision (10). (See also People v. Trausch, supra, 36 Cal.App.4th 1239.) The Carranza court also determined that, pursuant to People v. Scott (1994) 9 Cal.4th 331, 345, a sentence is generally unauthorized if it could not be lawfully imposed, and any sentence which is only procedurally or factually flawed is permitted unless there is an objection--in other words, the error is waived for purposes of appeal. After resolving the procedural dispute, the court found, when the entire statute is analyzed and the legislature's intent is considered, that section 290 (failing to register) is a wobbler, and therefore, the trial court did not err in sentencing appellant to one year in county jail. Given the fact that section 17 was on the books at the time section 290 was enacted, and given the fact that subdivision (g)(3) provides for a misdemeanor sentence under certain circumstances, the court found that the legislature was deemed aware of existing laws (e.g. § 17), when it passed the statute (e.g. § 290), and as a result there was no clear statement of intent to create a non-alternate felony. Given the fact that the court's sentence was not unauthorized, and there was no objection by the prosecution, any error is waived.

8. THREE STRIKE SENTENCING CALCULATIONS:

a. People v. Jenkins (1995) 10 Cal.4th 234. A defendant who qualifies under both three strikes and section 667.7, must be sentenced under three strikes, not 667.7 or an "other sentencing statute." [Isn't the death penalty an "other sentencing statute?"] The court also indicates that the prosecution must plead and prove the (b) to (I) allegations. They

also interpret a similar provision to (iii), indicating **serious felony enhancements are not added onto the minimum term**. The question remains whether the precatory phase in 667, subdivision (e) "in addition to any other enhancement" is a significant distinction from the language of section 667.7 to permit the addition of a determinate term to the indeterminate term.

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

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

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

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

f. **People v. Hayes (1996) 44 Cal.App.4th 1238. DEPUBLISHED.** Second District, Division 7, followed the lead of the aforementioned cases and find that the court's failure to impose the 2 section 667, subdivision (a)(1) prior serious felony convictions

amounted to an unauthorized sentence; as a result, the court ordered the 10 years added onto the sentence previously imposed.

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

Appellant argued that if the calculation were to be made on a count by count basis, (I) and (iii) would virtually never be used, the default of (ii) would be used for each count, therefore (i) and (iii) would become a nullity, which, as we know, violates all the rules of statutory construction. The court cites a few instances wherein the (I) sentence would exceed 25 years (e.g., §§ 215, 208, 288.5). However, I would not give up on this aspect of the argument given the limited application of this argument.

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

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

j. People v. Mines **DEPUBLISHED** (1997) 55 Cal.App.4th 698, Second Appellate District, Division 2, ruled that it was not error for the trial court to add an enhancement pursuant to Health and Safety Code section 11370.2, subdivision (a) to the minimum

term of 25 to life. The court had rejected our Jenkins analysis. Therefore, post-Dotson, this issue seems dead.

k. People v. Thomas (1997) 56 Cal.App.4th 396, Second Appellate District, Division 7, ruled that when calculating an indeterminate life sentence, in a multiple count case, each count is individually calculated to determine if it is greater or less than 25 years to life. The court specifically rejects our argument that the language from subdivision (e)(1), of section 667, "the term other wise provided as punishment" means that the calculation under subdivision (e)(2)(A)(i), which uses the same language must be calculated in the same "aggregate" manner. The court ruled that the above quoted phrase means that the court is to calculate the sentence using the lower, middle or upper term; it does not mean that the consecutive sentencing calculations are done pursuant to section 1170.1 terms as they are in the two strike calculations. (See People v. Ingram (1995) 40 Cal.App.4th 1397, 1407.) In spite of this conclusion drawn by Justice Johnson, I would continue to raise this issue until the Supreme Court rules against us. The statutory construction argument in this opinion is somewhat weak and may be subject to Supreme Court review in the future.

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

m. People v. Garcia (1997) 59 Cal.App.4th 834, the Second Appellate District, Division 2, and modified December 24, 1997, in 97 Los Angeles Daily Journal D.A.R. 15377, held that a trial court has the discretion of imposing the strikes on one count, but striking them for subordinate or other counts so as to avoid an unreasonable sentence. The Court of Appeal concluded that the striking of the strikes for the subordinate counts was not an unauthorized sentence and was in fact arguably permitted pursuant to People. v. Superior Court (Alvarez) (1997) 14 Cal.4th 968, 979.)

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

section 3046. However, I believe that the "term" in a 25 to life sentence is not 25 years, but life, and as a result, life cannot be tripled. **Remember, in People v. Dozier (2000) 78 Cal.App.4th 1195, Division 7 of the Second Appellate District held that subdivision (e)(2)(A)(iii) only applies when the term proscribed is a straight life sentence within the meaning of section 3046.**

o. **People v. Mendoza (2000) 78 Cal.App.4th 918, the Fourth Appellate District, Division 2, held that in a three strike case, the minimum term of 25 years is tripled under subdivision (e)(2)(A)(i) of section 667, and that the provisions of subdivision (e)(2)(A)(iii) do not merely apply to indeterminate three strike sentences. The Court of Appeal finds that the use of the word "term" means the minimum term in the sentence of 25 to life, thereby distinguishing it from the "period" proscribed in section 3046. However, I believe that the "term" in a 25 to life sentence is not 25 years, but life, and as a result, life cannot be tripled. The Court of Appeal rejected the notion that subdivision (i) uses the word "term", and not the word "period" when the court tripled the minimum term of 25 to life. The court rejected the notion that subdivision (iii) uses the word "period" in reference to a calculation of an indeterminate period, and therefore, only subdivision (iii) should be used in the calculation of the minimum period for an indeterminate sentence. Remember, in People v. Dozier (2000) 78 Cal.App.4th 1195, Division 7 of the Second Appellate District held that either subdivisions (e)(2)(A)(ii) or (iii) only applies when the term proscribed is a straight life sentence within the meaning of section 3046, and they found that in the context of a three-strike sentence for straight life term, that the Supreme Court's opinion in People v. Jefferson (1999) 21 Cal.4th 86, 99, supports that possession.**

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

q. **People v. Cornelius (2000) _ Cal.App.4th _, reported on April 6, 2000, in 00 Daily Journal D.A.R. 3551, the Fourth Appellate District, Division 1, held, after the matter was remanded back to the Division following Jefferson, supra, once again the Court of Appeal held that when a defendant is given a term of 25 years to life under the one strike law (see § 667.61), the minimum eligible parole date can be**

tripled under section 667, subdivision (e)(2)(A)(i), and is not limited to options (ii) of (iii) of the same subdivision. This Court of Appeal disagrees with the ultimate conclusion reached in Dozier, supra. I predict that this matter will once again be granted review to decide whether the minimum term can be tripled under subdivision (e)(2)(A)(i) or whether only subdivisions (ii) or (iii) apply in indeterminate life case.

9. MANDATORY CONSECUTIVE V. CONCURRENT SENTENCES

a. People v. Markson (1995) 41 Cal.App.4th 387.

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

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

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

e. People v. Davis (1996) 48 Cal.App.4th 1105, the Fifth Appellate District, held that the terms of section 667, subdivision (c)(8), of mandatory consecutive terms, applies to an appellant who had previously been committed to CRC, was paroled, then committed a strike offense while on CRC parole. The court found that appellant was "serving a sentence" while still on CRC parole when he committed the new offense. As a result, the court upheld the mandatory imposition of consecutive time on the new two strike sentence, consecutive to the term then imposed on the CRC matter. Given the fact that the CRC case was pre-1994 and the strikes legislation, this very well may violate ex post facto prohibitions.

f. People v. Randall REHEARING GRANTED AND DECIDED WITHOUT BEING REPUBLISHED--THEREFORE CASE IS DEAD; (1996) 50 Cal.App.4th 144, the

Sixth Appellate District held that the provisions of subdivisions (c)(6) and (7), pertaining to the same occasion and same set of operative facts exception, do not apply to a situation wherein the defendant commits one burglary and then immediately jumps a fence and burglarizes another residence. The court merely indicated that when there are separate crimes, even when they occur moments apart, the temporal closeness does not qualify to place the separate conduct within the exception to subdivisions (c) (6) and (7).

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

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

i. People v. Bell (1998) 61 Cal.App.4th 282, the Fourth Appellate District, Division One, held pursuant to Hendrix, supra, that the trial court erred when it harbored the belief that it was mandated to impose consecutive sentences after the jury found appellant had committed a robbery and an attempted robbery on two separate individuals when the conduct occurred on the same occasion and was based on the same set of operative facts. The Court of Appeal held, consistent with People v. Deloza, supra, that a trial court has the discretion to impose the two convictions either concurrently or consecutively; and remember, if the court is going to impose consecutive time, it must state its reasons for choosing that sentencing option.

j. People v. Hall (1998) 67 Cal.App.4th 128, the Second District, Division 4, held that, consistent with Hendrix, supra and Deloza, supra, that a court is not mandated to impose consecutive sentences where it is unclear from the facts whether the crimes were committed on the "same occasion", or arose "from the same set of operative facts." Here, defendant was convicted of receiving stolen property and conspiracy to commit robbery. It was impossible to tell from the facts when the conspiracy was completed as it pertains to when the defendant received the stolen property in

question. Therefore, the matter had to be transferred back to the trial court to either impose those two counts, concurrently, or to state its reasons why it was choosing its sentencing choice to impose them consecutively. (People v. Fernandez (1990) 226 Cal.App.3d 669, 678 [the most fundamental duty of a sentencing court is to state reasons justifying the sentencing choices that it makes]; CRC, rule 406 (b)(5).)

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

l. People v. Durant (1999) 68 Cal.App.4th 1393, the Fourth District, Division 1, held that the defendant's commission of three separate burglaries, albeit from the same apartment complex, on the same night, did not constitute facts that permit the court to find that they arose on same occasion or arose from the same set of operative facts. The court indicated that when multiple crimes are not so closely related in time and proximity as they were in Hendrix or Deloza, and when they occurred in different places, separated by more than seconds, additional factors should be considered to determine if the offenses occurred at the same time or arose from the same set of operative facts. The Court of Appeal found that "the nature and elements of the current offense charged becomes highly relevant" in a case of this nature. For example, when a robbery is charged, its continuous nature, its elements and the facts used to support those elements are the operative facts underlying the commission of the crime, and therefore, other crimes that occur shortly thereafter, would necessarily constitute the same set of operative facts. The Court of Appeal notes that when the elements of the crime have been satisfied, any crime subsequently committed will not arise from the same set of operative facts. I believe this definition is to restrictive and should be challenged in order for the Supreme Court to define same set of operative facts, which they did not do in either Deloza or Hendrix. The court did note that intent may be an factor to consider in determining whether separate crimes should be considered a part of the same set of operative facts; but they determined that it is not a factor to be considered when reviewing separate burglary convictions merely because they occurred on the same night with the intent to steal from each of the residences. I would strongly urge that when you have a burglary and then a 2800.1 etc. or related type events, even though the burglary was completed, that the escape from the scene and the events that transpired from the escape would be considered a part of the same set of operative facts.

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

10. PENAL CODE SECTION 1385 AND RELATED ISSUES:

a. People v. Metcalf (1996) 47 Cal.App.4th 248, Fourth District, Division 2, following the rationale of People v. Fritz (1985) 40 Cal.3d 227, indicated that the post-Romero re-sentencing hearing, should be remanded to the superior court in order for the court to exercise its discretion without the necessity of filing a writ of habeas corpus in the superior court.

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

> "We cannot conceive of any basis for differentiating the retroactive application of Romero to a defendant whose direct appellate rights have been exhausted or were never utilized from its applicability to an accused whose appeal is pending." (Id., at p. 8457.)

Additionally, the Court of Appeal implies that a remand is proper even when the issue was not raised in the trial court given the fact that the trial court has the sua sponte power to strike such an allegation. (Id., at p. 8458.) However, in footnote six, the court indicates that they are not reaching this question, and that the holding is limited to the case wherein the court expressed its misunderstanding of his or her discretion.

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

c. People v. Gutierrez (1996) 48 Cal.App.4th 1894, Division 2 of the Second Appellate District found that appellant who had been convicted in this two strike case, of 2 counts of robbery wherein the court imposed the high term on count 1, and count 2 consecutive thereto, imposed the 5 year section 667, subdivision (a) enhancement, and

chose not to strike 2 prior prison terms, did not remand pursuant to Romero. The trial court indicated that "this is the type of individual the law was intended to keep off the street as long as possible." Given the trial court's clear intention, and the fact that it imposed the maximum sentence possible, no purpose would be served in remanding for consideration pursuant to Romero. The trial court was very clear in setting forth its intent to give appellant the maximum possible; therefore, unless you have comparable facts, distinguish this case when used against you.

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

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

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

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

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

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

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

j. People v. Cepeda (1996) 49 Cal.App.4th 1235, the Second District, Division Seven, held that it would remand the matter back to the trial court so that it could state for the record, and in the minute order, its reason for dismissing two strike priors. Pursuant to a plea bargain, and with the prosecutor's concurrence, the court struck two serious felonies, and then sentenced appellant as a two striker. The Court of Appeal found that appellant does not now have the right to have the trial court, on Romero remand, determine whether it would strike the remaining strike. The court indicated that since appellant pled for a specified sentence, it was now precluded from asking for a further review of his sentence. (People v. Walker (1991) 54 Cal.3d 1013, 1024; People v. Panizzon (1996) 13 Cal.4th 68, 80.) The court found that the trial court is not inclined to find error even if the court acted in excess of jurisdiction, as long as the court did not lack fundamental jurisdiction. Whether appellant would have been better off is not the issue, or even if the court will strike another strike; the issue is does the court have a right to consider striking another strike--answer yes.

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

l. People v. Taylor (1998) 63 Cal.App.4th 29, the Second Appellate District, Division 7 held that, pursuant to People v. Fuhrman (1997) 16 Cal.4th 930, 945, on a silent record, the proper procedure for the review of a request to strike a strike, is for the defendant to file a writ of habeas corpus, and not a remand to the superior court with an order for a new sentencing hearing. Here, the trial court merely denied the prior request to strike the strike without giving any reasons. The Court of Appeal also indicated that appellant is not precluded from filing a writ even though a "plea bargain" of sorts had been entered into before the bifurcated trial on the enhancements and the strike priors. Appellant plead to 2 strike priors and the prosecutor struck four serious felony enhancements and prison priors, saving defendant 21 years. The Court of Appeal distinguished its own case of People v. Cepeda (1996) 49 Cal.App.4th 1235, which had precluded the motion to strike because a plea bargain, which struck a strike, and made Cepeda a "two-striker" rather than a "three-striker", was fundamentally different than the appellant's predicament in this matter. Here, appellant was still a "three-striker", subject to a life sentence, where in Cepeda, the defendant was not. The court did state that if the court was inclined to strike 3 strikes and make the defendant a "two-striker", then the prosecution would have the option of proving the serious felony priors and the prison prior that had previously been dismissed pursuant to the bargain.

m. People v. Allan (1996) 49 Cal.App.4th 1507, the Second District, Division Four, held that the court cannot enter into a "plea bargain" with the defendant as it is a violation of the strike law and of People v. Orin (1975) 13 Cal.3d 497. Additionally, the Court of Appeal ruled that the trial court could not dismiss a strike prior, in the master calendar court, even after the people had announced ready, and indicated that they did not have the proof of the prior at that time, but they indicated that they would have it latter in

the day. Citing People v. Ferguson (1990) 218 Cal.App.3d 1173, the Court of Appeal found that the trial court abused its discretion in striking the strike prior, at that time, since the interests of society was not considered, and that a reasonable judge would not have done the same thing. Given the fact that (1) the defendant had received prior continuances, (2) that the trial on the priors is usually bifurcated, (3) that the matter had not yet been assigned to a trial court, and (4) the people would have the priors packet in time for the presentation at the trial and objected to the dismissal of the prior, the court found that there was an abuse of discretion to enter into a plea bargain and to dismiss the prior in the manner described. Just factually argue this one away. No real new big news here, just another application of an abuse of discretion.

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

o. People v. Smith (1996) 50 Cal.App.4th 1194, Fourth District, Division One, held that a court's antipathy for the strikes law is not a valid reason for striking a strike. It therefore sent the matter back to the trial court in order for the court to state valid reasons for striking the strikes. Furthermore, the court held that People v. Scott (1994) 9 Cal.4th 331, did not preclude the prosecutor from raising the abuse of discretion issue for the first time on appeal. **HOWEVER, THIS CASE SHOULD BE REVIEWED IN LIGHT OF PEOPLE V. TILLMAN (2000) 22 CAL.4TH 300.**

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

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

filing of Romero on June 12, 1996, because the decision was not yet final, then footnote 13 would still mandate a remand for re-sentencing.

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

s. People v. McLeod (1997) 55 Cal.App.4th 1205, Fourth Appellate District, Division 1, ruled that, in this silent record case, the record does affirmatively show that the court would not have exercised its discretion had it understood its sentencing power. The Court of Appeal comes to this conclusion based on how the trial court did sentence appellant. It found that circumstances in aggravation outweighed those in mitigation, and the court imposed the middle term rather than the low term for the current offense. It then imposed a one year prison prior, and there was no dispute that the court knew that it could strike the prison prior. The court did go into defendant's background after his mother's plea for leniency and on balance found that a remand was not called for. The Court of Appeal did not preclude a Romero writ, if counsel could point to facts outside the record which would justify review.

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

u. In re Saldana (1997) 57 Cal.App.4th 620, Second Appellate District, Division 5, in one portion of the opinion that the trial court must base its decision to strike a strike on a multitude of individualized sentencing factors, and not merely on appellant's criminal record. Given the fact that the trial court was not presented with all mitigation the first time, nor was it presented to the Court of Appeal, appellant was not bound by the law of the case. The Court of Appeal found that considering only a defendant's criminal

history is "incompatible with the very nature of sentencing decision; the entire picture must remained exposed." This is another in a series of cases which established that individualized sentencing criteria must be used. Combine this case and the concepts of People v. Bishop, supra, 56 Cal.App.4th 1245, which indicate that all three strike defendant's have bad records, but alone should not preclude the court from striking a strike based on the mitigating factors presented, People v. Banks (1997) 59 Cal.App.4th 20, and even People v. Williams (1997) 17 Cal.4th 148 to establish that the trial court must consider whether appellant's background, current felony offense, character and other individualized considerations should be deemed inside or out of the **"**spirit**"** of the three strikes law.

v. People v. Humphrey (1997) 58 Cal.App.4th 809, Second Appellate District, Division 6, held that, the matter must be remanded for the court to state its reasons for striking the strike on the record. (See People v. Orin (1975) 13 Cal.3d 937, 944.) The Court of Appeal also held that, if the "sole" reason that the court was striking the prior was its remoteness, in this case 20 years old, and the defendant had not led a "continuous life of crime in the interim, then remoteness, in and of itself, was an insufficient reason to strike the strike.

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

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

y. People v. Garcia (1997) 59 Cal.App.4th 834, the Second Appellate District, Division 2, held that a trial court has the discretion of imposing the strikes on one count, but

striking them for subordinate or other counts so as to avoid an unreasonable sentence. The Court of Appeal concluded that the striking of the strikes for the subordinate counts was not an unauthorized sentence and was in fact arguably permitted pursuant to People. v. Superior Court (Alvarez) (1997) 14 Cal.4th 968, 979.) See People v. Garcia (1999) 20 Cal.4th 490 which is the definitive word from the Supreme Court.

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

aa. People v. Gillispie (1997) 60 Cal.App.4th 429, the First Appellate District, Division 1, held that, even though the defendant does not have a right to make a motion to strike a prior, s/he has standing to appeal the court's ruling refusing to strike a prior within the meaning of section 1385. This is true even though the court is not required to state its reasons for denying to exercise its discretion under section 1385. As the Court of Appeal indicated, "[T]he fact that an action is taken on the court's own motion does not preclude the possibility of error appearing on the record." The Court of Appeal goes on to find that the trial court may justify its denial of the motion to strike the prior based on the defendant's record of conviction; however, this does not preclude the possibility that the court erred in its failure to exercise its discretion. The record should be carefully reviewed to determine if the court was biased against the defendant based on his or her race or national origin, violated the equal protections guarantees, or under the peculiar circumstances of the case it produced an arbitrary, capricious or patently absurd result. I would argue that People v. Superior Court (Alvarez), supra, 14 Cal.4th 968, People v. Bishop, supra, 56 Cal.App.4th 1245, In re Saldana, supra, 57 Cal.App.4th 620, and People v. Banks, supra, 59 Cal.App.4th 20, indicate that the defendant's record alone is not a sufficient basis for denying the defendant's motion to strike the prior conviction, and that the other factors cited in those cases should be considered by the court before denying the motion.

bb. People v. Benevides (1998) 64 Cal.App.4th 728, the Fifth Appellate District, held that appellant does not have a right to appellate review when the trial court denies a motion to strike under section 1385. This court states that since the defendant does not have a right to make the motion, there is no right to appeal when the court rules and denies the request to strike. The Court of Appeal states that appellate review is only available where a trial court mistakenly believes it lacks the discretion to strike priors or refuses to even consider it for arbitrary or capricious reasons such as the defendant's race, gender or religious beliefs. But this is clearly contra to People v. Gillispie (1997) 60

Cal.App.4th 429, People v. Cline (1998) 60 Cal.App.4th 1327 and People v. Myers (1999) 69 Cal.App.4th 305. Some courts are using Benevides for the proposition that a trial court need not state reasons when it chooses not to exercise its discretion. I would force the issue and have the court state the reason; they may be subject to challenge on appeal; we certainly could not be in any worse shape if more courts decided to use this opinion for denying relief.

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

dd. People v. Superior Court (Roam) (1999) 69 Cal.App.4th 1220, Sixth District, held that the prosecution could writ the trial court's decision to continue a sentencing in order to get a report back from a diversion release program, before it made the decision whether to strike a strike within the meaning of Romero. The Court of Appeal acknowledged that the trial court could strike one or all strikes and then sentence appellant within the bounds of Romero and Williams and their progeny. But the Court of Appeal held that the court must bury its head in the sand and not wait for the report to come back from the OR release program. The defendant had been released on a supervised OR to Delancey Street rehabilitation program. The trial court wanted to get the report from the program before making its Romero decision. The Court of Appeal indicated that there were no valid procedures for waiting, and that once the probation report was back it had to sentence appellant and address any motion before the court. The defendant in this case did not help the situation by leaving Delancey, and was then arrested in Arkansas. He is presently in San Quentin prison. If the court wants to make an "informed decision" for Romero purposes, and it wants to state the appropriate reasons on the record for doing so, it should be able to continue sentencing to give the individualized sentence discussed in virtually all of the cases. This case should be challenged based on the aforementioned rationale.

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

ff. People v. Barron **DEPUBLISHED** (1999) 71 Cal.App.4th 1103, the Second Appellate District, Division 5 held that the trial court's failure to state reasons for striking a strike is not an unauthorized sentence. Therefore, the prosecution cannot raise it as part of a defendant's appeal. They must raise it either by way of their own direct appeal, or by way of writ of mandate. As Justice Turner points out, the trial court did err by failing to state the reasons for granting the section 1385 relief, or by failing to direct the clerk to place the reasons for striking the prior in the minute order; but that in and of itself is not an unauthorized or jurisdictionally void sentence. Here, the court did not do anything that it did not have the legal right to do. (See People v. Scott (1994) 9 Cal.4th 331, 354.) Note however, that Justice Turner does tell the prosecution how to remedy their problem. He invites them to file a writ of mandate, and so long as laches or prejudice is not controlling they can challenge the lower court's opinion for failure to state reasons. Additionally, the opinion notes that if a proper notice of appeal had been filed, it was proper within section 1328, subdivision (a)(10).

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

hh. People v. Stone (1999) 75 Cal.App.4th 707, the Second Appellate District, Division 4, held that the trial court did not abuse its discretion in failing to strike one or more

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

ii. People v. Aubrey (1998) 65 Cal.App.4th 279, the Fourth Appellate District, Division 3, held that when the trial court makes the ruling that it will exercise its discretion under Romero and strike appellant's only serious felony strike within the meaning of section 667, subdivisions (b)-(i), for this "two strike" defendant, said ruling made him eligible for probation, even though he was subject to the provisions of section 667, subdivision (a) (i.e. the five year prior for the prior serious felony). This Court of Appeal declined to follow People v. Winslow (1995) 40 Cal.App.4th 680, which held that when a defendant is subject to the five year prior within the meaning of section 667, subdivision (a)(1), he was not eligible for probation, as the five year prior must be imposed. Here, this Court of Appeal found that Winslow's analysis was erroneously premised on the proposition that section 1385, subdivision (b)'s prohibition against striking a prior necessarily includes prohibition against a stay of the enhancement which would occur incident to the grant of probation. The court found, based on People v. Vergara (1991) 230 Cal.App.3d 1564, 1568, that there is a fundamental difference between striking and staying an enhancement. As a result, the legislature by its language in other statutes knows how to prevent the granting of probation, but they did not use that or similar language when it enacted section 667, subdivision (a)(1), and as a result, probation is not precluded within the context of this case.

jj. People v. Bradley (1998) 64 Cal.App.4th 386, the Second Appellate District, Division 5 remanded the matter back to the superior court for re-sentencing as a result of the court's failure to either strike or impose a prior prison term within the meaning of section 667.5, subdivision (b). The Court of Appeal found that the failure to impose or to strike said enhancement was an unauthorized sentence. (See People v. Irwin (1991) 230 Cal.App.3d 180, 190; see also People v. Mustafaa (1994) 22 Cal.App.4th 1305, 1311.) The Court of Appeal rejected the prosecution's argument that the enhancement must be imposed based on the rationale of People v. Dotson (1997) 16 Cal.4th 547. The Court of Appeal concluded that even though the legislature eliminated section 1170.1, subdivision (h), which permitted that court to strike the prison prior, there was no express legislative intent to prohibit the court from striking the section 667.5,

subdivision (b) enhancement pursuant to section 1385, subdivision (a), and within the meaning of People v. Superior Court (Romero) (1997) 13 Cal.4th 497, and People v. Superior Court (Alverez) (1997) 13 Cal.4th 968. The statutory power to dismiss in furtherance of justice has always coexisted with statutes defining punishment and must be reconciled with the latter.

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

ll. People v. McGlothin (1998) 67 Cal.App.4th 468, the First District, Division 3, held that the trial court abused its discretion within the meaning of Romero and Williams, supra, when it struck a strike and sentenced appellant as a "two-striker" within the meaning of section 667, subdivision (e)(1). Appellant and others committed a robbery on two elderly persons, one of whom was knocked to the ground and a death threat was made. Citing California Rules of Court, rule 421, the Court of Appeal set out various factors that it considered in finding that the trial court had abused its discretion. It then considered appellant's criminal history which dated back to a robbery when he was 15 years old. The trial court essentially erred when it stated as one of the reasons that it was striking a strike was as follows: "But essentially I'm doing it for–because I don't think the punishment in this case should warrant a life top sentence." The court did the ultimate wrong–it basically stated that it did not concur with the three strikes sentencing scheme and therefore, it was striking a strike. Do not let the trial court show its antipathy for the strikes law–this will, as it did here, lead to a reversal against your client.

mm. People v. Thornton (1999) 73 Cal.App.4th 42, the Fourth Appellate District, Division 2, held that the trial court abused its discretion in striking a strike, within the meaning of People v. Williams (1998) 17 Cal.3d 148 and People v. McGlothin (1998) 67 Cal.App.4th 468. Here the court struck two priors as both of them involved the theft of food from the residence of persons that he knew. True enough, the defendant's background did have some violence and he was "not a nice guy", but the Court of

Appeal certainly does not say anything in this opinion, but, we do not like what the trial court did, and therefore we are going to reverse. They are merely substituting their own judgment for that of the trial courts. I would just try and distinguish this one on its facts.

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

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

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

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

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

12. VAGUENESS:

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

matter; therefore, if appellant can make such a showing, a vagueness challenge may be successfully argued.

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

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

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

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

13. JUDICIAL NOTICE:

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

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

a. People v. Gore (1995) 37 Cal.App.4th 1009. (TRANSFERRED BACK TO THE COURT OF APPEAL AND NOT RECERTIFIED FOR PUBLICATION.) [It is unclear whether the court granted review on any issue other than the court's power to strike a prior.] Prohibits the use of **plea bargaining** to strike a serious felony prior. Here, the trial court agreed to strike a robbery prior, leaving appellant with one remaining serious

felony, if appellant would plead guilty to the possession of .18 grams of a controlled substance, which he did. This is probably a violation of the prohibition against plea bargaining; but if the court had merely agreed to take the plea and indicated that it would strike a prior pursuant to section 1385, then it is arguably an "**indicated sentence**" that is not prohibited. Therefore, watch for the distinction between "plea bargaining" and "indicated sentences." (See People v. Superior Court (Ramos) (1991) 235 Cal.App.3d 1261; People v. Vergara (1991) 230 Cal.App.3d 1564, 1587; People v. Arauz (1992) 5 Cal.App.4th 663; see also People v. Orin (1975) 13 Cal.3d 937, 943.)

b. People v. Williams (1995) 40 Cal.App.4th 429, **DEPUBLISHED.** OBVIOUSLY THE SUPREME COURT AGREED WITH ME AND DEPUBLISHED THIS OPINION THAT TRIED TO DISTINGUISH RAMOS. The Fourth District Division 1, found that the "sentence bargain" was a violation of the "plea bargain" prohibition of section 667, subdivision (g). This falls within the dictates of People v. Superior Court (Ramos) (1991) 235 Cal.App.3d 1261. Appellant pleaded straight up to all of the allegations and then, at the time of sentence, the court struck the 2-strike allegation.

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

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

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

d. People v. Couch (1996) 48 Cal.App.4th 1053, the Sixth Appellate District, held that, if a defendant agrees to a specified period of time pursuant to a plea bargain, he cannot later challenge the sentence, albeit the strike portions of the sentence, given the fact that

he received a benefit from the bargain. The only exception to this rule would be if appellant were to challenge the court's fundamental jurisdiction, which he was not challenging in this case. The court even reaches this conclusion without citing People v. Panizzon (1996) 13 Cal.4th 68.

15. CRUEL AND/OR UNUSUAL ARGUMENTS:

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

b. People v. Campos formerly at (1995) 38 Cal.App.4th 1669. **THE MATTER WAS TRANSFERRED BACK TO THE COURT OF APPEAL AND NOT CERTIFIED FOR PUBLICATION THEREAFTER.** Justice Wood's rejected the CRUEL AND/OR UNUSUAL argument for Mr. Campos who was found to have taken a container of Clearasil and hair rollers without paying for them. **Justice Johnson notes in his dissent, that there was a violation of the California Constitution, and that the court has the power, and the duty, to refrain from imposing an unconstitutional sentence**. (See footnote 17.) Justice Johnson reaffirms the concept that it is the maximum sentence that must be reviewed for its constitutionality, citing Lynch. He also notes that a defendant's past offenses are certainly a relevant consideration in determining whether there is constitutional error, but finds that they do not result in a pro tanto repeal of the cruel or unusual punishment clause. Finally, of significance, Justice Johnson notes that some 40 states have something akin to a three-strikes law, but that in only two other states, Washington and West Virginia, can the third strike be any felony. Additionally, he holds that had Rummell v. Estelle (1980) 445 U.S. 263, been subject to the Lynch/Dillion proportionality review, it to, along with the sentence in Solem v. Helm, would have been found unconstitutional. Given the fact that Rummell was not subject to proportionality review, Justice Johnson finds it easily distinguishable. Use the cases cited by Justice Johnson in his dissent now that the matter has been depublished.

c. People v. Patton formerly at (1995) 40 Cal.App.4th 413. **THE MATTER WAS TRANSFERRED BACK TO THE COURT OF APPEAL AND NOT CERTIFIED FOR PUBLICATION THEREAFTER.** The Fourth District, Division 1, followed Romero. The trial court had struck one of the priors based on the fact that it would be

cruel and unusual punishment to sentence appellant, who was 23 years of age, with no violence in his background (e.g., 2 prior residential burglaries) to a three strike sentence. The prosecution objected, and the appellate court found that the trial court issued an **unauthorized sentence**, thereby imposing a sentence of 25 years to life, rather than the 2-strike sentence which had been imposed by the trial court. (See People v. Weddle (1991) 1 Cal.App.4th 1190, 1197.) The court rejected the argument based on both the federal and California Constitutions.

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

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

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

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

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

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

j. People v. Kelley (1997) 52 Cal.App.4th 568, Fourth Appellate District, Division 3, ruled that appellant's nine year sentence for stalking, did not violate either the state or federal prohibitions against cruel and/or unusual punishment. Additionally, the court noted that since the issue was not raised in the trial court, it is waived. (See People v. DeJesus (1995) 38 Cal.App.4th 1, 27.) I question whether a constitutional issue of this nature can be waived, but that is for another time, since they determined that even if it had, there would be no violation.

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

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

m. People v. Deloza (1998) 18 Cal.4th 585. Justice Mosk wrote a very interesting concurring opinion indicating that a sentence of 111 years to life would constitute cruel and unusual punishment under either the United States or California constitutions. That is an opinion that we can now use to bolster our cruel and/or unusual argument claims. We should also start thinking about having the trial attorneys, in cases wherein the trial courts indicated that they must impose consecutive sentences, or wherein they did not know that they had the discretion to impose concurrent sentences, to file writs in the superior court to help remedy those wrongs.

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

o. People v. Gray (1998) 66 Cal.App.4th 973, the First District, Division 5, held that there was no cruel and unusual violation when the defendant was convicted of attempted

carjacking and attempted kidnaping, wherein the court imposed a 25 years to life three strike sentence. The usual arguments were presented by both sides.

p. Riggs v. California (1999) _ U.S. _, [142 L.Ed.2d 789, 119 S.Ct. 840], the High Court denied certiorari on this cruel and unusual claim, but 4 justices penned some interesting language that can possibly be used in arguments in that the sentence for stealing a bottle of vitamins was "grossly disproportionate." Justice Stevens wrote: "This *pro se* petition for certiorari raises a serious question concerning the application of California's 'three strikes' law...to petty offenses." Justice Stevens continued, "This question is obviously substantial, particularly since California appears to be the only State in which a misdemeanor could receive such a severe sentence. (Citation.) While this Court has traditionally accorded to state legislatures considerable (but not unlimited) deference to determine the length of sentences 'for crimes concededly classified and classifiable as felonies (citation), petty theft does not appear to fall into that category. Furthermore petty theft has many characteristics in common with the crime for which we invalidated a life sentence in Solem, uttering a 'no account' check for $100..." However, Justice Stevens indicated that he did not vote to grant the writ since neither a lower federal court, nor the California Supreme Court has yet to review the issue. Conceding that recidivists can be punished more severely, as a stiffened penalty for the current offense and not a penalty for the earlier crimes (see Witte v. United States (1995) 515 U.S. 389, 400), questions are raised as to how the defendant's strikes, eight in all, affects the constitutionality of his sentence, "especially when the State 'double counts' the defendant's recidivism in the course of imposing that punishment. (Citations.)" Use some of this language in your AOBs and petitions for review.

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

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

s. People v. Martinez (1999) 71 Cal.App.4th 1502, Sixth Appellate District held that a defendant who was convicted of Health and Safety Code section 11377, subdivision

(a), drunk driving, and attempting by threat to deter a police officer from carrying out his duty, who had 3 strike priors, (1) assault with a deadly weapon, (2) robbery, and (3) attempted robbery, 50 misdemeanor convictions, mostly for alcohol and drug related offenses, and some for assaultive behavior, could be sentenced to 25 to life without violating the cruel and unusual clause of either the state or federal constitutions. The court held that appellant's social history, which included both parents being alcoholics, his illiteracy, and current attempts to "clean up", were not enough to overcome his long history of assaultive behavior and constant irritant for society. A comparison of other states is included in the discussion and concludes that even though California's Three Strike scheme is amongst the harshest in the country, its application does not violate the prohibition against cruel and/or unusual punishment.

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

16. URGENCY LEGISLATION ARGUMENTS:

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

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

c. People v. Kinsey (1995) 40 Cal.App.4th 1621, the Second District, Division 7, in another Fred Wood's opinion, concurs with the holding in Cartwright, that the statute does not violate the provisions pertaining to urgency legislation.

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

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

17. PROVING PRIORS AT PRELIMINARY HEARING:

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

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

18. BROUGHT AND TRIED SEPARATELY/RECIDIVIST ARGUMENTS:

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

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

c. People v. Dominguez (1996) 44 Cal.App.4th 389, DEPUBLISHED This case had rejected the "brought and tried separately" argument based on the same rationale as

Allison and Arevalos, that the "brought and tried" provisions do not apply to the three strikes legislation.

d. People v. Cole (1997) 54 Cal.App.4th 1061. (Review Granted-see notations supra.) The Court of Appeal ruled that the trial court did not determine whether the prior serious felony allegations were "brought" together, even though it was clear that they were "tried" separately. The Court of Appeal remanded for re-sentencing, and for the trial court to determine whether the prior serious felony allegations were "brought" together within the meaning set forth in In re Harris (1989) 49 Cal.3d 131, 136. The Court of Appeal found that there was no evidence that the prior convictions were not initially "brought together", in the felony complaint, and then severed in the superior court. However, after a long discussion, the court held that there was no double jeopardy bar for relitigating the issue of whether the matter was "brought and tried" separately. The court's analysis, even though rejected by this court, does set forth certain reasons as to how to arrive at an opposite conclusion.

19. OUT OF STATE PRIORS AND STRIKES AFTER THE INITIATIVE

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

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

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

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

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

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

c. People v. Andrews (1998) 65 Cal.App.4th 1098, the Fourth Appellate District, Division 1, held that there was not a violation of the equal protection clause do to the disparity of the charging policies of the three-strikes law by different counties. Appellant argued that he would not have been prosecuted in San Francisco county, as a third-strike defendant, had he been charged with the same possession offense, which now finds him serving a 25 to life sentence, after he was convicted of the possession charge in San Diego. The Court of Appeal indicated that "there can be vast differences in the manner of enforcement of this draconian sentencing law." The Court of Appeal added that the disparities in the laws enforcement was a "source of concern," but it did not amount to a violation of equal protection, at least on the record that was presented in this matter. The Court of Appeal indicated that there is no requirement for intercounty proportionality review. (See People v. Arias (1996) 13 Cal.4th 92, 192-193; People v. Kirkpatrick (1994) 7 Cal.4th 988, 1023.) In the end, the Court of Appeal called out for the Legislature to cure these vast discrepancies in sentence, do to the mere fact that the offense was committed in one location rather than another.

21. SEPARATION OF POWERS--THE LEGISLATURE USURPING THE DA'S POWER

a. People v. Kilborn (1996) 41 Cal.App.4th 1325, Second District, Division 4, held that Government Code section 26528 indicates that the prosecutor shall initiate all prosecutions for public offenses, and that in other contexts the legislature has required the prosecution to act, thereby restricting its discretionary authority. One of the problems with the holding is that Government Code section 26528 is not at issue here. The fact that the Legislature has from time to time enacted laws which would have the same effect of usurping the prosecution's traditional charging discretion does not lead to the conclusion that similar laws are impervious to a constitutional challenge that the Legislature has usurped the executive function of charging decisions. Furthermore, the court indicated that since the prosecution can either as the court to dismiss in the interest of justice or for insufficiency, the legislation has not changed the primary function of the district attorney's office. Nonetheless, this does not ameliorate the removal of the discretion as to whether the charge should be brought in the first place, as there is no certainty the court will act at the will of the prosecutor. The court did not discuss People v. Mikhail (1993) 13 Cal.App.4th 846, 854, which was based on article 3, section 3 of the California Constitution, which held that the charging function is within the sole province of the executive branch, which includes district attorneys. (See also Way v. Superior Court (1977) 74 Cal.App.3d 165, 174; People v. Aruaz (1992) 5 Cal.App.4th 663, 668 [charging decisions cannot be mandated by the Legislature.

22. EXPUNGED PRIORS ARE STILL STRIKES

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

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

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

23. A JUDGE CAN BE DISQUALIFIED FROM RULING ON PRIORS

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

24. THREE STRIKES SENTENCE APPLIES OVER OTHER SENTENCING SCHEMES

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

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

25. DOUBLE JEOPARDY ISSUES

a. People v. Torres (1996) 45 Cal.App.4th 640, the Fourth District, Division Two, held that there is no double jeopardy violation when an enhancement is not (1) submitted to the court for determination of it truth, nor (2) when the prosecution is not given the opportunity to prove the enhancements, nor (3) when the defendant is not mandated to either admit or face charges on enhancements that have not be dismissed on the motion of either the court or the prosecution. The Court of Appeal distinguished the line of cases that found that a court's failure to make a finding on the prior conviction allegation operates as an acquittal (see People v. Eppinger (1895) 109 Cal. 294, 298;

People v. Gutierrez (1993) 14 Cal.App.4th 1425, 1440; People v. Garcia (1970) 4 Cal.App.3d 904, 907, fn.2), given the fact that the cause of the prior was never submitted to the court for decision. The court analogized to the Supreme Court's holding in People v. Saunders (1993) 5 Cal.4th 580, 595, where they found that double jeopardy did not bar a retrial after the jury had been dismissed without the priors trial going forward. (See also People v. Bryant (1992) 10 Cal.App.4th 1584, 1597; People v. Superior Court (Jurado) (1992) 4 Cal.App.4th 1217, 1235-1236.)

b. People v. Walker (1996) 45 Cal.App.4th 1326, the First District, Division Five, held that pursuant to the rationale of Burks v. United States (1978) 437 U.S. 1, 11, retrial on an prior conviction enhancement, wherein the court found the proof to be insufficient, could not be retried. Given the fact that there was insufficient proof of recidivism, the matter is precluded from being retried based on a similar rationale as stated by Justice Kaus in People v. Bonner (1979) 97 Cal.App.3d 573, 575.) **IS THIS CASE CHANGED BY Monge v. California (1998) 615 U.S. _, [141 L.Ed2d 615, 118 S.Ct. _]?**

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

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

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

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

b. People v. Shoal (1997) 53 Cal.App.4th 911, Third Appellate District ruled that a reporter's transcript of a plea is part of the "record of conviction." As a result, the court could look to the transcript to determine whether any fact established a person

use of a deadly weapon or whether the assault was committed only "by means of force likely to produce great bodily injury", which would not quality as a serious felony. Also note that the prosecution has the burden of proving each element of the prior.

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

d. People v. Houck (1998) 66 Cal.App.4th 350, the Fourth District, Division 1, held that a preliminary hearing transcript cannot be used to prove that the prior conviction was a serious felony, when the conviction resulted from a trial and not a plea following the preliminary hearing. The Court of Appeal finds that the preliminary hearing transcript is not part of the "record of conviction" (see People v. Woodell (1998) 17 Cal.4th 448j, 454; People v. Reed (1996) 13 Cal.4th 217, 223), even though the "entire record" may be used to determine if the prior qualifies as a serious felony. (See People v. Myers (1993) 5 Cal.4th 1193, 1195.) People v. Bartow (1996) 46 Cal.App.4th 1573, has taken the opposite position and held that the preliminary hearing transcript is part of the record of conviction. Reed, supra, stated, within the context of a plea, that the preliminary hearing transcript was part of the record of conviction when determining if an assault with a deadly weapon was a serious felony prior. However, when there was a trial on the alleged charges, the jury finding is the reliable evidence the trier of fact must consider in determining if the prior is a serious felony and not the preliminary hearing transcript. This is the application of the "reliable reflection" test from Reed. But retrial is not barred pursuant to Monge v. California (1998) 524 U.S. _ [141 L.Ed.2d 615, 118 S.Ct. _].

e. People v. Ruiz (1999) 69 Cal.App.4th 1085, the Second District, Division 6, held that an abstract of judgment which showed that the defendant was convicted of an assault with a deadly weapon, and ambiguously, do to an illegible portion of the abstract, with a great bodily injury enhancement within the meaning of section 12022.7, was sufficient to find that the defendant had a prior serious felony, when the ambiguous portion was corroborated with a notation on the section 969b packet. The section 969b packet included a fingerprint card from the assault case that had a hand written note on it that indicated a 245...W/GBI ([§]) 12022.7. The Court of Appeal found that the note

supports the finding of great bodily injury and therefore, a serious felony prior. The Court of Appeal specifically indicated that if the abstract of judgment had not had the illegible portion pertaining to the gbi enhancement on it, then the note on the fingerprint card would not have been a document that could have been used to support the imposition of the enhancement. (See People v. Williams (1996) 50 Cal.App.4th 1405, 1411.) Here, the notation was not used to provide independent information about the prior, but only to determine the content of the now-illegible portion of the abstract.

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

27. GROSSLY NEGLIGENT DISCHARGE OF A FIREARM QUALIFIES AS A STRIKE

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

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

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

b. People v. Milosavljevic (1997) 56 Cal.App.4th 811, Fourth Appellate District, Division 2, the court imposed an enhancement for an offense that the prior court had stayed in the original sentencing. The Milosavljevic court, relying on People v. Shirley (1993) 18 Cal.App.4th 40, held that even when the court imposes no sentence the validity of the

prior conviction stands for purposes of enhancement statutes. For purposes of a prior conviction statute, defendant suffers such a conviction when he pleads guilty. (Id, at pp. 45-47.) Therefore, even if the original sentencing court had struck the enhancement for gbi at the time of the original sentencing, the court in the current case, can look to that case and still impose the enhancement for the serious felony prior based on the conviction in the original matter.

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

29. PRIOR CONVICTION FOR CAR JACKING "WITH A PERSONAL FIREARM USE" QUALIFIES AS A STRIKE

a. People v. Nava (1996) 47 Cal.App.4th 1732, the Fifth Appellate District, held that, even though section 215 (CAR JACKING) did not exist, on June 30, 1993, (see § 667, subd. (h); § 1170.12, § 2 of the initiative, but not found in the statute), that it can still be classified as a strike for sentencing purposes if the conduct involved also alleges great bodily injury or personal use of a firearm. (See §§ 1192.7, subd. (c)(8), 667.5, subd. (c)(8).) If the CAR JACKING did not have the enhanced conduct alleged and proven, then the CAR JACKING would not qualify as a strike. If a CAR JACKING is alleged as a prior, make sure that there is also the firearm use, or the GBI enhancement proven, or it does not qualify as a strike prior.

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

a. People v. Haywood (1996) 39 Cal.App.4th 907, the Fourth District, Division Two held that the determination of whether a substantive offense is a felony or a misdemeanor is a question of law for the court to decide and need not be presented to the jury. The court, on direction from the Supreme Court, discussed the implications of People v. Kobrin (1995) 11 Cal.4th 416 [in a mixed question of law and fact, the jury be instructed on each element of the offense, including materiality of the statement used in the perjury prosecution under section 118]). However, the court, in coming to its conclusion that the petty theft, with a prior qualifying theft constituted a felony and not a misdemeanor, failed to consider In re Boatwright (1932) 216 Cal. 677, 683.

Boatwright had qualifying priors and a current petty theft which qualified him for a life term. The Supreme Court found that the petty theft was a misdemeanor despite the possibility of felony punishment due to the prior convictions. Because petty theft remains analytically a misdemeanor, the general recidivist statute by its own terms did not apply to new petty theft convictions. Section 666 did not make a petty theft a felony. Rather, it is a sentencing scheme, (see People v. Bouzas (1991) 53 Cal.3d 467, 479), which applies to certain persons who have committed misdemeanor petty theft. The language of the three strikes law is ambiguous and does not clearly provide that it applies to persons who commit misdemeanor petty theft.

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

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

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

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

The court also rejected the argument that the Supreme Court expressly rejected in Coronado, that section 666 is the "special statute" that controls over the "general statute" of section 667, subdivisions (b)-(i). This court does an analysis of the Supreme Court's rationale of the specific v. general statute exceptions.

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

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

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

32. THE COURT NEED NOT GIVE JURY NULLIFICATION INSTRUCTIONS

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

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

c. People v. Nichols (1997) 54 Cal.App.4th 21, the First Appellate District, Division 3, ruled that, the trial court is not required to instruct on nullification even if the jury asks for instruction on the issue, even though the jury has the "undisputed power" to ignore

the evidence and the law and to acquit if that is what it chooses to do. (See People v. Fernandez (1994) 26 Cal.App.4th 710, 714.). The court rejected the language from Justice Kaus's concurring opinion in Dillon pertaining to the court's duty to instruct the jury on nullification if the jury asks about its power to nullify.

33. WHEN IS A PRIOR A PRIOR?

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

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

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

34. SECTION 667.61 (the one strike law) AND THE THREE STRIKES LAW, BOTH ARE APPLIED WHEN IMPOSING SENTENCE

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

35. INDETERMINATE TERM CALCULATION IN A TWO STRIKE CASE

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

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

c. People v. Tran **DEPUBLISHED;** formerly at (1998) 67 Cal.App.4th1320, the Third District held that it would be "absurd" to sentence the defendant to a term of double life without the possibility of parole, merely because the literal application of a two strike sentence within the meaning of section 667, subdivision (e)(1), would call for such a sentence. It is clear that a statute should not be given a literal meaning when it will lead to absurd results. Here the Court of Appeal specifically stated, "Defendant has but one life to give to the Department of Corrections." The Court of Appeal struck the double life sentence, and lowered it to a single life sentence.

d. People v. Hardy (1999) 73 Cal.App.4th 1429, the Second District Court of Appeal, Division 2, held that a person sentenced to a term of LWOP, can have that sentenced doubled if he or she falls into the two strike category. The court disagreed with

appellant's contention that doubling LWOP would be absurd, as there is a remote but real possibility that the Governor might commute one or more of the sentences. (People v. Garnica (1994) 29 Cal.App.4th 1558, 1564.)

e. People v. Smithson (2000) _ Cal.App.4th _, reported on March 31, 2000, in 00 Daily Journal D.A.R. 3337, the Third Appellate District held that, by the terms of section 667, subdivision (e)(1), LWOP sentences are not doubled.

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

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

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

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

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

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

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

b. People v. Lyons (1999) 72 Cal.App.4th 1224, the Fifth Appellate District held that use enhancements are added to the indeterminate term at full term rather than 1/3 the middle term even though the enhancement itself is a determinate term. In a holding directly opposite to Harrison, supra, this court finds, based on the rationale of Jackson, supra, that 1170 does not apply to indeterminate terms and therefore enhancements that attach to the substantive count, runs full term. I would still try and argue, that the rationale of Harrison, supra, is the more logical, but I would not hold my breath for any great results.

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

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

40. LAW OF THE CASE ISSUES

a. In re Saldana (1997) 57 Cal.App.4th 620, Second Appellate District, Division 5, held that, an intervening or contemporaneous change in the law, between the time the Court of Appeal has initially ruled, and the new trial court ruling, does not bind the trial court to the Court of Appeal's initial decision. Here, the Court of Appeal initially ruled that it would be an abuse of discretion to strike a strike; then Romero and People v. Superior Court (Alvarez) were decided. This Court of Appeal found that those decisions were intervening changes in the law, and as a result, the trial court was not precluded from striking a strike when the Romero writ was filed in the trial court. The court reasoned that the trial court must base its decision to strike a strike on a multitude of individualized sentencing factors, and not merely on appellant's criminal record. Given the fact that the trial court was not presented with all mitigation the first time, nor was it presented to the Court of Appeal, appellant was not bound by the law of the case. The Court of Appeal found that considering only a defendant's criminal history is "incompatible with the very nature of sentencing decision; the entire picture must remained exposed." This is another in a series of cases which established that individualized sentencing criteria must be used. Combine this case and the concepts of People v. Bishop, supra, 56 Cal.App.4th 1245, which indicate that all three strike defendant's have bad records, but alone should not preclude the court from striking a strike based on the mitigating factors presented.

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

a. People v. Vong (1997) 58 Cal.App.4th 1063, Second Appellate District, Division 7, held that, where the Court of Appeal "remands" a matter back to the trial court for "re-sentencing," in order for the trial court to exercise its discretion to strike a strike, appellant must be represented by counsel and appellant must be present for the hearing. This ruling is consistent with the holdings in In re Cortez (1978) 6 Cal.3d 78, and People v. Tenorio (1970) 3 Cal.3d 89. The issue has now been decided in People v. Rodriguez, supra, (1998) 17 Cal.4th 253. As a result, this matter will likely be transferred back to the Court of Appeal in light of Rodriguez.

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

lacked discretion to strike the prior conviction. The Court of Appeal indicated that the better practice would be to file, as an exhibit to the writ, a copy of transcript to establish the prima facie case.

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

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

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

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

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

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

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

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

a. Lewis v. Superior Court **DEPUBLISHED**; formerly at (1998) 60 Cal.App.4th 913, the Second Appellate District, Division 2, held that, if the superior court finds the Romero writ of habeas corpus sufficient to order an order show cause, but ultimately does not grant the writ, petitioner has the right to appeal from that ruling rather than merely filing another writ in the appellate court. On the other hand, if the superior court denies the Romero writ without granting an order to show cause, then petitioner's only remedy is to file a writ in the Court of Appeal. **However, we can still rely on People v. Wax (1972) 24 Cal.App.3d 302, 304, to obtain the same result.**

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

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

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

a. Myresheia W. v. Superior Court (1998) 61 Cal.App.4th 734, the Second Appellate District, Division 5, held that, a juvenile is not entitled to a jury trial in the juvenile court since there are still theoretical different purposes between juvenile and adult proceedings. As we know, in reality, this is a fallacy that exits when the court wants to deny a juvenile any further protections. Amendments to Welfare and Institutions Code section 202 have added as a purpose "protection of the public" and provides for "punishment" that is consistent with the rehabilitative objectives of the juvenile court in order to proceed more punitively. Use this case in an attempt to persuade a trial court that wants to incarcerate your client without an attempt to rehabilitate first.

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

c. People v. Fowler (1999) 72 Cal.App.4th 581, the Fifth Appellate District held that a prior sustained petition can be used as a prior strike under the Three Strikes law since the law only acts to increase punishment for a recidivist, and does not state an element of an offense or constitute a new offense. (See Almendarez-Torres v. United States (1998) 523 U.S. 224 [140 L.Ed.2d, 118 S.Ct. 1219]; Parke v. Raley (1999) 506 U.S. 20, 27 [121 L.Ed2d 391, 113 S.Ct. _].)

d. People v. Cervantes (1999) 75 Cal.App.4th 28, the Fourth Appellate District, Division 3 held that the defendant's prior juvenile adjudication for armed robbery could be considered as strikes (see People v. Garcia (1999) 21 Cal.4th 1), even though sustained

petition occurred prior to the strike statute being enacted and even though the court sustained the petition without a jury trial or waiver of same. (See People v. Fowler (1999) 72 Cal.App.4th 581.)

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

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

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

c. People v. Cortez (1999) 73 Cal.App.4th 276, the Second Appellate District, Division 3 held that, even though appellant admitted a prior conviction for section 12034, subdivision (c), (discharge of a firearm from a motor vehicle at another person), the prior is not a strike unless the prosecution proves that the defendant either personally used a weapon within the meaning of section 667, subdivision (c)(8) or a dangerous weapon within the meaning of section 667, subdivision (c)(23). The facts of the predicate offense were not shown; therefore, the court can only presume the predicate

offense was for the least adjudicated elements. (See People v. Rodriguez (1998) 17 Cal.3d 253, 262.) Given the fact that the defendant could have committed the offense as an accomplice who did not use a weapon, there is insufficient evidence that the offense is a strike. This case is wonderful from the standpoint that it reiterates what Rodriguez says, in a different context, and it is contra to People v. Guerrero (1993) 19 Cal.App.4th 401, which holds that a guilty plea is conclusive of the fact that the defendant admitted every element of the charged crime, which includes the personal use.

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

47. WAIVER

a. People v. Gray (1998) 66 Cal.App.4th 973, the First District, Division 5, held that a claim of vagueness is waived, even though raised in appellant's opening briefing, if appellant fails to provide any substantial argument or citation to authority to support these contentions. (See People v. Hardy (1992) 2 Cal.4th 86, 150.) Counsel cannot merely mention vagueness or any other constitutional principal for the purpose of exhaustion, without citing some specific wording in the statute and case law to support the theory.

b. People v. Murphy (1998) 67 Cal.App.4th 1205, the Third District, held that a defendant who admits prior convictions, must be informed of the precise increased term as an

habitual offender, and of the effect of any increased terms on the defendant's eligibility for parole within the meaning of People v. Howard (1992) 1 Cal.4th 1132, 1175. However, the Court of Appeal held that the defendant waived the error of being advised of the penal consequences of the plea, as it is a judicially declared rule of criminal procedure and is not constitutionally mandated. (See People v. Walker (1991) 54 Cal.3d 1013, 1022-1023.)

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

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

49. WHEN TAKING A PLEA TO PRIORS THAT WILL AMOUNT TO A STRIKE, A DEFENDANT MUST BE TOLD OF THE PENAL CONSEQUENCES OF HIS ADMISSION UNDER THE THREE STRIKE LAW.

a. People v. Murphy (1998) 67 Cal.App.4th 1205, the Third District, held that a defendant who admits prior convictions, must be informed of the precise increased term as an habitual offender, and of the effect of any increased terms on the defendant's eligibility for parole within the meaning of People v. Howard (1992) 1 Cal.4th 1132, 1175. However, the Court of Appeal held that the defendant waived the error of being advised of the penal consequences of the plea, as it is a judicially declared rule of criminal procedure and is not constitutionally mandated. (See People v. Walker (1991) 54 Cal.3d 1013, 1022-1023.)

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

a. People v. Mitchell **DEPUBLISHED** (1999) 68 Cal.App.4th 1489, the Fourth District, Division 1, held that the federal bank robbery statute can be violated in two distinct ways: (1) felony taking by force or fear, and (2) entering with the intent to commit a felony or larceny therein. Defendant had pled to the bank robbery and the prosecution argued that the plea constituted an admission to each element of the offense. This argument was essentially adopted in People v. Guerrero (1993) 19 Cal.App.4th 401.

This court finds that People v. Rodriguez (1998) 17 Cal.4th 253, 261-262 implicitly disapproved Guerrero, in that Rodriguez held that when the defendant plead to an assault, which can be committed in two different ways, and the record of conviction (see People v. Woodell) (1998) 17 Cal.4th 448), did not specifically prove either of the two distinct manners in which the statute could be violated, held that the prior was not sufficiently proven as a matter of law. That rationale was similarly followed by the Court of Appeal in this matter. The court reverses based on ineffective assistance of appellate counsel for failing to raise the issue on the first appeal.

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

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

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

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

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

a. People v. Gonzalez **REV. GRT AND HOLD BEHIND EPPS.** (S081855) Formerly cited at (1999) 73 Cal.App.4th 885, the Second Appellate District, Division 2, held, in a trial on his priors, the defendant has a right to have a jury determine (1) Is there a prior conviction; (2) When did it occur; (3) Was the defendant sentenced to prison based on the conviction and/or was the defendant incarcerated in prison; and (4) How long has the defendant been out of custody since suffering the conviction. The Court of Appeal found that since the defendant did not argue anything else but identity, he waived any other potential issue. Finally, they hold that a defendant does not have the right to have the jury decide the question of identity pursuant to section 1025, subdivision (c). Furthermore, based on People v. Wiley (1995) 9 Cal.4th 580, on the issue of whether the judge or the jury determines if the defendant suffered a serious or violent felony, this Court of Appeal finds that it is the court's determination.

b. People v. Valentine (1999) 77 Cal.App.4th 301, the Second Appellate District, Division 4 held, that pursuant to People v. Kelii (1999) 21 Cal.4th 452, appellant did have a right to a jury trial on his priors; however, given the fact it is a statutory right, and not a constitutional right (see People v. Vera (1997) 15 Cal.4th 580), it was harmless error to deny appellant his jury trial right. REMEMBER, THE ISSUE OF WHETHER THIS TYPE OF ERROR IS STRUCTURAL OR NOT WAS GRANTED REVIEW BY THE CALIFORNIA SUPREME COURT IN, In re Epps (1999) November 22, 1999, reported in 99 Daily Journal D.A.R. 11597 (S082110) formerly cited at, 73 Cal.App.4th 1332, WHICH WAS DECIDED BY THE SAME DIVISIONS AS THIS MATTER.

c. People v. Tobias (1999)77 Cal.App.4th 38; formerly at 71Cal.App.4th 704, the Sixth Appellate District, held that pursuant to People v. Kelii (1999) 21 Cal.4th 452, appellant did have a right to a jury trial on his priors; however, given the fact it is a statutory right, and not a constitutional right (see People v. Vera (1997) 15 Cal.4th 580), it was harmless error to deny appellant his jury trial right. REMEMBER, THE ISSUE OF WHETHER THIS TYPE OF ERROR IS STRUCTURAL OR NOT WAS GRANTED REVIEW BY THE CALIFORNIA SUPREME COURT IN, In re Epps (1999) November 22, 1999, reported in 99 Daily Journal D.A.R. 11597 (S082110) formerly cited at, 73 Cal.App.4th 1332.

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

a. People v. Leng (1999) 71 Cal.App.4th 1, the Fifth Appellate District held that an offense that is listed as a Welfare & Institutions Code section 707, subdivision (b) offense, but is not a serious or violent felony, cannot be a strike prior, as it would violate the defendant's right to equal protection. The intent of the legislature in enacting the Three Strikes law was to ensure longer sentences for those persons who have previously committed serious or violent felonies. (See § 667, subd. (b).) As the Court of Appeal stated, if all of the offenses listed in W & I C section 707, subdivision (b) were considered strikes, it would expand the list beyond serious or violent felonies. An adult offender, who as a juvenile, committed a 707, subdivision (b) offense that was not serious or violent would be treated more harshly than the adult offender who had committed the same prior offense as an adult.

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

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

55. STRIKING A USE ENHANCEMENT AS PART OF A PREVIOUS PLEA BARGAIN DOES NOT PREVENT THE FACTS OF THAT CASE TO SHOW THAT THE DEFENDANT "PERSONALLY USED A FIREARM" WITHIN THE MEANING OF SECTION 1192.7, SUBDIVISION (C)(8); THEREFORE, A STRICKEN ALLEGATION CAN BECOME A STRIKE

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

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

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

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

a. People v. Tobias (1999) 77 Cal.App.4th 38, the Sixth Appellate District, held that a defendant who was previously convicted of a lewd act **"**upon and with the body**"** of a child, satisfied the requirements of section 1192.7, subdivision (c) and 667.5, subdivision (c), which indicated that the lewd act is **"**on a child**"** under the age of 14 years of age. REMEMBER, THIS ISSUE IS ONE REVIEW IN PEOPLE V. MONTES (S075759).

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

a. People v. Young (2000) 77 Cal.App.4th 827, the Third Appellant District held that, within the meaning of People v. Panizzon (1996) 13 Cal.4th 79, appellant's appeal must be dismissed for failure to obtain a certificate of probable cause as the challenge was to the validity of the plea itself. Even though appellant's plea did not call for a particular sentence, and gave him the ability to seek a reduction in the sentence within the meaning of People v. Superior Court (Romero) (1996) 13 Cal.4th 497, the Court of Appeal held that the challenge was to the plea itself and was dissimilar to the permitted challenge of People v. Lloyd (1998) 17 Cal.4th 658. In Lloyd, supra, the defendant had entered a plea without a plea bargain, and the court held that he was not challenging the plea itself, therefore, a certificate of probable cause was not needed, and reinstated the appeal. Here, the Court of Appeal held that the case more closely resembled Panizzon and not Lloyd, in that, even though the challenge was based on "post-plea" events, the attack went to the heart of the agreement. The Court of Appeal found that reserving the right to challenge the sentence under Romero, was not similar to reserving the right to challenge the maximum sentence.

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

a. People v. Fountain (2000) 78 Cal.App.4th 1183, the Third Appellate District held that, a violation of section 243, subdivision (d) when committed by a juvenile, is not a strike as it is not a crime within the meaning of Welfare and Institutions Code section 707, subdivision (b). Serious bodily injury has been held to be the equivalent of great bodily injury. (People v. Burroughs (1984) 35 Cal.3d 824, 831.) However, a violation of 243, subdivision (d) can be committed without force "likely" to cause serious injury; only the end result that great bodily injury actually occurred matters. But, there is a catch-all within Welfare and Institutions Code section 707, subdivision (b)(14) applies to any assault by means "likely" to produce great bodily injury. However, given the fact that an act of simply pushing the victim, which causes him or her to fall, and as a result suffers serious injury, is not force "likely" to cause great bodily injury, the offense does not qualify as a strike.

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

a. **People v. Davis (2000) _ Cal.App.4th _, reported on March 24, 2000, in 00 Daily Journal D.A.R. 3099, the Second Appellate District, Division 3, held that a three-strikes defendant is not ineligible for the deferred entry of judgment program due to the fact that he is not "convicted" of a current offense, unless and until (s)he fails to perform satisfactorily in the program. The plea of guilty by a defendant who enters into the deferred entry of judgment program does not constitute a conviction, and the mere allegation of one or two prior strikes, does not preclude the defendant from entering the program. Finally, the court held that the consequences of the deferred entry of judgment program are more sever than the old diversion programs, and therefore, they are not prohibited pursuant to the Three-Strikes Law.**

SELECTED ENHANCEMENT AND SENTENCING ISSUES

By: GARY M. MANDINACH, CAPLA
MAY 22, 2000

BIFURCATED JURY TRIAL ISSUES:

People v. Candelario (1970) 3 Cal.3d 702, it is clear that a jury or court is required to find a charge or allegation true or not true. Failure to make such a finding is considered in favor of d. (People v. Najera (1972) 8 Cal.3d 504.) Failure of court in a court trial to orally pronounce the finding even if the defendant admitted the truth of the enhancement operates as a not true finding. (See also People v. Mesa (1975) 14 Cal.3d 466; People v. Gutierrez (1993) 14 Cal.App.4th 1425, 1439-1440; People v. Garcia (1970) 4 Cal.App.3d 904, 907; People v. Molina (1977) 74 Cal.App.3d 544, 550.)

People v. Vera (1997) 15 Cal.4th 269, the California Supreme Court held that a defendant cannot challenge a prison prior enhancement, on appeal on the ground that he had been denied his right to a jury trial because he had waived the contention by failing to object to the alleged deprivation prior to the trial court's discharge of the jury. There is no constitutional right to a jury trial on the prior; only a statutory right.

People v. Milosavljevic (1997) 52 Cal.App.4th 811. In a jury trial, jeopardy attaches when jury is impaneled and sworn to try the case. (Crist v. Bretz (1978) 437 U.S. 28.) In a court trial jeopardy attaches after the first witness is sworn. (People v. Superior Court (Jurado) (1992) 4 Cal.App.4th 1217 1231.) In a bifurcated trial when jury is waived jeopardy attaches when the court begins to take testimony it does not relate back to the beginning of the jury trial. After the first witness is called in the court trial jeopardy has attached and the prosecution cannot ask the court to reconsider its finding of not true as jeopardy has attached.

People v. Yarborough (1997) 57 Cal.App.4th 469, the Court of Appeal determined that a jury trial on an enhancement allegation is not violated if the issue is not raised before the jury is discharged. Defendant was charged with battery and GBI. The information charged the current offense as a serious felony because of the GBI. The defendant waived jury on a serious felony prior. At the outset of the trial the DA moved to strike the GBI allegation as surplusage which was granted. After the jury returned a guilty verdict and was discharged, the DA moved to reinstate the GBI allegation to make the current felony a serious felony. No problem says the court. Defendant complained since there was no jury finding on this issue. The Court of Appeal did not find error for the judge to resolve the issue, in this case whether the defendant personally inflicted GBI since only such personal infliction comes within section 1192.7, subdivision (c). (See People v. Equarte (86) 42 Cal.3d 456 460-467.) In Equarte, as here, the Supreme Court rejected defendant's claim that the allegation under sections 667, subdivision (a)(1) and 1192.7 was insufficient to give him notice that the current offense was a serious felony. The court said that, if anything, it was subject to a demurrer. The court also rejected the defendant's contention

that the jury had not made a factual finding which established the current offense as a serious felony. The Court of Appeal also found consistent with Equarte that defendant's waiver of a jury trial on the priors issue included the issue of whether or not his current conviction was a serious felony.

People v. Wiley (1995) 9 Cal.4th 580, the Supreme Court held that the trial court has the obligation to make the legal ruling as a matter of law that the prior is a serious felony within the meaning of section 667, subdivision (a)(1), which includes the issue of whether the matters were brought and tried separately and that the jury only determines if the d suffered a prior conviction. (Id. at pp. 590-591.)

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

In re Epps (1999) REVIEW GRANTED November 22, 1999, reported in 99 Daily Journal D.A.R. 11597 (S082110) formerly cited at, 73 Cal.App.4th 1332, the Second District Court of Appeal, Division 4, held that a defendant, in light of People v. Kelii (1999) 21 Cal.4th 452, is entitled to a hearing to determine whether the priors actually exist and if the court denies a jury trial altogether, it must be reversed as it would be structural error. However, they will be able to retry the matter as a result of Monge v. California (1998) 615 U.S. __, [141 L.Ed2d 615, 118 S.Ct. __].

ENHANCEMENT SUFFICIENCY ISSUES:

People v. Flynn (1995) 31 Cal.App.4th 1387 prior serious felony enhancement is properly imposed even though the jury found the GBI allegation not true. The court can find the prior a serious felony if the facts establish appellant used a dangerous or deadly weapon pursuant to section 1192.7, subdivision. (c)(23) even though it was not charged in the information.

People v. Campbell (1999) 76 Cal.App.4th 305, the Fourth Appellate District, Division 1, held that if the trial court fails to advise the defendant of his constitutional rights before he admits the prior(s), the admissions are not valid. The prosecutor read the defendant each of the allegations. The court asked whether he admitted each of them, and counsel concurred. The court failed to inform the defendant that he was waiving any of his constitutional rights by making these admissions and there were no admissions with respect to any of the three constitutional rights.

The court found that there was a violation of In re Yurko (1999) 10 Cal.3d 857, 861-865. The Court of Appeal held that the record is inadequate to support an intelligent and voluntary plea under a totality of the circumstances. (See People v. Howard (1992) 1 Cal.4th 1132, 1175; People v. Carroll (1996) 47 Cal.App.4th 892, 896-898; People v. Johnson (1993) 15 Cal.App.4th 169, 177-178.)

People v. Newman (1999) 21 Cal.4th 413, the Supreme Court held that a defendant may stipulate to an element of his offense, such as ex-felon status when charged with a section 12021, subdivision (a)(1) without being given his Boykin/Tahl rights. The Court cleared up a conflict in some of their own cases, namely People v. Adams (1993) 6 Cal.4th 570, and People v. Hall (1980) 28 Cal.3d 143. The High Court followed its latest expression in Adams, holding that "a defendant validly may stipulate to one or more, but not all, of the evidentiary facts necessary to a conviction of an offense or an enhancement" without first having received such advisements. The Court expressly overruled contrary expressions in People v. Hall, supra, and People v. Robertson (1992) 11 Cal.App.4th 835 and People v. Turner (1983) 145 Cal.App.3d 658.

People v. Harris (1992) 8 Cal.App.4th 104, 108-109, defendant who admits the priors in the guilt phase, those admissions can be considered in the bifurcated trial on the priors to determine the priors validity. Therefore, even if the documents presented are insufficient, then it appears that the admissions may be sufficient to find the priors true. Query: That is unless a similar rule to the corpus cop-out rule applies wherein the prosecution must prove a prima facia case first before the admission/confession would come it.

People v. Cortez (1999) 73 Cal.App.4th 276, the Second Appellate District, Division 3 held that, even though appellant admitted a prior conviction for section 12034, subdivision (c), (discharge of a firearm from a motor vehicle at another person), the prior is not a strike unless the prosecution proves that the defendant either personally used a weapon within the meaning of section 667, subdivision (c)(8) or a dangerous weapon within the meaning of section 667, subdivision (c)(23). The facts of the predicate offense were not shown; therefore, the court can only presume the predicate offense was for the least adjudicated elements. (See People v. Rodriguez (1998) 17 Cal.3d 253, 262.) Given the fact that the defendant could have committed the offense as an accomplice who did not use a weapon, there is insufficient evidence that the offense is a strike. This case is wonderful from the standpoint that it reiterates what Rodriguez says, in a different context, and it is contra to People v. Guerrero (1993) 19 Cal.App.4th 401, which held that a guilty plea is conclusive of the fact that the defendant admitted every element of the charged crime, which includes the personal use.

People v. Tenner (1993) 6 Cal.4th 559 566 held that 3 elements must be proven beyond a reasonable doubt to prove a section1192.7, subdivision (c) serious felony enhancement: (1) the conduct in the current case constitutes a serious felony, (2) the fact of a prior conviction, and (3) an offense underlying the prior constitutes a serious felony. (See also People v. Shirley (1993) 18 Cal.App.4th 40, 44.)

People v. Myers (1993) 5 Cal.4th 1193, 1195, the Supreme Court held that when the prior conviction is not on its face a serious felony within the meaning of section 1192.7, the question of whether the conduct underlying the prior meets the definition is a factual question, and you look to the entire "record of conviction."

People v. Milosavljevic (1997) 52 Cal.App.4th 811 prior assault conviction justifies sentencing enhancement on current case even though the original sentence on the prior stayed the term for assault enhancement. (See People v. Shirley (1993) 18 Cal.App.4th 40 [the court struck not merely stayed the GBI as they did in Milosavljevic.) For purposes of a prior conviction statute, a defendant suffers such a conviction when he pleads guilty. (Id., at pp. 45-47.)

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

People v. Williams (1996) 50 Cal.App.4th 1405, the Fifth Appellate District, held that there was insufficient evidence of the prior for section 245, subdivision (b) [now 245(c)] assault on an officer as the evidence did not show that a deadly weapon was used in the 1983 assault. Section 1192.7, subdivision (11) indicates that for the assault to be a serious felony, it must be with a deadly weapon and not merely by means likely to produce GBI. Given the fact that no evidence of great bodily injury was submitted, the evidence was not substantial such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (People v. Johnson (1980) 26 Cal.3d 557 578; People v. Jones (1990) 51 Cal.3d 294, 314.) Additionally, the Court of Appeal held that the fingerprint card which is part of the record said ADW on it. The Court of Appeal indicated that the Department of Corrections fingerprint card is not part of the record of conviction therefore it will not support the enhancement.

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

People v. Woodell (1998) 17 Cal.4th 448. The High Court held that the appellate court opinion which, affirms a conviction, is part of the record of conviction and may be considered in determining whether that conviction was for a serious felony within the meaning of Penal Code section 667. The Supreme Court concluded that there was no valid reason to limit the record of conviction to the trial court proceedings. The High Court stated that noticing an appellate opinion for the limited purpose of proving the existence of the conviction does not require consideration of the facts beyond those necessarily adjudicated in the prior proceeding. The Supreme Court also gave short shrift to appellant's argument that the statements in the opinion were in large part hearsay, and therefore inadmissible. The High court held that the Court of Appeal opinion can be considered for a nonhearsay purpose to establish the basis for the conviction, and may also be admitted within the meaning of Evidence Code section 1280, as an official record. The enhancement must be proven beyond a reasonable doubt.

People v. Houck (1998) 66 Cal.App.4th 350, the Fourth District, Division 1, held that a preliminary hearing transcript cannot be used to prove that the prior conviction was a serious felony, when the conviction resulted from a trial and not a plea following the preliminary hearing. The Court of Appeal finds that the preliminary hearing transcript is not part of the "record of conviction" (see People v. Woodell (1998) 17 Cal.4th 448j, 454; People v. Reed (1996) 13 Cal.4th 217, 223), even though the "entire record" may be used to determine if the prior qualifies as a serious felony. (See People v. Myers (1993) 5 Cal.4th 1193, 1195.) People v. Bartow (1996) 46 Cal.App.4th 1573, has taken the opposite position and held that the preliminary hearing transcript is part of the record of conviction. Reed, supra, stated, within the context of a plea, that the preliminary hearing transcript was part of the record of conviction when determining if an assault with a deadly weapon was a serious felony prior. However, when there was a trial on the alleged charges, the jury finding is the reliable evidence the trier of fact must consider in determining if the prior is a serious felony and not the preliminary hearing transcript. This is the application of the "reliable reflection" test from Reed. But retrial is not barred pursuant to Monge v. California (1998) 524 U.S. _[141 L.Ed.2d 615, 118 S.Ct. _].

People v. Jones (1988) 203 Cal.App.3d 456, 460; People v. Williams (1990) 222 Cal.App.3d 911, 915, the prosecution has the burden of proving each element of an enhancement beyond a reasonable doubt.

People v. Jones (1995) 37 Cal.App.4th 1312, the First Appellate District, Division 3 held that a true findings as to prior convictions cannot be based on waiver forms for prior charges. (See also In re Moss (1985) 175 Cal.App.3d 913.)

People v. Castello (1998) 65 Cal.App.4th 1242, Fourth Appellate District, Division 1, held that a defendant suffers a prior conviction at the time he or she is found guilty by the trier of act, or pleads to a given charge. (See People v. Rosbury (1997) 15 Cal.4th 206, 210; see also People v. Rhoads (1990) 221 Cal.App.3d 56, 60.) The Court of Appeal found that it was irrelevant that the Florida court, where the convictions occurred, had yet to determine when a conviction actually

became a prior offense, as we are guided by the interpretation of conviction under California and not Florida law. Remember, a prior conviction qualifies as a prior only when the conviction for that offense was entered before the commission of the new offense. (See People v. Balderas (1985) 41 Cal.3d 144; People v. Malone (1988) 47 Cal.3d 1; People v. Rojas (1988) 206 Cal.App.3d 795.)

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

U.S. v. Coleman (2000) (9th Cir) _ F3 _, reported on April 4, 2000, in 00 Daily Journal D.A.R. 3505, the facts showed that the defendant was a co-conspirator for an unarmed bank robbery, but there were no facts establishing that the defendant knew that the co-conspirators would use a weapon in the bank robbery. The defendant was the driver of the car and helped plan the event, but no mention of guns was discussed. Therefore, the failure to show that the defendant knowingly aided and abetted the co-conspirators in an armed bank robbery, precludes the finding for armed bank robbery, and the defendant can only be convicted of bank robbery. The government did not show that the defendant knew that the principals had and intended to use a dangerous weapon during the robbery or that he intended to aid in that endeavor.

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

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

People v. Dennis (1998) 17 Cal.4th 468, the Supreme Court held that a section 12022.9 is an enhancement and not a lesser include or related offense to fetal murder. Enhancements like special circumstances are not substantive crimes but an additional term of confinement. Plus, a statute with only one term of additional punishment is characteristic of an enhancement.

People v Gamble (1996) 48 Cal.App.4th 76, the Second Appellate District, Division 1 held that for a prior prison term from another jurisdiction to apply (see § 667.5, subd. (g)) the record must establish that the defendant must have served at least 1 year in state prison. The court will not infer that defendant served at least one year given no other statement in the record. Most prison priors apply if defendant did 1 day in state prison but, subd. (g) added the 1 year term; therefore, since the prosecution did not prove it the enhancement. was struck. People v. Maki (1984) 161 Cal.App.3d 697, 700 indicated that felony convictions are not the same as prior prison terms; a defendant must serve a separate prison term. (People v. James (1978) 88 Cal.App.3d 150, 161; see also People v. Jones (1988) 203 Cal.App.3d 456, 459; People v. Tenner (1993) 6 Cal.4th 559 [4 elements to § 667.5, subd. (b): (1) defendant convicted of a felony (2) imprisoned; (3) completed term; and (4) did not remain free for 5 yrs. Case discusses sufficiency of evidence for prong 3.

People v. Mendoza (1986) 183 Cal.App.3d 390, 400-401, it has long been the rule in California that in the absence of countervailing evidence, that identity of person may be presumed or inferred from the identity of name. (People v. Brucker (1983) 148 Cal.App.3d 230, 242.) Plus there must be an objection and it may not be raised for the first time on appeal.

STATUS ENHANCEMENTS:

People v. Medina (1988) 206 Cal.App.3d 986 there is no application of brought and tried together as to the application of 667, subdivision (a) and 667.5, subdivision (b) when in one trial defendant

is convicted of two felony offenses one being used as the section 667, section (a) and the other the section 667.5, subdivision (b) as the statutes serve two different purposes. There is no section 654 violation per Medina.

People v. Ruiz (1996) 44 Cal.App.4th 1653, the Fifth Appellate District follows Medina, supra regarding the imposition of a section 667.5, subdivision (b) and a section 667, subdivision (a), when in one trial the defendant is convicted of multiple offenses that run concurrently. The Court of Appeal held that both can be imposed as there is no brought and tried separately requirement in section 667.5, subdivision (b).

People v. Jones (1993) 5 Cal.4th 1150, the Supreme Court held that only the greater of a section 667, subdivision (a) and 667.5, subdivision (b) enhancement can be imposed when the enhancements become applicable through the same offense.

People v Gamble (1996) 48 Cal.App.4th 76, the Second Appellate District, Division 1 held that for a prior prison term from another jurisdiction to apply (see § 667.5, subd. (g)) the record must establish that the defendant must have served at least 1 year in state prison. The court will not infer that defendant served at least one year given no other statement in the record. Most prison priors apply if defendant did 1 day in state prison but, subd. (g) added the 1 year term; therefore, since the prosecution did not prove it the enhancement. was struck. People v. Maki (1984) 161 Cal.App.3d 697, 700 indicated that felony convictions are not the same as prior prison terms; a defendant must serve a separate prison term. (People v. James (1978) 88 Cal.App.3d 150, 161; see also People v. Jones (1988) 203 Cal.App.3d 456, 459; People v. Tenner (1993) 6 Cal.4th 559 [4 elements to § 667.5, subd. (b): (1) defendant convicted of a felony (2) imprisoned; (3) completed term; and (4) did not remain free for 5 yrs.

People v. Gokey (1998) 62 Cal.App.4th 932, the First Appellate District, Division 3 held that a court can impose enhancements for both status offenses, sections 11370.2 and 667.5, subdivision (b) based on the same offense as the provisions of section 654 do not apply and the wording of section 11370.2 itself. (See also People v. Powell (1991) 230 Cal.App.3d 438, 441-442.)

People v. Jones (1998) 63 Cal.App.4th 744, the Second Appellate District, Division 4, held that the trial court erred when it imposed a separate enhancement for prior convictions involving concurrent crimes. Court found that the defendant had prior convictions and impose one enhancement for each of them for which he served a concurrent prison term. The Court of Appeal says wrong, this is only one separate prison term for 667.5, subdivision (b) purposes.

People v. Gatson (1998) 60 Cal.App.4th 1020, the Second Appellate District, Division 5, held that a court can not stay a prior prison term enhancement, but it can strike it; if the court takes that option, in doing so, it must state its mitigating reasons on the record if it cannot then it must be imposed.
People v. Aubrey (1998) 65 Cal.App.4th 279, the Fourth Appellate District, Division 3, held that when the trial court makes the ruling that it will exercise its discretion under Romero and strike

appellant's only serious felony strike within the meaning of section 667, subdivisions (b)-(i), for this "two strike" defendant, said ruling made him eligible for probation, even though he was subject to the provisions of section 667, subdivision (a) (i.e. the five year prior for the prior serious felony). This Court of Appeal declined to follow People v. Winslow (1995) 40 Cal.App.4th 680, which held that when a defendant is subject to the five year prior within the meaning of section 667, subdivision (a)(1), he was not eligible for probation, as the five year prior must be imposed. Here, this Court of Appeal found that Winslow's analysis was erroneously premised on the proposition that section 1385, subdivision (b)'s prohibition against striking a prior necessarily includes prohibition against a stay of the enhancement which would occur incident to the grant of probation. The court found, based on People v. Vergara (1991) 230 Cal.App.3d 1564, 1568, that there is a fundamental difference between striking and staying an enhancement. As a result, the legislature by its language in other statutes knows how to prevent the granting of probation, but they did not use that or similar language when it enacted section 667, subdivision (a)(1), and as a result, probation is not precluded within the context of this case.

FIREARM ENHANCEMENT ISSUES:

People v. Austin (1985) 165 Cal.App.3d 547, 550-552 defendant's prior was an attempted exhibition of a firearm in the presence of a police officer (§ 417, subd. (b)). The court found that the offense is not a serious felony even though the crime was a felony and involved a firearm. First the prior must be a crime listed in section 1192.7 of which a section 417 or even section 246.3 does not fall within. The catch-all within subdivision (c)(8) (use of a weapon) does not apply and that the use is an enhancement not the offense itself.

People v. Piper (1986) 42 Cal.3d 471 shooting into an inhabited vehicle (§ 246), even though it is not listed in section 1192.7, is a serious felony as it involved the intentional personal use of a weapon and is not exempt from subdivisions (c)(23) and (c)(8) of section 1192.7.

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

People v. Thomas (1992) 4 Cal.4th 206, the Supreme Court held that a trial court cannot strike a section 12022.5 enhancement under section 1385.

People v. Cruz (1978) 83 Cal.App.3d 308, 333 [pros failed to show the defendant's possession of firearm was not merely incidental to the primary objective for handling the firearm; also People v. Kane 1985) 165 Cal.App.3d 480, 488; but possibly contra People v. Ratcliff (1990) 223 Cal.App.3d 1401. Argue that there is no evidence that appellant's possession of the gun before or after or for a purpose other than perpetrating the given event; the section 12021 offense must be

stayed.

People v. Goodwin (1996) 47 Cal.App.4th 680, the Second Appellate District, Division 7 held that based on rationale of People v. Reid (1982) 133 Cal.App.3d 354, 367 [metal toy pistol was not inherently dangerous itself and therefore not a dangerous or deadly weapon as a matter of law]. Since there was no evidence that the starter pistol was used as or contemplated to be used as a bludgeon (People v. Hood (1958) 160 Cal.App.2d 121, 122; see also People v. Graham (1969) 71 Cal.2d 303, 327-328) there was no substantial evidence to justify the enhancement within section 12022, subdivision (b).

People v. Ward (1948) 84 Cal.App.2d 357, 360 a toy gun does not have to loaded or operative for there to be a 12022, subdivision (b) violation. And a toy gun can be a dangerous or deadly weapon.

People v. Davis (1995) 41 Cal.App.4th 367 indicated that the personal use enhancement of 12022.5, subdivision (a) and the GBI enhancement within section 12022.5, subdivision (b)(1) [shooting into an occupied vehicle causing GBI] can both be imposed.

People v Granado (1996) 49 Cal.App.4th 317 defendant's failure to point the weapon at the victim or make a threat of harm with it does not warrant an exception to section 12022.5, subdivision (b). However see People v. Jacobs (1987) 193 Cal.App.3d 375 which indicates that the display of the gun established that it was fired or that the display was coupled with a threat of harm. See also People v. James (1989) 208 Cal.App.3d 1155, 1163 wherein the court finds that the second victim did not see the gun nor hear a threat only the first victim, therefore, there should be no use as to the second victim. Granado, supra is again contra citing People v. Fierro (1991) 1 Cal.4th 173, 225-227.; see also People v. Berry (1993) 17 Cal.App.4th 332, 335-339 [use encompasses a situation where the defendant is armed an uses his firearm in furtherance of a series of related offenses that culminates in a fatal or near fatal shooting even though the d does not personally fire the actually shot. The enhancement can be imposed upon a person who personally uses a firearm while aiding and abetting the underlying felony.])

People v Tameka C. (2000) 22 Cal.4th 190, the California Supreme Court held that a single shot from a firearm, which harms more than 1 victim, can subject the defendant to multiple section 12022.5 enhancements even though one or more of the persons assaulted were unintended victims, even if they were not know to exist at the time of the shot. The court relied on People v. King (1993) 5 Cal.4th 59 to justify its ruling. In King, this court said that when a defendant uses a firearm in a single, indivisible transaction that results in injury to multiple victims, more than one enhancement within the meaning of section 12022.5 can be imposed.

People v. Herrera (1998) 67 Cal.App.4th 987 the court has no discretion to strike a section 12022.5 enhancement with section 1385 following the repeal of section 1170.1, subdivision (h). The legislature did not intend to reinvest the court with the power to strike a gun use enhancement.

People v. Ledesma (1997) 16 Cal.4th 90, the California Supreme Court held that an enhancement within the meaning of section 12022.5, subdivision (d) provides that if the offense is an ADW the additional term may be imposed. However, the majority of the court found that the term "may"'is actually "must" and the additional enhancement "must" be added.

People v Myers (1997) 59 Cal.App.4th 1523, the defendant was convicted of 1st degree murder and 1st degree attempted premeditated murder for shooting from a vehicle. The jury also found the enhancement for section 12022.55, true. The Court of Appeal refused to apply section 654 to the enhancement even though the use of the gun was for the same act and intent as the murder and attempted murder itself. The Court of Appeal acknowledged that the supreme court has not ruled on this enhancement issue and the application of section 654 and noted the split of authority in the Court of Appeal opinions. The issue is the dual use of the facts for both the enhancement and the underlying crime. The same issue would arise with a section 12022.53 enhancement.

People v. Felix (2000) _ Cal.4th _, reported on March 31, 2000, in 00 Daily Journal D.A.R. 3321, 2000 Cal. Lexis 2062, the California Supreme Court held that when imposing a sentence enhancement for the use of a weapon under section 12022.5, and the enhancement attaches to one count of first degree murder and to another count of premeditated first degree murder, the court must impose both enhancements full term, and not 1/3 the middle term. The court reasoned that both counts are indeterminate life terms and not subject to the determinate sentencing scheme within the meaning of section 1170.1. The Court of Appeal concluded also concluded that the trial court should impose the use enhancement at 1/3 the middle term for **"**violent**"** determinate term crimes, and not impose them at all when they attach to **"**nonviolent**"** determinate term crimes.

People v. Eck (1999) 76 Cal.App.4th 759, the Second Appellate District, Division 7, held that the trial court erred by imposing a great bodily injury enhancement within the meaning of section 12022.7 and a section 12022.55 enhancement for causing GBI when shooting from a motor vehicle. The Court of Appeal found that section 1170.1, subdivision (g) indicates that when two or more enhancements may be imposed for infliction of great bodily injury in the commission of a single offense, only the greatest of those enhancements should be imposed. (See also, People v. Myers (1997) 59 Cal.App.4th 1523, 1528; People v. Dominguez (1992) 4 Cal.App.4th 516, 518; In re Sergio R. (1991) 228 Cal.App.3d 588, 594.) Here the court said you cannot impose the section 12022.7 enhancement when the section 12022.55 enhancement is imposed.

WAIVER ISSUES:

People v. Scott (1994) 9 Cal.4th 331 356-358 the California Supreme Court held that the failure to object to the court's failing to state reasons for the record will be waived on appeal. However, the court must give a tentative ruling before argument on the issue. (Id., at p. 356.) The concurring opinion by Justice Arabian indicates that the lack of objection would not always insulate the error

if fundamental principles of policy and constitutional guarantees apply. (People v. Welch (1993) 5 Cal.4th 228, 240-241.)When lower court's sentence is unauthorized it is beyond that court's jurisdiction and may be raised on appeal even if no objection was raised in the trial court; the issue is not waived for lack of objection. (People v. Neal (1993) 19 Cal.App.4th 1114 1120; People v. Kim (1995) 33 Cal.App.4th 462 fn. 3; People v. Scott, supra, 9 Cal.4th at p. 354.)

People v. Tillman (2000) 22 Cal.4th 300, the California Supreme Court held that what is good for the goose is good for the gander, or People v. Scott (1994) 9 Cal.4th 331 applies to the prosecution as well as the defendant. Here, the prosecutor failed to object when the court failed to impose a restitution fine under either sections 1202.4 or 1202.45. The court can refrain from imposing the fines if a statement is made on the record as to its rationale for doing so. Where the court did not impose the fines, or make any statement of reason, but the prosecution does not bring this to the court's attention, they cannot raise the matter for the first time on appeal.

People v. Mendez (1999) 19 Cal.4th 1084, 1100, the California Supreme Court held that, unless there is an objection, on the record as to the amount of credit coming to the defendant, they are waived on appeal per section 1237.1. This is not to say that an application cannot be made back in the trial court for those credits.

People v. Zuniga (1996) 46 Cal.App.4th 81 finds that there is no requirement for the trial court to give a tentative ruling so that counsel has a right to object before the actual sentence especially as in this probation violation case. BUT, see People v. Superior Court (Dorsey) (1996) 50 Cal.App.4th 1216, 1223-1224 for a contrary result.

People v. Superior Court (Dorsey) (1996) 50 Cal.App.4th 1216, 1223-1224, where the parties were not appraised of the court's ruling before it is given there is no waiver per Scott, supra. Here, the prosecution was not given a meaningful opportunity to object.

People v. Erdelen (1996) 46 Cal.App.4th 86 defendant's failure to object to court's statement of reasons waives any challenge pursuant to Scott, supra.

People v. Soto (1997) 56 Cal.App.4th 196, the First Appellate District, Division 3, held that the objection to the sentencing at the time of the hearing cannot be boilerplate and must be specific (specifically articulated) or it is waived per Scott, supra.

People v. Mustafaa (1994) 22 Cal.App.4th 1305 the Fourth Appellate District, Division One held that a defendant waives review of error, such as a sentencing court's reasons or asserted lack of reasons for imposing an upper or consecutive term, by failing to object at the time of sentencing. However, fashioning a sentence in a manner unauthorized by law exceeds the jurisdiction of the court and may be subject to later review even though no objection was made in the trial court. (People v. Neal (1993) 19 Cal.App.4th 1114.)

People v. Gardineer (2000) _ Cal.App.4th _, reported in March 22, 2000, in 00 Daily Journal

D.A.R. 3015, the Third Appellate District held, pursuant to People v. Welch (1993) 5 Cal.4th 228, 234-235, People v. Tillman (2000) 22 Cal.4th 300, and People v. Woods (1999) 21 Cal.App.4th 668, 678, fn. 5, appellant must object to a condition of probation in the trial court, or the issue cannot be raised on appeal. The Court of Appeal also rejected appellant's contention that the imposition of the condition was an unauthorized sentence, and therefore could not be raised for the first time on appeal.

People v. Hester (2000) 22 Cal.4th 290, the California Supreme Court held, 4-3, that when a defendant agrees to a prison term or plea bargain, here 4 years, and one of the counts was run concurrently rather than properly stayed under section 654, he abandons his section 654 double punishment issue. The dissent indicates that CRC, Rule 412(b) is inapplicable here as the defendant is not trying to reduce his sentence, and a violation of section 654 is an unauthorized sentence that can be corrected at any time even when there is no objection in the trial court. (See People v. Scott (1994) 9 Cal.4th 331, 354, fn. 17; People v. Perez (1979) 23 Cal.3d 545, 549-550.)

MITIGATION/AGGRAVATION

People v. Simpson (1979) 90 Cal.App.3d 919, 926-928 appellant's drug addiction could be utilized as a factor in mitigation. Also alcohol addiction.

Robinson v. California (1962) 370 U.S. 660 666-667 fn. 8 [8 L.Ed2 758 763] narcotic addiction is considered an illness.

People v. Peterson (1973) 9 Cal.3d 717, 727, a judge may consider other criminal conduct even if uncharged if there is some substantial basis for believing that such information is reliable as the criminal justice system must have some concern for the probable accuracy of the information it inputs into the process.

People v. Myers (1983) 148 Cal.App.3d 699, it can be argued that the court erred by merely balancing the number of aggravating factors against those of mitigation and not weighing those factors according to their relative importance acted to blind itself and abused its discretion in the sentencing process. The court should use a qualitative rather than a quantitative approach to weighing the aggravated v. the mitigated factors.

People v. Oberreuter (1988) 204 Cal.App.3d 884 the Fourth Appellate District, Division One held that sentencing courts have wide discretion in weighing aggravating and mitigating factors. (See People v. Evans (1983) 141 Cal.App.3d 1019, 1022; People v. Giminez (1975) 14 Cal.3d 68, 72; People v. Covino (1980) 100 Cal. App.3d 660, 670-671.) An appellate court must affirm the sentencing court's decision unless there is a clear showing the sentence was arbitrary or irrational. (People v. Hubbel (1980) 108 Cal.App.3d 253, 260.) The sentencing court's reliance on one impermissible factor in aggravation was harmless error because other aggravating factors were present and it was not reasonably probable a result more favorable to the defendant would have occurred had the sentencing court not relied on the impermissible factor.

People v. Tatlis (1991) 230 Cal.App.3d 1266, 1274 in making sentencing decisions the trial court must consider all of the relevant factors both aggravating and mitigating, including those factors of an individual (personal) nature of the defendant. (People v. Dent 1995) 38 Cal.App.4th 1726, 1731).

People v. Rodriquez (1993) 21 Cal.App.4th 232, 241 the Court of Appeal held that the middle term of 4 years is to be imposed unless circumstances in aggravation or mitigation warrant the upper or lower term. The upper term for an enhancement may be imposed only when there are circumtances in aggravation. (§ 428, subd. (b); People v. Leung (1992) 5 Cal.App.4th 482, 504.) A fact is aggravating if it makes the defendant's conduct distinctively worse than it would have otherwise been.

People v. Hall (1994) 8 Cal.4th 950; The court may look to any mitigating facts which are unrelated to the use of the firearm in connection with the attempted robbery. Disapproves CRC, Rule 428 and the facts need not be limited to the facts of the enhancement.

Linder v. U.S. (1925) 268 U.S. 5, 18; In re Foss (1974) 10 Cal.3d 910, 921 (heroin addition is a disease subject to medical treatment) and as such constitutes a strong mitigating circumstance. (See CRC, Rule 423(b)(2).)

People v. Hearn **DEPUBLISHED** formerly cited at (1996) 51 Cal.App.4th 479, the Third Appellate District held that pursuant to section 1170, subdivision (b) and CRC, Rule 420(c), the court cannot use an enhancement as an aggravating factor. But a single aggravating factor is sufficient to warrant the upper term. (See also People v. Dreas (1984) 153 Cal.App.3d 623, 636; People v. Clark (1990) 50 Cal.3d 583 638 fn. 38; People v. Vasquez (1996) 51 Cal.App.4th 1277.)

People v. Spencer (1996) 51 Cal.App.4th 1208, the First Appellate District, Division 4, held that when the jury returned its verdict of voluntary manslaughter and attempted voluntary manslaughter down from murder based on the defendant's imperfect self defense, the court erred in using the victim vulnerability factor to give the high term as it is inconsistent with the juries finding. Also, this was the only factor used to justify the high term; therefore harmful error.

People v. Avalos (1984) 37 Cal.3d 316, 233, cannot use the same fact to both aggravate and to impose the upper term.

People v. Castellano (1993) 140 Cal.App.3d 608, 614-615 only a single aggravating factor is required to impose the upper term or the choice of a consecutive sentence. (People v. Coulter (1989) 209 Cal.App.3d 506, 516.)

People v. Kelley (1997) 52 Cal.App.4th 568, the Fourth Appellate District, Division 3 held that when two aggravating factors are used, one proper and one not, the proper factor can be used to uphold the use of the enhancement and there is no prejudice in that an improper factor was used.

(See People v Piceno (1987) 195 Cal.App.3d 1353, 1360.) Remand is necessary when the court fails to consider relevant mitigating factors. (People v. Strunk (1995) 31 Cal.App.4th 265, 273-275.) But the objection must be made on the record or it is waived within Scott. The court is presumed to have considered all mitigating factors unless the record affirmatively shows to the contrary. (People v. Superior Court (Du) 52 Cal.App.4th 822, 836.)

People v. Scott (1994) 9 Cal.4th 331, 350, the court must tie separate aggravating factors to each of the sentencing choices in made, even within one count. (See also CRC, Rule 420 (e); see also People v. Keeton (1992) 10 Cal.App.4th 1125, 1128-1132.)

People v. Castorena (1996) 51 Cal.App.4th 558, the Fourth Appellate District, Division 3 held that where the facts excede those necessary to establish gross negligence, they can be used to impose the aggravated term.

People v. Bradford (1995) 38 Cal.App.4th 1733 , the Third Appellate District held that possession of a firearm can be used as an aggravating factor if the possession is transactually related to the marijuana cultivation. Defendant's shotguns were found in his cabin in a compound dedicated to cultivating marijuana. Defendant knew the weapons were there. The record permits a fair inference defendant was present in the cabin with the weapons at some point during the cultivation. The Court of Appeal says that is enough for the upper term on the armed enhancement. (Cf. People v. Bland (1995) 10 Cal.4th 991, 995 re: possession of a firearm and drugs in the same place even though not on the defendant at the time of the arrest or finding of the drugs and weapon.)

JURISDICTIONAL ISSUES:

People v. Martinez (1998) 65 Cal.App.4th 1511, the Second Appellate District, Division 5, held that the mandatory provisions for fines such as sections 1202.4 and 1202.45 are jurisdictional and must be imposed and it is an unauthorized sentence not to impose them; therefore, the issue can be raised for the first time on appeal. Here, Justice Turner found that the drug program fee is not jurisdictional, therefore not mandatory. Since the court shall determine if the defendant has the ability to pay it is therefore not mandatory and as result not jurisdictional. But, the criminal laboratory fee per Health & Safety Code section 11372.5, subdivision (a) is mandatory and therefore jurisdictional and must be imposed. Penalty assessments must be imposed and all of the fines and assessments must be stated on the abstract of judgment.

People v. Collins (1996) 45 Cal.App.4th 849, 864-865 held that where a court has subject matter jurisdiction, a party who consents to action beyond the court's power may be estopped to complain of the ensuing action in excess of jurisdiction.

People v. Welch (1995) 5 Cal.4th 228, 235 and People v. Scott (1994) 9 Cal.4th 331, 354 held that where a sentence imposed upon a charge not founded upon a plea of guilty or no contest nor a finding of guilt, is an unauthorized sentence and is in excess of jurisdiction, which is not waived

by the defendant's failure to object in the trial court.; see also People v. Tillman (2000) 22 Cal.4th 300.)

INCREASE IN SENTENCE ON REMAND

People v. Williams (1998) 61 Cal.App.4th 649, under the rule in N.C. v. Pearce (1969) 395 U.S. 711 a defendant's sentence generally cannot be increased after appeal. But if there is no contemporaneous objection then the problem is generally waived (see People v. Scott, supra, 9 Cal.4th at p. 353; United States v. Vonsteen (5th Cir. 1992) 950 F.2d 1086, 1089-1090; but the Court of Appeal or Supreme Court can resolve the problem to avoid an IAC issue. (See also, People v. Marshall (1996) 13 Cal.4th 799, 831.) The Court of Appeal also held that it could not merely add a 5-year prior serious felony, even though it constituted an unlawful sentence since it would violate the terms of the defendant's plea agreement. Under that scenario, the Court of Appeal had to transfer the matter back to the trial court as the total sentence exceeded the terms of the plea agreement, and it would have been unjust not to let the trial court resentenced appellant in an attempt to keep as close to the original sentence as reasonably practicable.

People v. Massengale (1970) 10 Cal.App.3d 689 the Second Appellate District, Division Four held that when a court pronounces a sentence which is unauthorized by the Penal Code, that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately brought to the attention of the court. (In Re Sandal (1966) 64 Cal.2d 412; In Re Robinson (1956) 142 Cal.App. 2d 484, 486.) If a trial court refuses to correct an illegal sentence, the People may obtain relief in the appellate court by writ of mandate. (People v. Superior Court (1933) 135 Cal.App. 562; People v. Superior Court (1931) 116 Cal.App. 412. When the mistake is discovered while the defendant's appeal is pending, the appellate court should affirm the conviction and remand the case for a proper sentence. (People v. Phillips (1946) 76 Cal.App.2d 515, 525.)

It is important to recognize that such a correction in judgment is not a penalty imposed upon appellants because of their appeals. The rationale of People v. Henderson (1963) 60 Cal.2d 482, forbidding increased punishment after a reversal and second trial, does not apply. The correction in the judgments here would be required whenever the mistake was discovered, regardless of whether or not defendants had appealed.

People v. Coleman (1989) 48 Cal.3d 112, 166 the improper use of the same fact for imposition of both upper term and consecutive term of another enhancement does not necessitate resentencing if it is not reasonably probable that a more favorable sentence would have been imposed in the absence of error. (See also People v. Dixon (1993) 20 Cal.App.4th 1029.)
People v. Reiley (1987) 192 Cal.App.3d 1487, the First Appellate District, Division Five held that the trial court must state its reasons for the imposition of consecutive enhancements within the meaning of sections 12022 and 12022.7. The trial court's meticulous attention to explaining its exercise of discretion and the lack of prior case law indicate that the trial court may have been unaware that it had a separate and additional "sentencing choice" under section 1170.1,

subdivision (e) (* now subdivision (g)). The Court of Appeal "cannot assume *harmless error* by speculating on the probability the court will impose the same sentences on remand." People v. Huntherington (1984) 154 Cal.App.3d 1132, 1143.) The trial court's omission requires a remand for sentencing on the enhancements.

UNAUTHORIZED SENTENCES

People v. Serrato (1973) 9 Cal.3d 753 the California Supreme Court held that an unauthorized sentence is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement.
People v. Fond (1999) 71 Cal.App.4th 127, the Second Appellate District, Division 6 held that sentencing appellant under section 667.61 was cruel and unusual. The people did not appeal, but argued, as part of the defendant's appeal, that the sentence was unauthorized. Court of Appeal held no, it is authorized and the People cannot get in through the back door of defendant's appeal.

People v. Tran (2000) 78 Cal.App.4th 383, the First Appellate District, Division 2, held that a waiver of custody credits within the meaning of section 2900.5, cannot be waived as a condition of probation, as it is an unauthorized sentence, if the defendant objects to the imposition of such a condition for a violation of probation. Appellant's acceptance of a condition of probation does not preclude him from challenging it on appeal. His objection at the time of sentence suffices to preserve the point for appeal. (See People v. Welch (1993) 5 Cal.4th 23-237.) This is a very good case that distinguishes other types of waivers that have been upheld by the appellate courts. Here, the Court of Appeal did not send it back to the trial court for any further determination on the matter.

People v. Hester (2000) 22 Cal.4th 290, the California Supreme Court held, 4-3, that when a defendant agrees to a prison term or plea bargain, here 4 years, and one of the counts was run concurrently rather than properly stayed under section 654, he abandons his section 654 double punishment issue. The dissent indicates that 412(b) is inapplicable here as the defendant is not trying to reduce his sentence, and a violation of section 654 is an unauthorized sentence that can be corrected at any time even when there is no objection in the trial court. (See People v. Scott (1994) 9 Cal.4th 331, 354, fn. 17; People v. Perez (1979) 23 Cal.3d 545, 549-550.)

People v. Murillo (1995) 39 Cal.App.4th 1298, 1306; People v. Williams (1996) 49 Cal.App.4th 1632, 1635 the court's of appeal have consistently held that the trial court cannot stay or strike a 5 year enhancement within the meaning of section 667, subdivision (a) after it is found true. (See also People v. Williams (1998) 61 Cal.App.4th 649, 653.)
People v. Welch (1995) 5 Cal.4th 228, 235; People v. Scott (1994) 9 Cal.4th 331, 354 indicate that a sentence imposed upon a charge not founded upon a plea of guilty or no contest nor a finding of guilt, is an unauthorized sentence and is in excess of jurisdiction, which is not waived by the defendant's failure to object in the trial court. (See also People v. Tillman (2000) 22 Cal.4th 300.)

In Re Birdwell II (1996) 50 Cal.App.4th 926 the Second Appellate District, Division Six held that "an appellate court may 'correct a sentence that is not authorized by law whenever the error comes to the attention of the court.'" (In Re Harris (1993) 5 Cal.4th 813, 842.) An unauthorized sentence is not subject to harmless error analysis. Nor does it ripen into a sentence authorized by law with the passage of time. Imposition of an unauthorized sentence is an act which is in excess of the court's jurisdiction and may be subject of later review even after the affirmance of judgment on direct appeal. (Id. at 838-840.) Thus, the general rule that an unexplained delay in seeking relief may bar habeas corpus relief does not apply to bar the correction of an unauthorized sentence.

People v. Reiley (1987) 192 Cal.App.3d 1487, the First Appellate District, Division Five held that the trial court must state its reasons for the imposition of consecutive enhancements within the meaning of sections 12022 and 12022.7. The trial court's meticulous attention to explaining its exercise of discretion and the lack of prior case law indicate that the trial court may have been unaware that it had a separate and additional "sentencing choice" under section 1170.1, subdivision (e) (* now subdivision (g)). The Court of Appeal "cannot assume harmless error by speculating on the probability the court will impose the same sentences on remand." People v. Huntherington (1984) 154 Cal.App.3d 1132, 1143.) The trial court's omission requires a remand for sentencing on the enhancements.

SUPPLEMENTAL PROBATION REPORTS:

People v. Llamas (1998) 67 Cal.App.4th 35, a defendant must object to not being given a supplemental probation report or the problem is waived if the defendant is ineligible for probation. Pursuant to section 1203, subdivision (b)(4) a probation report may be waived if written stipulation is filed or by oral stipulation on the record for persons eligible for probation. Given the fact that defendant was not eligible for probation as a second strike defendant, he waived his claim for lack of a supplemental probation rpt.

People v. Begnaud (1991) 235 Cal.App.3d 1548, 1554-1555 if the defendant does not object to using the old report or request a new one, then the issue is waived. (See also People v. Oseguera (1993) 20 Cal.App.4th 290, 293-294.)

People v. Johnson (1999) 70 Cal.App.4th 1429, the Fourth Appellate District, Division 2, held, consistent with its opinion in People v. Begnaud (1991) 235 Cal.App.3d 1548, if a defendant does a sentencing and does not request a supplemental probation report the issue is waived. Defendant argued that section 1203, subdivision (b)(4) was amended post Begnaud and cannot now be waived. This court indicated that said section is inapplicable.

People v. Mobley (1999) 72 Cal.App.4th 761, Fourth Appellate District, Division 1 held that the defendant's statement in a probation report is not inadmissible hearsay pursuant to People v. Monreal (1997) 52 Cal.App.4th 670, 674-680. The Court of Appeal, again relying on Monreal, stated that the presentence report was a part of the record of conviction that the trier of fact could,

at least in part, base it decision on whether the out of state prior qualified as a strike under section 1192.7. But keep in mind, People v. Reed (1996) 13 Cal.4th 217, 230-231 which says that the probation report itself cannot come in but that the defendant's statement in the report can.

Van Velzer v. Superior Court (1984) 152 Cal.App.3d 742, 743-744 court should have updated information that could cause it to reconsider whether the original sent is still appropriate.

CREDIT ISSUES:

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

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

People v. Mendez (1999) 19 Cal.4th 1084, 1100, the California Supreme Court held that, unless there is an objection, on the record as to the amount of credit coming to the defendant, they are waived on appeal per section 1237.1. This is not to say that an application cannot be made back in the trial court for those credits.

People v. Burks (1998) 66 Cal.App.4th 236 this Court of Appeal holds that custody credits waived after probation violation are not recaptured when probation violated again even though there was not an advisement to this effect at the time of the prior plea to the violation. This case is in direct conflict with People v. Harris (1987) 195 Cal.App.3d 717 (which we should use) and follows People v. Zuniga (1980) 108 Cal.App.3d 739, 743.)

People v. Tran (2000) _ Cal.App.4th _, reported on February 22, 2000, in 00 Daily Journal D.A.R. 1799, the First Appellate District, Division 2, held that a waiver of custody credits within the meaning of section 2900.5, cannot be waived as a condition of probation, as it is an unauthorized sentence, if the defendant objects to the imposition of such a condition for a

violation of probation. Appellant's acceptance of a condition of probation does not preclude him from challenging it on appeal. His objection at the time of sentence suffices to preserve the point for appeal. (See People v. Welch (1993) 5 Cal.4th 23-237.) This is a very good case that distinguishes other types of waivers that have been upheld by the appellate courts. Here, the Court of Appeal struck the waiver, and did not send it back to the trial court for any further determination on the matter.

People v. Ramos (1996) 50 Cal.App.4th 810, 817, the Court of Appeal held that a defendant receives only 15% credit on the entire sentence even though some of the convictions are not for violent crimes and they are imposed consecutively. Review the case for how the computation is done. Therefore, it is 15 percent on the entire sentence even though all of the counts are not serious or violent.

People v. Anderson (1999) 77 Cal.App.4th 1063, the Fourth Appellate District, Division 3 follows Ramos, supra, indicating that section 2933.1 applies to the offender and not the offense. Therefore, even if one crime would not come under 2933.1 if by itself, if coupled with another crime that does, the whole sentence is subject to 2933.1.

In re Carr (1998) 65 Cal.App.4th 1525, the Second Appellate District, Division 5 held that for 15% limit to apply, the defendant must be sent to state prison and it is not applicable if the defendant is placed on probation even with county jail as a term and condition of probation. A good statutory/legislative history analysis by Justice Turner.

People v. Thomas (1999) 21 Cal.4th 1121, the Supreme Court held that a defendant who is subject to a life term under the three-strikes law, is not limited to the 15% limitation on presentence credits, when the underlying crime, would not in and of itself, subject appellant to a life sentence. This case relied on the rationale first set forth in People v. Henson (1997) 57 Cal.App.4th 1380, which made explicitly clear that the limitation on presentence credits is limited to the crime as originally charged, rather than the ultimate sentence that the defendant received. The High Court concluded that a strike defendant is entitled to presentence credits under section 4019. However, the court holds open the question, in footnote 3, whether a three strike defendants are entitled to presentence conduct credits when he solely has an indeterminate term, and not the mixed determinate and indeterminate term as in this case.

People v. Zaragoza (2000) 77 Cal.App.4th 1032, the Second Appellate District, Division 5, held that even though the court stayed imposition of sentence on an offense which falls within the provisions of section 2933.1 and 667.5, subdivision (c), which limit the defendant's presentence credits to 15%, the defendant is limited to those limited number of credits given the fact that he was "convicted" of the offense. It is irrelevant that the sentence was not imposed.

People v. Walkkein (1993) 14 Cal.App.4th 1401, 1411 one day of credit is given for each four-day period of confinement if a defendant has substantially complied with all rules and regulations of the institute. (See also People v. King (1992) 3 Cal.App.4th 882, 886-887.) No partial time is

given for blocks of time fewer than 4 days. (Id., at p. 885.)

FINES AND PENALTIES

People v. Thomas (1996) 42 Cal.App.4th 798 held that the imposition of a fine for cocaine sale is improper as the statute does not provide for such as it does in mere possession of the substance. Section 11352 does not necessarily include a violation of section 11350, therefore, the court had no authority to impose the fine.

People v. Thompson (1998) 61 Cal.App.4th 1269, 1273-1276, the Court of Appeal held that an increase in the penalty or the fine after a retrial is a violation of the double jeopardy clause. (See also People v. Harris (1990) 217 Cal.App.3d 1132 ,1136; see also People v. Monge (1997) 16 Cal.4th 826, 843.) Fines should not be increased either. (See also People v Jones (1994) 24 Cal.App.4th 1780, 1783-1784 fn. 5.)

People v. Martinez (1998) 65 Cal.App.4th 1511, the Second Appellate District, Division 5, held that the mandatory provisions for fines such as sections 1202.4 and 1202.45 are jurisdictional and must be imposed and it is an unauthorized sentence not to impose them; therefore, the issue can be raised for the first time on appeal. Here, Justice Turner found that the drug program fee is not jurisdictional, therefore not mandatory. Since the court shall determine if the defendant has the ability to pay it is therefore not mandatory and as result not jurisdictional. But, the criminal laboratory fee per Health & Safety Code section 11372.5, subdivision (a) is mandatory and therefore jurisdictional and must be imposed. Penalty assessments must be imposed and all of the fines and assessments must be stated on the abstract of judgment.

People v. Tillman (2000) 22 Cal.4th 300, the California Supreme Court held that what is good for the goose is good for the gander, or People v. Scott (1994) 9 Cal.4th 331 applies to the prosecution as well as the defendant. Scott, supra, held that if a proper objection is not made at the time of sentencing to a sentencing choice, then it is waived on appeal. Here, the prosecutor failed to object when the court failed to impose a restitution fine under either sections 1202.4 or 1202.45. The court can refrain from imposing the fines if a statement is made on the record as to its rationale for doing so. Where the court did not impose the fines, or make any statement of reason, but the prosecution does not bring this to the court's attention, they cannot raise the matter for the first time on appeal.

People v. Parker Review Granted (S074831) formerly at (1998) 67 Cal.App.4th 200, modification 67 Cal.App.4th 1291a. The Supreme Court will decide whether a Court of Appeal may decline to consider a claim the trial court failed to impose a mandatory fine when the People have not first sought correction in the trial court. The Court of Appeal had followed People v. Martinez, supra, 65 Cal.App.4th 1511, regarding the restitution fine and penalty assessments pursuant to sections 1464 and 1202.4, subdivision (a)(2) and Government Code section 76000, subdivision (a). The Court of Appeal held that they can correct those matters on appeal, but warned that in the future the prosecution must go to the trial court and have the matter cured

there.

People v. Hannah (1999) 73 Cal.App.4th 270, the Second Appellate District, Division 5, held that when imposition of sentence is suspended and the defendant is placed on probation, a fine within the meaning of section 1202.45 does not apply at this time, and does not apply until some time that the defendant is violated on probation and sent to state prison.

People v. Hanson (1999) Review Granted (S078689), formerly at 70 Cal.App.4th 1372, the Second Appellate District, Division 5, held that on remand for resentencing after a partly successful appeal, the court can increase a fine without violating double jeopardy principals. Justice Turner distinguishes People v. Henderson (1963) 60 Cal.2d 482, indicating that it applies only to offenses, but not fines. I believe a fine is a part of the sentence, and Justice Turner's mincing of words is a distinction without a difference.

People v. Duran (1998) 67 Cal.App.4th 267, the Second Appellate District, Division 5, held that the defendant or prosecution can appeal an error in credits as it is an unauthorized sentence (see People v Guillen (1994) 25 Cal.App.4th 756, 764) with the defendant doing it within the meaning of People v. Acosta (1996) 48 Cal.App.4th 411, 420.

People v. Terrell (1999) 69 Cal.App.4th 1246, 1256, the Second Appellate District , Division 4, held that fines and penalty assessments under section 1464 {i.e. 10%} and Government Code 76000 {i.e. 7%}, are mandatory. See also People v. Ramsey (2000) _ Cal.App.4th _, reported on April 3, 2000 in 00 Daily Journal D.A.R. 3373.)

CUSTODY TIME IN A REHABILITATION PROGRAM AND CRC

People v. Penoli (1996) 46 Cal.App.4th 298 the defendant can waive future credits for time served in a rehabilitation program, but found that a sentence must be individualized and struck down such a waiver where the court said it was a standard condition of probation. (See also People v. Ambrose (1992) 7 Cal.App.4th 1917, 1921-23 [a court can grant probation and impose a rehabilitation program while taking a waiver of credits].)

People v. Torres (1997) 52 Cal.App.4th 771, the Fourth District, Division 1 held that a defendant ordered into rehabilitation program is generally entitled to custody credits for time spent against later prison commitment. (See § 2900.5; People v. Sylvestry (1980) 112 Cal.App.3d Supp 1; People v Mobley (1983) 139 Cal.App.3d 320.)

People v. Planavsky (1995) 40 Cal.App.4th 1300, the Fourth Appellate District, Division 3 held that if a defendant does not request CRC (civil commitment) the court need not raise it on its own and the issue is waived on appeal.

People v. Abdullah (1992) 6 Cal.App.4th 1728, 1733-1734 work time credits are not given at CRC. (See also People v. Eddy (1995) 32 Cal.App.4th 1098, 1108.)

People v. Nubla (1999) 74 Cal.App.4th 719, no work time or conduct credits for CRC commitment, but section 4019 credits given from the time of his exclusion from CRC for time spent either at CRC or county jail. (See People v. Guzman (1995) 40 Cal.App.4th 691, 694-695.)

REGISTRATION IS NOT PUNISHMENT

People v. Castellanos (1999) 21 Cal.4th 785, the Supreme Court, in another fractionalized opinion, held that sex offender registration is not a punishment and does not violate ex post facto principles. However, 4 of the justices would could not sign off on the lead opinion, as Justice Kennard writes, it misdescribes current United States Supreme Court jurisprudence, and would cause mischief in future cases.

SCHOOL ZONE ENHANCEMENT

People v. Marzet (1997) 57 Cal.App.4th 329, enhancement for selling drugs within a school zone applies to a conspiracy conviction if the overt act is near school. (See generally People v. Todd (1994) 30 Cal.App.4th 1724.)

People v. Townsend (1998) 62 Cal.App.4th 1390 the Court of Appeal held that a drug sale near school during any time when the kids are present on campus, even if the campus is closed, requires the sentence enhancement. The 1993 amendment is dealt with in this case which indicates that the enhancement applies any time when minors are using the facility where the offense occurred. The Court of Appeal stated that the facility does not have to be the campus as it is the 1000 ft provision that applies and that any other construction would be inconsistent with the purpose of the statute which is to protect them from exposure to drug trafficking. The Court of Appeal also stated that the statute is not vague.

People v. Atlas (1998) 64 Cal.App.4th 526, the Second Appellate District, Division 2 held that section 1353.6 enhancement for sale near school does not require intent to sell within 1000 ft of school property.

People v. Mejia (1999) 72 Cal.App.4th 1269, the Fourth Appellate District, Division 3, held that a defendant fleeing from a car is guilty of possession of a firearm within a school zone. There is a dissent by Justice Crosby.

HARVEY WAIVER:
People v. Lamb (1999) 76 Cal.App.4th 664, the First Appellate District, Division 2, found that the rule set forth in People v. Harvey (1979) 25 Cal.3d 754, that the court could not consider the facts of dismissed counts, unless there is a waiver, did not apply in this case do to the fact that appellate pled to 3 counts of 288, subdivision (a). Section 288.1 mandates a report on the defendant's mental condition as it relates to suitability for probation. As a result, the defendant could have no reasonable expectation regarding the dismissed charges. (See People v.

Bustamante (1992) 7 Cal.App.4th 722, 725-726; People v. Franco (1986) 181 Cal.App.3d 342, 349-350.) However, since the court mislead appellant in regard to the Harvey waivers, he was permitted to withdraw his guilty plea as there was a substantial misadvisement about the consequences of his plea. (People v. DeVaughn (1977) 18 Cal.3d 889, 896.)

SOME EXAMPLES SECTION 654 APPLICATION:

People v. Pearson (1986) 42 Cal.3d 351 361; see also People v. Adams (1975) 14 Cal.3d 629 636 [concurrent time could affect appellant's parole date].) A concurrent sentence is improper for an offense subject to section 654 as the defendant may ultimately suffer collateral consequences amounting to increased punishment by virtue of a concurrent term.

People v. Miller (1977) 18 Cal.3d 873, 887 the imposition of concurrent as well as consecutive terms violates section 654 if based on an indivisible course of conduct.

People v. Bauer (1969) 1 Cal.3d 368, 377; People v. Evers (1992) 10 Cal.App.4th 588, 603; establish that even though a crime is technically complete before the other crime begins, that fact does not in and of itself establish that multiple punishment is permissible.

People v. Ortega (1998) 19 Cal.4th 686, 700, the Supreme Court held that a defendant can be convicted of both sections 215 and 211 and can be punished for both if the objects of the offenses are different. (See also People v. Williams (1992) 9 Cal.App.4th 1465, 1473-1474.) Can have multiple punishment when there is conduct against different victims or if one objective is not merely incidental to the other.

People v. Beamon (1973) 8 Cal.3d 625, 637; People v. Medina (1972) 26 Cal.App.3d 809, 823 in accord with People v. Logan (1953) 41 Cal.2d 290, multiple punishment is barred for a violation of sections 211 and 245 if they occur during one course of conduct.

People v. Guzman (1996) 45 Cal.App.4th 1023, the Second Appellate District, Division 7 held that a defendant cannot be convicted of a grand theft and a robbery since the grand theft is a lesser included offense of the 211 per (Cf. People v. Cole (1982) 31 Cal.3d 568, 582; People v. Irvin (1991) 230 Cal.App.3d 180, 184-186.) See similar ruling as to grand theft auto and section 211: People v. Rush (1993) 16 Cal.App.4th 20, 25; People v. Gamble (1994) 22 Cal.App.4th 446; People v. Escobar (1996) 45 Cal.App.4th 477.

People v. Allen (1999) 21 Cal.4th 846, the Supreme Court held that (1) a defendant can be convicted of both receiving stolen property and theft, when the evidence also shows that the statute of limitations on the theft has not run, and (2) that the defendant can be convicted of both receiving stolen property and burglary. The court specifically disapproved In re Kali D. (1995) 37 Cal.App.4th 381 [actual thief can be convicted of stolen property only if the statute of limitations has run on the underlying theft], based on the 1992 amendment to section 496, and People v. Taylor (1935) 4 Cal.App.2d 214 [could not have dual convictions for burglary and receiving

stolen property]. The court specifically found that the trial court's staying sentence and barring multiple punishment as to the receiving stolen property was a correct application of section 654.

People v Arndt (1999) 69 Cal.App.4th 154, 654 does not prohibit imposition of more than one 12022.7 (But see Wilkoff v. Superior Court (1985) 38 Cal.3d 345) where there are multiple victims, but Arndt seems to say that section 654 bars the use of multiple types of section 12022.7 enhancements on one victim and only the greater will apply to the single victim. Section 654 does not preclude a conviction or sentence for a duece with injury and transportation of drugs even though both crimes are done at the same time as they both have very different intents.

People v. Hester (2000) 22 Cal.4th 290, the California Supreme Court held, 4-3, that when a defendant agrees to a prison term or plea bargain, here 4 years, and one of the counts was run concurrently rather than properly stayed under section 654, he abandons his section 654 double punishment issue. The dissent indicates that 412(b) is inapplicable here as the defendant is not trying to reduce his sentence, and a violation of section 654 is an unauthorized sentence that can be corrected at any time even when there is no objection in the trial court. (See People v. Scott (1994) 9 Cal.4th 331, 354, fn. 17; People v. Perez (1979) 23 Cal.3d 545, 549-550.)

People v. Avila (1982) 138 Cal.App.3d 873 when a count is stayed there can be no sentence on it. Therefore, if a future sentence can be enhanced by the stayed conviction this would constitute the type of incremental punishment that section 654 forbids. (See People v. Pearson (1986) 42 Cal.3d 351, 361-363.) Pursuant to Pearson, the proper procedure for disposing of a sentence which is banned by section 654 is to impose the sentenced and then stay it. If the court is going to strike it it must state its reasons, formerly under section 1170.1 subdivision (h), and now under section 1385. (See also People v. Dominguez (1995) 38 Cal.App.4th 410, 420.)

People v. Fuhrman (1997) 16 Cal.4th 930; People v. Landis (1996) 51 Cal.App.4th 1247; defendant can be convicted of burglary or theft and receiving stolen property but the punishment for one based on the same set of facts must be 654 as a concurrent sentence is multiple punishment.

People v. Mendoza (1997) 59 Cal.App.4th 1333, the Second Appellate District, Division 1 held that the convictions for terrorist threats (422) and dissuading a witness (136.1) were all incident to one objective and therefore the sentence for the terrorist threat must be stayed per 654 and not run concurrently. (See People v. Dominguez (1995) 38 Cal.App.4th 410, 420.)

People v. Adams (1975) 14 Cal.3d 629, 635 distinguishes different drug possessions as many things can be done with the drugs; therefore, different possessions can be charged and punished. (People v. Avalos (1996) 47 Cal.App.4th 1569) and based on People v. Lopez (1992) 11 Cal.App.4th 844, 849-850, the trial court erred in failing to run multiple counts for transportation and possession for sale within the meaning of section 654 based on same intent and objective test. However, pursuant to People v. Goodall (1982) 131 Cal.App.3d 129, 147-148 there can be imposition of sentence on multiple counts of manufacture of drug sale of drug and possession to

manufacture more of the drug.

People v Monarrez (1998) 66 Cal.App.4th 710, the Fourth Appellate District, Division 2, held that a defendant can be convicted of possessing and for the sale of both heroin and cocaine. The Court of Appeal found that the defendant can be sentenced on both in spit of Adams, supra, 14 Cal.3d 629 and they rely on People v. Barger (1974) 40 Cal.App.3d 662 and uphold the consecutive sentence for both possessions saying the possession is different than the transportation in Adams and having two different drugs for sale cannot be left for the punishment for merely having one drug for sale.

KNIFE ENHANCEMENTS:

People v. Lerma (1996) 42 Cal.App.4th 1221, the Fourth Appellate District, Division 2 found that the defendant stabbed the victim with a knife but the death was caused by defendant clubbing the victim over the head. The court found a that a use can be found even though there was no nexus between the death and the knife use but for the fact that the stabbing may have debilitated the victim so the defendant could club him to death.

ON BAIL ENHANCEMENT

In re Ramey (1999) 70 Cal.App.4th 508, the Second Appellate District, Division 6, found that a defendant admitted that he was on bail for a Colorado offense when he committed a 211 in California. He was found guilty of the robbery. The enhancement pursuant to section section 12022.1 was stayed. He went back to Colorado and pled to a misdemeanor. The enhancement was then imposed back in California. The Court of Appeal held that you can not impose the on bail enhancement as the defendant was not convicted of a felony for the offense in which he was on bail pursuant to the statute.

ALLOCUTION

People v. Sanchez (1977) 72 Cal.App.3d 356 359 a defendant does not have the right to elocution if not within bounds of section 1200-1201 (as to whether there is any legal cause why judgment should not be pronounced; plus, it is harmless error if the court does not ask.

People v. Shannon B.(1994) 22 Cal.App.4th 1235 the minor has a right to personally talk to the court at sentencing in a juvenile matter.
RESTITUTION

People v. Lunsford (1998) 67 Cal.App.4th 901, the Court of Appeal held that generally the trial court must set the amount of restitution not someone else or some other entity. But where amount of loss cannot be ascertained at the time of sentencing the court may state that the agency that administers the victim restitution program can set the amount. Defendant still retains the right to a hearing if dissatisfied with the amount. (People v. Guardado (1995) 40 Cal.App.4th

757.)

ABUSE OF DISCRETION:

People v. Trausch (1995) 36 Cal.App.4th 1239, 1247 citing People v. Welch (1993) 5 Cal.4th 228, 234 an abuse of sentencing discretion is found only where the court's choice is arbitrary or capricious or exceeds the bounds of reason for all of the circumstances being considered.

People v Gimenez (1975) 14 Cal.3d 68, 72 a trial court's broad discretion in making its sentencing choices and those choices will be affirmed in the absence of a clear showing that the trial court's actions were arbitrary or irrational.

People v. Jordan (1986) 42 Cal.3d 308, 316 if the trial court has exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice, it will be reversed for abuse of discretion. It is the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. Absent such a showing the trial court is presumed to have acted to achieve legitimate sentencing objectives an its discretionary determination to impose a particular sentence will not be set aside on review. Concomitantly, a decision will not be reversed merely because people might disagree. (See also People v. Superior Court (Alvarez) (1997) 14 Cal.4th 968, 977-978.)

People v. Williams (1998) 17 Cal.4th 148. Quite simply, the Supreme Court found that the Court of Appeal did not err when it reviewed the trial court's ruling to strike a strike under an abuse of discretion standard. That standard being whether the superior court's order fell outside the bounds of reason under the applicable law and relevant facts. However, the Supreme Court did not uphold the Court of Appeal's ruling which supplanted a different sentence for that of the trial court. It ordered the matter remanded to the trial court for the defendant to be allowed to withdraw his plea as the trial court's ruling was "ineffective". The trial court's comments to appellant, before he entered his plea, that it was willing to consider striking one of the strikes, definitely influenced his decision to plead straight up, and as a result, he was entitled to withdraw the plea rather than have the Court of Appeal reinstate the stricken strike, and impose a 25 to life sentence. Specifically note footnote 6, which indicates that the Court of Appeal can, on its own, raise the question whether the trial court abused its discretion, even if the prosecution did not object in the trial court, and even if the prosecution is bared from raising it for the first time on appeal. This could lead to many unanticipated adverse consequences; therefore, with the client that has a long record like Mr. Williams, you better have a long discussion with him or her before proceeding with an appeal when the trial court has stricken a strike, and you are in a district and/or division that is prone to reviewing a sentence in a manner similar to Second District, Division 5.

I would argue, based on footnote 7, that the Court of Appeal must remand the matter back to the superior court to allow the defendant to place on the record any other evidence that would support the striking of the strike. This evidence must be new and different from that which was

presented at the first motion to strike, and which the Court of Appeal found was an abuse of discretion.

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

People v. Soto (1999) 74 Cal.App.4th 1099, the Second Appellate District, Division 4 held that, within the meaning of People v. Dillon (1983) 34 Cal.3d 441 and People v. Kelly (1997) 52 Cal.App.4th 568, 583, the trial court has the discretion to reduce a first degree murder to second degree if the sentence is disproportionate to the defendant's culpability and the sentence is out of proportion to the offense and that it offends fundamental notion of human dignity. However, this Court of Appeal found that it could not reduce the matter to voluntary manslaughter under the same rationale as the defendant's conduct did not amount to manslaughter under the facts of this case. That does not preclude such a ruling under a different factual scenario.

People v. Keeton (1992) 10 Cal.App.4th 1125 1131, the sentencing court must make a record showing that it was aware of its discretion to select an alternate disposition. Fundamental fairness requires that sentencing decisions be based upon the court's informed discretion. (U.S. v. Tucker (1972) 404 U.S. 443 447 [30 L.Ed.2d 592 92 S.Ct. 589.]) A court which proceeds on a false assumption as to its sentencing powers can no more exercise that informed discretion than one whose sentence is or may have been based on misinformation regarding a material aspect of a d's record." (People v. Belmontes (1983) 34 Cal.3d 335, 348 fn. 8.) See also Townsend v. Burke (1948) 334 U.S. 736 741 [68 S.Ct. 1252 92 L.Ed. 1690; Roberts v. State of Maine (1st Cir. 1995) 48 F.3 1287 1294; People v. Manriquez (1991) 235 Cal.App.3d 1614, 1620; when court denies probation in significant part on erroneous impression d is ineligible for probation it has abused its discretion. (See also People v. DeJesus (1995) 38 Cal.App.4th 1, 29.) See also People v. Fraught (1981) 124 Cal.App.3d 848, 860 "because the trial court was under the mistaken belief that the prior prison term enhancement legally could not be imposed it never exercised its discretion as to whether to strike the prior...." Since a defendant is entitled to an informed decision the failure to recognize discretion requires remand for meaningful exercise of judicial discretion. (Ibid.) People v. Allan (1996) 49 Cal.App.4th 1507, the Fourth Appellate District, Division 2, held that a section 1385 dismissal must state reasons on the record and in the minutes, and it must reflect a consideration of the defendant's interests and the interest of society represented by the People. Reasons for the dismissal must motivate a reasonable judge. (Id.; see also People v. Superior Court (Romero) 13 Cal.4th 497, 530-531; People v. Ferguson (1990) 218 Cal.App.3d 1173 [the court cannot dismiss a case by simply saying the people are not ready when the attorney assigned to the case was in another trial--it was an abuse of discretion.)

DEFERRED ENTRY OF JUDGMENT

People v. Mazurette REVIEW GRANTED (S081661) formerly at (1999) 73 Cal.App.4th 814, the Second Appellate District, Division 2 held that an appellant cannot appeal from a deferred entry of judgment. Deferred entry of judgment is a new statutory procedure taking the place of diversion. (People v. Barrajas (1998) 62 Cal.App.4th 926, 928, fn. 2.) Defendant pleads guilty or no contest, and if he completes the program the case is dismissed. People v. Perez (1998) 68 Cal.App.4th 346 held that such an order was appealable since it was similar to an order granting probation. However, this court holds that there is no judgment of conviction within the meaning of section 1538.5, subdivision (m), therefore, there is no statutory right to appeal. The Court of Appeal does state that the defendant can file a writ of mandate or prohibition within the meaning of section 1538.5, subdivision (i) following the denial of the motion to suppress or if the defendant does not complete the program, and is ultimately sentenced on the matter, he can obtain review of the order denying the suppression motion by appealing from the judgment.

People v. Davis (2000) _ Cal.App.4th _, reported on March 24, 2000, in 00 Daily Journal D.A.R. 3099, the Second Appellate District, Division 3, held that a three-strikes defendant is not ineligible for the deferred entry of judgment program due to the fact that he is not **"**convicted**"** of a current offense, unless and until (s)he fails to perform satisfactorily in the program. The plea of guilty by a defendant who enters into the deferred entry of judgment program does not constitute a conviction, and the mere allegation of one or two prior strikes does not preclude the defendant from entering the program. Finally, the court held that the consequences of the deferred entry of judgment program are more sever than the old diversion programs, and therefore, they are not prohibited pursuant to the Three-Strikes Law.

GANG ENHANCEMENTS

People v. Herrera (1999) 70 Cal.App.4th 1456, relying on People v. Ortiz (1997) 57 Cal.App.4th 480 when a defendant is sentenced to an indeterminate crime and is also found guilty of a section 186.22, subdivision (b) offense pursuant to subdivision (b)(4) and (b)(1), it cannot be imposed but a minimum of 15 years must be served before parole eligibility. But they say no section 654 application to section 186.22, subdivision (a), as the defendant can be sentenced on both counts.

People v. Elodio O. (1997) 56 Cal.App.4th 1175, the Fifth Appellate District held that the pattern of criminal gang activity was not established as the prosecution failed to show, based on the evidence from the expert, that one or more of the crimes specified in section 186.22, subdivision (e) was proven. The testimony did not necessarily describe the offenses of the section. It proved to nebulous for the court and they reversed the section 186.22 enhancement. The pattern cannot be shown by an offense charged after the current offense. (People v. Godinez (1993) 17 Cal.App.4th 1363.) An officers opinion must be based on his background, training, personal knowledge and experience, which in part can be based on hearsay statements of others. (People v. Gamaz (1991) 235 Cal.App.3d 957, 966-969; People v. Loeun (1997) 17 Cal.4th 1, the predicate

or prior crimes may be proven with the current offense(s). (Id., at pp. 6-7.) The expert may state on direct exam the matters in which he may testify. The rule rests on the rationale that while an expert may give reasons on direct exam for his opinions, including the matter he considered in forming the, he may not under the guise of reasons bring before the jury incompetent hearsay evidence. (People v. Loeun, supra; People v. Coleman (1985) 38 Cal.3d 69, 92.) Pattern of criminal gang activity must establish one prior enumerated offense within three years and involving more than one person or two prior enumerated events occurring on separate occasions within 3 years of the current offense. (People v. Loeun, supra; In re Nathaniel C. ((1991) 228 Cal.App.3d 990, 1004-1005 [the pattern can be found based on the current offense only, if that offense was participated in by more than one gang member] at p. 1003].) Evidence offered not for the truth but for the basis for the wits expert opinion were properly admitted. (People v. Gamez, supra, 235 Cal.App.3d at pp. 967-969; accord, People v. Olguin (1994) 31 Cal.App.4th 1355, 1384-1385.) An expert may rely on hearsay to form his opinion. (Jefferson, supra; People v. Arias (1996) 13 Cal.4th 92, 184.) Section 186.22, subdivision (b) is an enhancement. (see also People v. Gamez, supra, 235 Cal.App.3d at p. 974.)

People v. Gardeley (1996) 14 Cal.4th 605, the California Supreme Court held that a defendant's prior offenses do not have to be gang related to satisfy statutory enhancements for gang activity, only the current offense needs to be gang related. They use the current offense as one of the 2 offenses, and permit use of a police gang expert to prove gang involvement. The pattern of gang activity within section186.22 is defined as doing or attempting 2 or more specified offenses.

People v. Ortiz (1997) 57 Cal.App.4th 480, the Fourth Appellate District, Division 3, held that, nothing in section 186.22 (b)(4) suggests that the minimum eligible parole date of 15 years should be combined with an additional minimum term. In fact subdivision (b)(1) does just to the contrary. Stated another way, 186.22 enhancement, is not an additional determinate term, but an extended parole eligibility date. (See also People v. Jefferson (1999) 21 Cal.4th 86, wherein they indicated that the 15 to life was a term that could be doubled and replaced the section 3046 term.)

People v. Valdez (1997) 58 Cal.App.4th 494, the Sixth Appellate District established that de convicted of murder and conspiracy with a section 186.22, subdivision (b) enhancement. The officer testified from hearsay regarding the gang involvement, which was permissible pursuant to Gardeley. But the officer also stated the defendant acted for the benefit of the gang, the ultimate jury issue. This court validated that evidence, but it was error in People v. Torres (1995) 33 Cal.App.4th 37.

People v. Zermeno (1999) 21 Cal.4th 927, the California Supreme Court once again dealt with the issue of the definition of a pattern of criminal activity, and more specifically the provision of section 186.22, subdivision (b)(1), "for the benefit of, at the direction of, or in association with any criminal street gang." The High Court reversed the lower court, holding that the prosecution failed to prove the "pattern of criminal gang activity" when it takes two or more members to participate in a single predicate offense, or the pattern can be shown by crimes on two or more occasions. Here, the defendant committed an assault, and he was aided by a gang member who

prevented others from helping the victim. The Supreme Court held that there must be two offenses to establish a pattern of criminal gang activity and distinguished People v. Loeun (1997) 17 Cal.4th 1 wherein the defendant committed an assault on the victim and another gang member committed a separate assault on the victim during one occasion. Here, the aider and abetter did not commit another offense, and as a result only one predicate offense was established; therefore, the prosecution failed to establish the pattern of gang activity.

REMAND ISSUES:

People v. Flores (1988) 198 Cal.App.3d 1156, 1161 the accused on remand has the right to the same procedures available at the time judgment is pronounced.

People v. Deere (1991) 53 Cal.3d 705, 713 appeals from resentencing on remand are authorized under California law but limited to issues considered on remand.

People v. Thompson (1998) 61 Cal.App.4th 1269, 1273-1276, the Court of Appeal held that an increase in the penalty or the fine after a retrial is a violation of the double jeopardy clause. (See also People v. Harris (1990) 217 Cal.App.3d 1132 ,1136; see also People v. Monge (1997) 16 Cal.4th 826, 843.) Fines should not be increased either. (See also People v Jones (1994) 24 Cal.App.4th 1780, 1783-1784 fn. 5.)

People v. Rodriguez (1998) 17 Cal.4th 253. The Supreme Court ruled, consistent with its prior ruling in In re Cortez (1971) 6 Cal.3d 78, and within the parameters of section 977, subdivision (b)(1), that the defendant has a right to be personally present when an appellate court “remands” a sentence back to the trial court. The High Court held that the defendant has a right to be present at this hearing, just as he had a right to be at the initial sentencing hearing, unless he waived that appearance pursuant to section 977, subdivision (b)(1). The Supreme Court expressly distinguished this situation from the silent record case in People v. Fuhrman (1997) 16 Cal.4th 930, where the court held that the appellate court did not have to remand the matter back to the trial court, that appellant’s only remedy was to file a Romero writ, and the defendant did not have to be personally present.

STANDARD OF REVIEW:

People v. Sanchez (1994) 23 Cal. App.4th 1680, the First Appellate District, Division Two held that Section 1170 (c) requires a sentencing court to "state the reasons for its sentence choice on the record at the time of sentencing." The decision to impose consecutive rather than concurrent sentences is a "sentence choice" within the meaning of the above section. Where the sentencing court fails to give reasons, remand for resentencing is not automatic; reversal is required only when it is "reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (People v. Watson (1956) 46 Cal.2d 818, 836.)

The defendant argued that the correct test for making this determination is whether "there is a

reasonable possibility that a statement of reasons would have altered the trial judge's conclusion or revealed reversible error." (People v. May (1990) 221 Cal.App.3d 836, 839.) This court rejects defendant's argument because a large majority of cases that apply an explicit harmless error standard for procedural error use the Watson standard. (See e.g., People v. Gutierrez (1991) 227 Cal.App.3d 1634, 1638; People v. Price (1991) 1 Cal.4th 324, 492; People v. Avalos (1984) 37 Cal.3d 216, 233; People v. Edwards (1993) 13 Cal.App.4th 75, 79; People v. McLeod (1989) 210 Cal.App.3d 585, 590; People v. Scott (1988) 200 Cal.App.3d 1090, 1096; People v. Jackson (1987) 196 Cal.App.3d 380, 392; People v. Porter (1987) 194 Cal.App.3d, 34, 39.) Although the defendant cites many cases following the May case, we believe those courts mistakenly adopted a Chapman style test for prejudice that is only applicable to capital cases. This standard is inappropriate to cases involving ordinary sentencing error.

It is well established that an ordinary criminal judgment may not be reversed for non-constitutional error unless it is reasonably probable the result would have been more favorable to the defendant had the error not occurred. (Cal. Const., art. VI § 13.; see People v. Cahill (1993) 5 Cal.4th 478, 487-493.) This standard has almost universally been applied to a trial court's failure to either select or articulate proper reasons for a noncapital sentence. On the other hand, a stricter Chapman style standard is required in a capital case because the 'result' under review is a normative conclusion based on guided, individualized discretion and the sentencing choice involves life or death. Thus, the Watson standard in this instance is insufficient.

In Re Birdwell II (1996) 50 Cal.App.4th 926 the Second Appellate District, Division Six held that "an appellate court may 'correct a sentence that is not authorized by law whenever the error comes to the attention of the court.'" (In Re Harris (1993) 5 Cal.4th 813, 842.) An unauthorized sentence is not subject to harmless error analysis. Nor does it ripen into a sentence authorized by law with the passage of time. Imposition of an unauthorized sentence is an act which is in excess of the court's jurisdiction and may be subject of later review even after the affirmance of judgment on direct appeal. (Id. at 838-840.) Thus, the general rule that an unexplained delay in seeking relief may bar habeas corpus relief does not apply to bar the correction of an unauthorized sentence.

People v. Jackson (1987) 196 Cal.App.3d 380 the First Appellate District, Division One held that the doctrine of harmless error applies as much in cases of sentencing error as in other cases. (People v. Avalos (1984) 37 Cal.3d 216; People v. Smith (1984) 155 Cal.App.3d 539, 546; People v. Dunnahoo (1984) 152 Cal.App.3d 561, 578-579; People v. Hurley (1983) 144 Cal.App.3d 706, 713-714.) Because the People acknowledged a sentencing error and recommended that the case be remanded for sentencing, the court held that the People were implicitly conceding that the sentencing error was not harmless and therefore, found prejudicial error.

POP QUIZ:

1. Does the Supreme Court’s decision in People v. Tillman (2000) 22 Cal.4th 300 apply merely to fines and assessments, or does it have broader implications? And if so, what

are they?

2. For purposes of analyzing the sufficiency of a prior conviction, what can constitute the "record of conviction"?

3. Is it an unauthorized sentence to stay or strike a 5-year serious felony enhancement once it is either proven or admitted by appellant? And if so, under what circumstances does the Court of Appeal have to remand the matter back to the trial court for resentencing?

4. Do you double enhancements in a "two-strike" sentence within the meaning of section 667, subdivision (e)(1)?

5. When calculating a "three-strike" sentence within the meaning of section 667, subdivisions (e)(2)(A)(i), (ii), (iii), which of the subdivisions is selected when the defendant has been convicted of carjacking, with the use of a gun within the meaning of both sections 12022.5, subdivision (a)(1) and 12022.53, subdivision (b), and he has 2 prior serious felonies within the meaning of section 667, subdivision (a)(1) and 4 prior prison terms within the meaning of section 667.5, subdivision (b), two of which arise out of the same convictions as the two prior serious felonies? And then, determine: (1) what is the minimum eligible parole date, and (2) what is the total sentence that the court must impose, assuming that no strikes are stricken?

6. Is section 654 applicable, in other words, is it still applied, with the addition of section 667, subdivisions (c) (6) and (c) (7)? And if so, how is it applied?

7. What factors would you consider in arguing that the court abused its discretion in failing to strike a strike?

III. THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES FOR THE SERIES OF CRIMES ARISING OUT OF EACH INCIDENT.

The trial court imposed consecutive sentenced for all 57 convictions against appellant. These 57 convictions arose out of a series of six separate incidents, each of which resulted in multiple convictions. The number of convictions per incident ranges from six (May 29 Blockbuster Video and June 27 Blockbuster Video) to fifteen (June 9 PETCO). With regard to each of these six incidents, imposition of consecutive sentences for each crime committed during the course of that incident was error.

The trial court repeatedly erred by imposing consecutive sentences for multiple convictions arising out of one incident. The court ignored the general principle established by Rule 425 of the California Rules of Court, that offenses occurring during a single incident should be punished concurrently. The court also relied in impermissible factors in imposing consecutive sentences for all 57 convictions.

The consequences of this sentencing approach cannot be overstated. This error by the trial court resulted, for practical purposes, in a sentences of life without the possibility of parole for a series of crimes in which no one was injured. The appellate court failed to reverse on this point, but gave no reasoning to support this decision. (Opinion at p. 12.)

A. The Factors Set Forth in Rule 425 Support Concurrent Sentences for the Convictions Arising out of Each Incident.

Rule 425 of the California Rules of Court sets forth factors which should be weighed by courts considering whether to impose sentences concurrently or consecutively. These factors include whether "the crimes and their objectives were predominantly independent of each other,"

(Rule 425(a)(1)); whether "the crimes involved separate acts of violence or threats of violence, " (Rule 425(a)(2))' and whether "the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior," (Rule 425(a)(3)). Taken together, these factors establish the general principle that convictions for multiple offenses committed during a single, indivisible incident should be sentenced concurrently.

A review of the convictions arising out of the incidents in this case makes clear that application of the Rule 425 factors supports imposition of concurrent sentences. The set of convictions arising out of the June 7 robbery of Blockbuster Video is typical. As described above, an individual entered the store, herded two employees into a back room, took some of their possessions, made a general threat to all present regarding consequences of the employees' cooperating with the police, secured them in the back room, took money from the store, and left. (RT 123-26, 138-141.) Appellant was convicted of six charges relating to this incident: a robbery, a false imprisonments, and an intimidations of a witness charge relating to each of the two individuals. (CT 210-220, 457-58.)

The factors listed in Rule 425 support imposition of concurrent sentenced for these six convictions. There were no independent criminal objectives for the conduct leading to these convictions: all of appellant's conduct was aimed at the obvious objective of robbery of money from the Blockbuster Video store. (*See* Rule 425(a)(1); *cf. People v. Calvert* (1993) 18 Cal.App.4th 1820.) These crimes did not involve separate acts of violence: the two individuals were grouped together and treated as a pair throughout this incident. (*See* Rule 425(a)(2); *cf. People v. Thurs* (1986) 176 Cal.App.3d 448.) And these crimes plainly were not committed in separate times or in separate places: all offenses occurred within a very short period of time. (*See*

Rule 425(a)(3); *cf. People v. Martin* (1992) 3 Cal.App.4th 482; *People v. Calver*t (1993) 18 Cal.App.4th 1820.) Application of the Rule 425 factors to these facts can only result in a conclusion that concurrent sentences are appropriate, and each of the six discrete incidents for which appellant received multiple convictions would be similar in this regard tot he June 7 robbery described above.

While factors set forth in Rule 425(a) are not exclusive, *see* Rule 425(b),they are illustrative of the intent of the legislature regarding this aspect of the sentencing scheme. Application of these factors to the convictions arising out of each incident in this case demonstrated the appropriateness of concurrent sentencing.

1. The Trial Court Used Impermissible Factors to Support Imposition of Consecutive Sentences for the Convictions Arising out of Each Incident.

The trial court stated as justification for imposing consecutive sentences that each of the crimes involved the "threat of violence, "danger to the individual victims," and "planning [and] sophistication."} (RT 623.) The court also noted that "each personal use of a firearm increased the danger and peril to the carious victims." Use of these factors to impose consecutive sentences for the convictions arising out of each incident was clear error. All of the factors used by the court to justify consecutive sentencing violated Rule 425(b) or were unsupported in the record.

Rule 425(b) prohibits imposition of consecutive sentences based on "a fact that us ab element of the crime," (Rule

425(b)(iii).) The court violated this rule by relying on the presence of a “threat of violence” and “danger to the individual victims,” both of which are simply restatements of elements of the crimes for which appellant was convicted.

An element of robbery is that the taking in question was "accomplished by force or fear." (Pen. Code, § 211; CALJIC 9.40.) Similarly, an element of false imprisonment is that the restraint in question was "accomplished by violence or menace." CALJIC 9.60. In addition, an element of dissuading a witness under Penal Code section 136.1(c)(1) is that the appellant used "force or ... an express or implied threat of force and violence." The existence of the "threat of violence" was, thus, in substance, and element of each of the convictions against appellant; the trial court therefore erred violated Rule 425(b)(iii) by using this fact to support consecutive sentencing. (*See People v. Key* (1984) 153 Cal.App.3d 888, 901.)

Rule 425(b) also prohibits reliance for purposes of consecutive sentencing on "a fact used to ... enhance the defendant's prison sentence." (Rule 425(b)(ii).) The trial court violated this prohibition by relying on the fact tat appellant used a firearm during commission of his crimes. (RT 623.) Appellant received 57 separate enhancements for personal use of a firearm under Penal Code section 12022.5. (CT 457-58.) Appellant's use of a firearm this was "a fact used to ... enhance the defendant's prison sentence," and also could not be used to justify consecutive sentencing. *(See* Rule 425(b)(iii).)

In addition, the court's reliance on the "planning [and]

sophistication" of the offense, was unsupported by the record. There is no evidence that appellant was the individual who planned these offenses, and there was in fact uncontroverted evidence that he was merely taking orders from others. (RT 411, 427-434; People's Exhibit 40.) As facts used in sentencing need to be supported by a preponderance of the evidence, (*Nochols v. U.S.* (1994) 511 U.S. 738 [114 S.Ct. 1921, 1928]), the court's reliance on this factor was in error. All of the factors used by the court to impose consecutive sentencing were either unsupported by the record or prohibited by Rule 425(b).[1]

2. The Trial Court's Imposition of 57 Consecutive Sentenced Transformed a Reasonable Punishment into a Sentence of Life Without the Possibility of Parole for an Offense in Which No One was Injured.

Using several prohibited factors, and ignoring the factors listen in Rule 425, the trial court imposed 57 consecutive sentences, for an aggregate sentence of 184 years. The court in

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[1] The court also noted that the crimes involved "a great deal of violence." (RT 623). To the extent that this indicates that the court relied on the actual occurrence of violence, rather than merely the threat of violence, such reliance would be unsupported by the record. While multiple threats of violence clearly occurred, the record is devoid of any actual violence: none of the individuals were physically injured in any way. In fact, the record showed that appellant more than once when out of his way to relieve physical discomfort suffered by individuals who were restrained (RT 201, 215, 230, 233, 290-91, 309-10.) There was a threat of violence, but the difference between a threat and an act is dispositive in the criminal law and appellant did not cross that threshold in this case. If the court did case the imposition of consecutive sentences on the actual occurrence of violence, such imposition was unsupported by the record. (*See Nochols, supra*, 511 U.S. 738 [114 S.Ct. 1921, 1928] (sentencing factors must be proved by a preponderance of the evidence).)

effect imposed the most severe punishment short of death available in the State of California. Because all sentences were imposed consecutively, a lengthy prison sentence was transformed into a life sentence without the possibility of parole.

Rule 425, governing consecutive and concurrent sentences, was written before the advent of the three strikes law. It was intended to govern the imposition of several terms of years under the Determinate Sentencing Law. It was never intended to provide the basis for the imposition of a sentence of life without parole in a case in which no one was injured, no shot was fired, and very little money was stolen.

Even if every factor listed in Rule 425 were present – and none are – these facts do not provide reasons of sufficient weight to justify a life without parole sentence in this case. The decision to incarcerate a defendant for his natural life is a momentous one because, among other reasons, it completely removes any chance for rehabilitation. It is qualitatively different from a sentence of life with parole. Only the death penalty exceeds it in severity. (*Solem v. Helm* (1982) 463 U.S. 277, 283, 297 [103 S.Ct. 3001].) It must be accompanied by a careful and thorough consideration of the reasons for such a sentence and be supported by weighty factors. Had appellant been accused of murder, he could not have received a sentence as severe as that

imposed in this case without an exhaustive sentencing hearing and findings by a jury and a court. (Pen. Code, §§ 190, et seq.) Yet here the sentence was imposed based upon findings comprising a total of seven lines in the record, containing several reasons prohibited by Rule 425.

Instead of imposing all 57 sentences consecutively, the court could have treated each incident like the discrete occurrence it was, and imposed six consecutive groups of concurrent sentences. This approach would still have required appellant to serve a very lengthy prison term, commensurate with the number of appellant's offenses, yet would recognize that appellant physically injured no one and deserved a something less than a sentence of life without the possibility of parole. This approach would also comport with the text and intention of Rule 425. Because its decision violated Rule 425 in several respects, the court abused its discretion in imposing consecutive sentenced for the convictions arising out of each incident. Therefore, this petition should be granted and the matter remanded for resentencing.