

“THREE STRIKES” ISSUES OUTLINE

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I. GENERAL PROVISIONS

The “Three Strikes” law, codified at subdivisions (b) through (i) of Penal Code section 667 (enacted by the Legislature) and Penal Code section 1170.12 (Prop. 184), does two things: (1) it limits plea bargaining in cases where the defendant has an alleged prior “serious” or “violent” felony as those terms are defined in the Penal Code; and (2) it sets up an alternative felony sentencing scheme for defendants found to have suffered one or more prior “serious” or “violent” felony conviction.

II. CONSTITUTIONALITY

A. Equal Protection Claims

The fact that some counties have much more lenient charging policies than others does not give rise to an equal protection claim. (*People v. Andrews* (1998) 65 Cal.App.4th 1098 [“Although it is disturbing to realize that whether a given offense produces minor sanctions or life in prison may depend on one’s physical location within the state, the solution does not lie in courts requiring all of the state’s prosecutors to follow the lead of the most eccentric among them,” says the San Diego court about San Francisco].)

The Los Angeles District Attorney’s policy shift after Garcetti left office of only charging violent current offenses as third strikes does not apply retroactively. A defendant sentenced under the previous policy could not prevail on an equal protection claim. (*People v. Roman* (2001) 92 Cal.App.4th 141. Accord, *People v. Floyd* (2003) 31 Cal.4th 179 [no equal protection claim arising from Prop. 36’s cut-off date for drug treatment alternative to prison for drug offenders].)

B. Ex Post Facto Punishment Claims

Mandatory consecutive sentencing on subsequent Three Strikes sentences under subdivisions (c)(8) and (e)(2)(B) of section 667 (see § G.1., below) where the defendant is already serving a term does not violate the prohibition against ex post facto punishment where the defendant was already serving a term for a pre-1994 offense and received a mandatory aggregate consecutive term in connection with a new sentence under the Three Strikes Law. (*People v. Helms* (1997) 15 Cal.4th 608.)

C. Cruel And Unusual Claims

The Eighth Amendment, which forbids cruel and unusual punishments, contains a “narrow proportionality principle” that “applies to noncapital sentences.” (*Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997.) In *Rummel v. Estelle* (1980) 445 U.S. 263, 284-285, the Court held that it did not violate the Eighth Amendment for a State to sentence a three-time offender to life in prison with the possibility of parole. In *Solem v. Helm* (1983) 463 U.S. 277, 279, the Court held that the Eighth Amendment prohibited “a

life sentence without possibility of parole for a seventh nonviolent felony,” passing a bad \$100.00 check.

In 2003, the United States Supreme Court addressed California’s Three Strikes Law in two cases. In neither case did the court conclude that the sentence constituted cruel and unusual punishment. (*Lockyer v. Andrade* (2003) 538 U.S. 63 [conviction for petty with a prior, and several nonviolent strike priors]; *Ewing v. California* (2003) 538 U.S. 11 [conviction for grand theft, and two violent priors].)

In performing an 8th Amendment analysis, the court first compares the gravity of the offense (including its recidivist character) to the harshness of the penalty. (*Ewing v. California, supra*, 538 U.S. at pp. 28-29; *Harmelin v. Michigan, supra*, 501 U.S. at p. 1005.) Then, if this threshold comparison demonstrates the penalty is “grossly disproportionate” to the offense, the court will undertake a “proportionality analysis” considering “objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.” (*Solem v. Helm, supra*, 463 U.S. at p. 292.)

Since *Ewing*, the 9th Circuit has held that a life term under the Three Strikes Law was cruel and unusual punishment for a conviction of petty theft with a prior with two “strikes” for robberies that arose from a single past case which involved a minimal amount of force. (*Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755. See also, *Reyes v. Brown* (2005) 399 F.3d 964 [a life term under the Three Strikes Law for perjury where the defendant had two strikes, including a robbery where the defendant had a knife, might be cruel and unusual; remanded to see if the defendant’s priors satisfied *Ewing*]; *Banyard v. Duncan* (C.D. Cal. 2004) 342 F.Supp.2d 865 [a life term under the Three Strikes Law for possession of a minuscule amount of cocaine with strike priors for a non-violent robbery and an assault on his girlfriend was cruel and unusual punishment].)

At least one panel of the California Court of Appeal has found a sentence for a merely technical failure to “update” sex offender registration within five working days of offender’s birthday, where defendant had registered his correct address one month before his birthday and the parole agent knew that the defendant continued to reside at that address, was cruel and unusual. (*People v. Carmony* (2005) 127 Cal.App.4th 1066 [3DCA]. Conversely, another panel has upheld a life term where the defendant failed to register and had a long and serious criminal history. (*People v. Meeks* (2004) 123 Cal.App.4th 695.)

Generally, though, even prior to *Andrade* and *Ewing*, California case law in this area was unfavorable to defendants. (See, e.g., *People v. Edwards* (2002) 97 Cal.App.4th 161 [convicted of petty with a prior and simple possession with residential burglary, car thefts, and possession of sawed-off shotgun priors]; *People v. Strong* (2001) 87 Cal.App.4th 328 [conviction for selling bunk cocaine, most priors were drug and theft misdemeanors, but one was for a knife assault]; *People v. Stone* (1999) 75 Cal.App.4th

707 [new offense is manufacturing PCP]; *People v. Martinez* (1999) 71 Cal.App.4th 1502 [meth possession and DUI]; *People v. Cline* (1998) 60 Cal.App.4th 1327 [shoplifting (\$648 worth of clothes)]; *People v. Ayon* (1996) 46 Cal.App.4th 385 [7 new robberies and sentence is “functional LWOP”]; *People v. Cooper* (1996) 43 Cal.App.4th 815 [ex-felon in possession with 15 and 30 year old robberies]; *People v. Diaz* (1996) 41 Cal.App.4th 1424 [lewd and lascivious with multiple molestation priors arising from single 1989 proceeding for which probation and an expungement (in 1993) had been granted]; *People v. Kinsey* (1995) 40 Cal.App.4th 1621 [attempted spousal battery]; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134 [375 years to life plus enhancements for multiple sex offenses].)

III. QUALIFICATIONS FOR “STRIKE” PRIORS

A. Generally

Enumerated serious felonies are found in subdivision (c) of section 1192.7, and enumerated “violent” felonies are found in subdivision (c) of section 667.5. These lists were enlarged by Proposition 21, effective March 7, 2000. (*People v. Moore* (2004) 118 Cal. App. 4th 74.)

There is no requirement defendant actually served a prison term for the “strike” prior; no “washout” period as with prison priors (§ 667.5, subd. (b)); and no requirement that the priors have been brought and tried separately. (*People v. Fuhrman* (1997) 16 Cal.4th 930.) Further, even if one strike is stayed under § 654 and *Neal v. State of California* (1960) 55 Cal.2d 11 [term for offense that is part of a continuous course of conduct pursuant to a single objective in common with another must be stayed], it will count as a “strike” in a later case. (*People v. Benson* (1998) 18 Cal.4th 24.) However, where there a conviction for attempted robbery and one for attempted carjacking are obtained based on a single act, one of the strikes must be dismissed on a subsequent felony charge. (*People v. Burgos* (2004) 117 Cal.App.4th 1209; *People v. Carmony* (2004) 33 Cal.App.4th 367.)

Even an expunged prior can be a strike. (*People v. Diaz* (1996) 41 Cal.App.4th 1424 (prior expunged under Pen Code § 1203.4); *People v. Daniels* (1996) 51 Cal.App.4th 520 (prior expunged under Welf.& Inst. Code, § 1772.) But, one dismissed under Penal Code section 1385, cannot. (*People v. Barro* (2001) 93 Cal.App.4th 62. *Contra*, *People v. Blackburn* (1999) 72 Cal.App.4th 1520 [where a “personal use” allegation in the prior proceeding was dismissed per 1385—and even where it was found not true—the prosecution can still prove in the current case that the prior was a strike, based on the fact of personal gun use].)

A conviction is considered a “prior” conviction for the purpose of the “Three Strikes” law as soon as there has been a verdict or a plea. It is not necessary that judgment be entered, unless the offense is a wobbler. (*People v. Williams* (1996) 49 Cal.App.4th 1632; *People v. Rhoads* (1990) 221 Cal.App.3d 56. See also *People v. Laino* (2004) 32 Cal.4th 878, 895-896 [regardless of what disposition another state orders on a plea of guilty, whether

the conviction is a “prior” conviction for purposes of California law is determined according to California law]; *People v. Castello* (1998) 65 Cal.App.4th 1242 [a 1975 Florida prior in which the court had “withheld adjudication of guilt” until after defendant completed probation was a strike].)

However, a case only counts as a “prior” if the crime resulted in a conviction before the defendant committed the current offense. If the defendant committed a crime but was not convicted until after the defendant commits the currently charged crime, the first crime cannot be used as a prior to increase punishment on the second crime. (*People v. Flood* (2003) 108 Cal.App.4th 504, 507.)

A prior serious or violent felony conviction that predates the passage of the “Three Strikes” law may qualify as a strike, as may a felony conviction entered prior to 1982. (*People v. James* (2001) 91 Cal.App.4th 1147; *People v. Moenius* (1998) 60 Cal.App.4th 820; § 667, subd. (h).) Further, if a defendant entered into a plea agreement before the enactment of the Three Strikes law, it does not violate constitutional contract clauses to permit use of the prior to trigger a Three Strikes sentence in the current case. (*People v. Gipson* (2004) 117 Cal. App. 4th 1065.) However, where a term of a plea limiting the use of the convictions in subsequent proceedings induces a defendant to enter a plea, the state is bound to that term. (*Davis v. Woodford* (2006) 446 F. 3d 957 [state bound to one “prior” despite multiple counts of conviction under plea].)

B. Juvenile Priors

The constitutional argument that juvenile court priors cannot be used, because the defendant did not have a right to a jury trial at the prior proceeding (see *Baldasar v. Illinois* (1980) 446 U.S. 222 [100 S.Ct.1585]) has not fared well. California courts have rejected a limitation on use of juvenile priors based on the absence of a right to a jury trial in the prior proceeding. (See, *People v. Smith* (2003) 110 Cal.App.4th 1072 [a defendant need not be given the right to a full blown jury trial on a juvenile adjudication being used as a strike prior]; *People v. Andrades* (2003) 113 Cal. App. 4th 817 [same].) Though the Ninth Circuit held in *United States v. Tighe* (9th Cir. 2001) 266 F. 3d 1187 that when a prior conviction for a juvenile adjudication is used to increase a defendant’s punishment, the defendant has the right to have a jury in the current case determine the truth of the prior, *Smith* and *Andrades* have limited *Tighe* to hold not that the prior must be retried before the jury, but that the jury must only find the prior proven true beyond a reasonable doubt. (See also, *Nichols v. United States* (1994) 511 U.S. 738 [114 S.Ct.1921] [a prior misdemeanor could be used to enhance a later sentence under the federal Sentencing Guidelines, even in the absence of a right to counsel in the prior proceeding].)

Under subparagraph (B) of Penal Code “section 667, subdivision (d)(3) . . . , a prior juvenile adjudication qualifies as a prior felony conviction for Three Strikes purposes only if the prior offense is listed in Welfare and Institutions Code section 707(b) or is classified as ‘serious’ or ‘violent.’ [Subp]aragraph (D) does not modify or conflict with [sub]paragraph (B), but states a separate, additional requirement: the prior adjudication

qualifies as a prior felony conviction only if the defendant, in the prior juvenile proceeding, was adjudged a ward because of at least one offense listed in section 707(b).” (*People v. Garcia* (1999) 21 Cal.4th 1.) Garcia does not answer whether there is a constitutional barrier to use of a juvenile prior adjudication that is a 707(b) offense but not a serious or violent felony, leaving open the possibility of an equal protection challenge to section 667, subdivision (d)(3)(B). (But see, *People v. Superior Court (Manuel G.)* (2002) 104 Cal.App.4th 915, 934 [treatment of minors who have committed 707(b) offenses may differ from that of adults who have committed the same offense without violating the right to equal protection].)

Under section 667(d)(3)(C), the minor must have been “found to be a fit and proper subject to be dealt with under the juvenile court law.” However, an implied finding is enough, and there is an implied finding even if no one ever sought a formal fitness hearing in the juvenile case. (*People v. Davis* (1997) 15 Cal.4th 1096 [Note strong separate dissents by Mosk and Kennard, each joined by Werdegar].)

However, there is some limitation in the use of juvenile priors: in the current proceeding, a trial court cannot examine the record behind the juvenile adjudication to determine if the conduct equals a 707(b) offense, if it is not on the 707(b) list. “Paragraph (D) requires an adjudication of a Welfare and Institutions Code section 707(b) offense; a showing the conduct includes the elements of such an offense is not adequate.” (*In re Jensen* (2001) 92 Cal.App.4th 262.)

C. Foreign priors

A foreign conviction may be used to enhance a California prison sentence if the conduct under the foreign offense constitutes a serious or violent felony under California law. (Pen. Code § 667(a); *People v. Woodell* (1998) 17 Cal.4th 448, 453; *People v. Hazelton* (1996) 14 Cal.4th 101; *People v. Myers* (1993) 5 Cal.4th 1193, 1201.)

Even a dismissed foreign prior, dismissed in the foreign state after successful completion of diversion, may still be a strike under California law. The full faith and credit doctrine does not bar California from deciding that sister-state’s judgment of dismissal has no effect. (*People v. Laino* (2004) 32 Cal.4th 828; *People v. Shear* (1999) 71 Cal.App.4th 27.)

Texas prior conviction for burglary with intent to commit theft was equivalent to California burglary, even though the “intent to deprive” element of a Texas theft is more broadly defined than in California. (*People v. Avery* (2002) 27 Cal.4th 49.)

However, Texas robbery and burglary priors did not qualify as strikes in California because the prosecution failed to prove beyond a reasonable doubt that all of the elements of a California robbery and burglary were present in this defendant’s Texas priors. With respect to the robberies the court held the prosecution failed to prove either asportation or a taking from the immediate presence of the victim. With respect to the burglaries, the

court held that the prosecution failed to prove that the location of the burglary was an inhabited dwelling. (*People v. Rodriguez* (2004) 122 Cal. App. 4th 121.)

D. Some specific felonies

1. Violent

“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, 12022.8, or 12022.9” is a “violent” felony. (Pen. Code § 667.5, subd. (c), para. (8). See, *People v. Taylor* (2004) 118 Cal.App.4th 11 [differences between “great bodily injury” and “serious bodily injury”].)

2. Serious

Even if there was no 12022.7 enhancement imposed on the prior conviction, if there is other competent evidence showing personal infliction of GBI, the prior may be deemed a “strike” under subdivision (c), paragraph (8) of § 1192.7 (*In re Cruise* (2003) 110 Cal.App.4th 1495. See also, *People v. Rodriguez* (1999) 69 Cal.App.4th 341 [a prior conviction for § 148.10 in which the defendant “proximately caused” great bodily injury is not necessarily a serious felony prior under § 1192.7(c)(8), requiring “personal infliction” of great bodily injury].)

All residential burglaries as defined by Penal Code § 460 is a serious felony under former § 1192.7, subd. (c), para. (18) [burglary of an “inhabited dwelling house”]. (*People v. Cruz* (1996) 13 Cal.4th 764.) Amendment to paragraph (18) to designate “all first degree burglaries” serious felonies did not alter law that pre-1983 residential second degree burglaries are serious felonies. (*People v. Garrett* (2001) 92 Cal.App.4th 1417.)

Though § 288 (lewd or lascivious act on a child under 14), a serious felony under § 1192.7(c)(6), includes a specific intent element to gratify sexual purpose (see *People v. Martinez* (1995) 11 Cal.App.4th 434), and § 288a, subd. (c) (oral copulation of a child under 14) does not, the latter has been held to be included in the enumeration of § 288. (*People v. Murphy* (2001) 25 Cal.4th 136.)

“[I]ntimidation of victims or witnesses, in violation of Section 136.1” and “criminal threats, in violation of Section 422” are “serious” felonies. (Pen. Code § 1192.7, subd. (c), paras. (37) and (38); *People v. Neely* (2004) 124 Cal. App. 4th 1258.)

IV. PLEADING AND PRETRIAL PROCEDURE

A. Must be pled and proved

“The prosecuting attorney shall plead and prove each prior felony conviction except” that [t]he 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 insufficient evidence to prove the prior conviction.” (Pen. Code § 667, subd. (f); § 1170.12, subd. (d).)

B. Timely Pleading

A strike does not have to be pled and proven at the PX. (*People v. Valladoli* (1996) 13 Cal.4th 590; *Thompson v. Superior Court*, (2001) 91 Cal.App.4th 144; *People v. Superior Court (Arevalos)* (1996) 41 Cal.App.4th 908, 911.) However, priors may not be added after the verdict has been rendered (*People v. Tindall* (2000) 24 Cal.4th 767) or after a defendant has begun serving his sentence (*Cano v. Superior Court* (1999) 72 Cal.App.4th 1310).

The statute of limitations is not increased by a longer possible sentence from a strike allegation. (*People v. Turner* (2005) 134 Cal. App. 4th 1591.)

C. Limitations on plea bargaining

“Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution . . . shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in . . . subdivision (f).” (§ 667, subd. (g); § 1170.12, subd. (e). See, *People v. Allan* (1996) 49 Cal.App.4th 1507 [bargain violated section 1192.7, because the prosecutor objected].)

This limitation has actually opened the door to appeals of negotiated sentences in “Three Strikes” cases, because “[t]here was, in fact, no plea bargain. Nor could there have been – at least not as to any of the allegations of a prior serious and/or violent felony conviction under the Three Strikes law.” (*People v. Lloyd* (1998) 17 Cal.4th 658, 666. See also, *People v. Smith* (1997) 59 Cal.App.4th 46 [as long as the plea bargain was not for a specific term, defendant can raise the issue that the trial court did not understand it had discretion to strike priors]. But see, *People v. Young* (2000) 77 Cal.App.4th 827 [though agreement reserved defendant’s right to ask trial court to strike priors, he still needed a certificate of probable cause to attack the 25-life sentence as cruel and unusual]; *People v. Couch* (1996) 48 Cal.App.4th 1053 [cannot raise routine “Three Strikes” issues on appeal from plea bargain];.)

Further, this limitation will not be enforced to permit an appealing defendant to improve upon his bargain. (*People v. Vera* (2004) 122 Cal.App.4th 970 [defendant is estopped from contending that the trial court lacked authority under Three Strikes Law to strike

serious felony enhancements under section 667, subdivision (a) where striking the enhancements was agreed to as part of a plea bargain]; *People v. Cepada* (1996) 49 Cal.App.4th 1235 [defendant is estopped from asking to have the case sent back for the trial court to strike the remaining “strike” prior after pleading to an agreement to strike only one]. But see, *People v. Taylor* (1998) 63 Cal.App.4th 29 [defendant not estopped from raising a habeas claim that trial court should have exercised discretion regarding two “strike” priors after he agreed to a life term in exchange for prosecutor foregoing seeking additional enhancements] distinguishing *Cepada*.)

V. TRIAL RIGHTS AND PROCEDURE

A. Right to jury trial

Apprendi v. New Jersey (2000) 530 U.S. 466 [120 S.Ct. 2348] restated the so-called “exception” from *Almendarez-Torres v. United States* (1998) 523 US 224 [118 S.Ct.1219], that there is a federal constitutional right to a jury trial and proof beyond a reasonable doubt as to every fact that increases a defendant’s sentence over the statutory maximum.

Though California agrees that *Apprendi* applies to current-conduct enhancements, such as gang enhancement allegations (*People v. Sengpadychith* (2001) 26 Cal.4th 316), it has rested the right to a jury trial regarding the fact of a prior conviction on statutory law. (*People v. Epps* (2001) 25 Cal.4th 19, 32.) Under Penal Code section 1025, there is no right to a jury determination whether (a) the prior conviction constituted a “serious” or “violent” felony (*People v. Kelii* (1999) 21 cal.4th 452); or (b) whether the defendant is the person who actually suffered the prior conviction. (*People v. McGee* (2006) 38 Cal.4th 682 [“there has been a clear expression of legislative intent that a jury play a very limited role in determining prior offense allegations and that a court, not a jury, examine records of prior convictions to determine whether the conviction alleged qualifies as a conviction under the applicable sentence-enhancement provision;” “although the decision in *Apprendi* noted that tension existed between the rationale of its decision and the established rule permitting a court, rather than a jury, to determine sentence enhancements that are based upon a defendant’s prior convictions, the high court in that decision did not purport to overrule the prior case law pertaining to recidivist sentencing provisions”].) For a complete discussion of this rule and its impact on prior conviction trials, see “*Apprendi* in California” (Jonathan Soglin, Staff Attorney).

B. Trial Procedure

Trial on the prior convictions may be bifurcated at the defendant’s (*People v. Calderon* (1994) 9 Cal. 4th 69) or the prosecutor’s request (*People v. Cline* (1998) 60 Cal.App.4th 1327).

One court has recognized the potential for a conflict of interest arising from the current attorney having represented the defendant in a prior proceeding where the conviction

arising from that proceeding was being introduced under subdivision (b) of Evidence Code section 1101. (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1686, overruled on another point in *People v. Hammon* (1997) 15 Cal.4th 1117.) In *Dancer*, the trial court appointed separate counsel to advise the defendant on the issue. The San Diego Bar Assn. Committee on Legal Ethics, Opn. No.1995-1 provides that counsel must at least advise defendant of the potential conflict.

C. Proof of priors

1. Generally

Generally, prior convictions are established through introduction of the record of conviction (charging document, transcript of plea, abstract of judgment), a Penal Code section 969b “prison packet” and any supplementary material the prosecutor believes is necessary to establish the facts of the offense (preliminary hearing transcripts, probation reports, etc.).

If a prior conviction could have been committed in two ways, only one of which would be a strike, the court is obligated to select the crime with the least adjudicated elements (unless there is evidence in the record that the defendant’s conduct qualified as a strike.) *People v. Watts* (2005) 131 Cal. App. 4th 589.)

There are two factors to determine whether a document offered to prove that a prior is a strike should be admitted: (1) is it part of the record of conviction [not “yet defined”]; and (2) does it pass the “reliable reflection” test of *People v. Reed* (1996) 13 Cal.4th 217? (*People v. Houck* (1998) 66 Cal.App.4th 350.)

Uncertainty about what evidence a court may consider to determine retrospectively that a prior was a serious felony may create an unconstitutional vagueness issue. (See, *People v. Murphy* (2001) 25 Cal.4th 136, 148-149 [posing the question, but declining to answer it].)

2. Charging document, minute orders, abstracts of judgment

“The determination of whether a prior conviction is a [strike] ... is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor.” (§ 667, subd. (d), para. (1).) Under subdivision (b), paragraph (1) of § 17, an offense is an automatic misdemeanor when the court imposes summary probation (rather than ISS) to terminate upon completion of jail time. (*People v. Glee* (2000) 82 Cal.App.4th 99; *People v. Soto* (1985) 166 Cal.App.3d 770.)

An abstract showing that defendant pled to “245 ASLT GBI/DLY WPN” was insufficient to sustain finding that the particular “ADW” was a serious felony. (*People v. Rodriguez* (1998) 17 Cal.4th 253. See also, *People v. Banuelos* (2005)

130 Cal.App.4th 601; *People v. Winters* (2001) 93 Cal.App.4th 273 [“assault with a deadly weapon ...” added to § 1192.7(c)(31) does not incorporate all violations of § 245 – assault by means of force likely is still not a serious felony]; *People v. Encinas* (1998) 62 Cal.App.4th 489 [abstract showing a conviction for “PC 245(c) Assault [on] Officer,” alone is insufficient proof that the assault was done with a deadly weapon or that GBI was inflicted] following *Rodriguez*.)

An abstract of judgment, showing defendant got a 3-year enhancement *plus* a 969b packet indicating “245 ... w/gbi (12022.7)” is sufficient. (*People v. Luna* (2003) 113 Cal.App.4th 395. See also, *In re Cruse* (2003) 110 Cal.App.4th 1495 [even in the absence of a 12022.7 enhancement on the prior, if there is other competent evidence showing infliction of GBI, the “strike” finding will be upheld].)

3. Plea Transcript

A defendant’s “adoptive admission” at the time he pled to the prior established that his ADW was a serious felony. (*People v. Sohal* (1997) 53 Cal.App.4th 911. But see, *People v. Jones* (1999) 75 Cal.App.4th 616 [defendant’s plea to “bank robbery in violation of 18 USC 2113(a)” is not enough to show that he admitted violating the statute in a way which actually is a bank robbery in California].)

An indictment and judgment in Oregon requiring defendant pay restitution to theft victims named in the indictment was admissible to prove asportation. (*People v. Zangari* (2001) 89 Cal.App.4th 1436 [“A reasonable inference from this record is that personal property was carried away from the burglarized premises.”].)

The prosecutor’s failure to obtain an admission at the time of the prior plea that the offense was a serious felony does not stop a court in a subsequent case from revisiting the question and determining that the prior was in fact a serious felony. (*People v. Leslie* (1996) 47 Cal.App.4th 198. See also, *People v. Thompson* (1997) 59 Cal.App.4th 1271 [no need to plead a new offense is a serious felony under § 969f, unless that offense is going to be enhanced with priors in that case].)

4. Former Testimony

Proof of priors is subject to the rules of evidence and the Confrontation Clause. If hearsay documentation is employed, each piece of evidence used to prove the “extra” element of a prior (e.g., *personal* use of a deadly weapon) had to be admissible under some statutory exception to the hearsay rule. (*People v. Reed, supra*, 13 Cal.4th 217 [PX transcript constitutes former testimony under *People v. Guerrero* (1988) 44 Cal.3d 343].)

Though a PX transcript may be admissible to prove the defendant’s conduct was “violent” or “serious,” where the prior conviction was by guilty plea, a PX

transcript is not admissible to “reliably reflect[] the conduct of which a defendant was convicted,” where the defendant was convicted in a jury trial. (*People v. Houck*, *supra*, 66 Cal.App.4th 350 [distinguishing *Reed* on the basis that that case involved a conviction after guilty plea]. Compare *People v. Bartow* (1996) 46 Cal.App.4th 1573 [though PX transcript was properly admitted, it was error to deny introduction of the entire jury trial transcript].) Nor is it admissible where the PX was held under the procedures permitted by Prop. 115. (*People v. Best* (1997) 56 Cal.App.4th 41.)

Recently, the United States Supreme Court has issued 2 opinions impacting this area. In *Crawford v. Washington* (2004) 541 U.S. 36, the U.S. Supreme Court held that whenever the state offers hearsay evidence against the accused that is “testimonial” in nature, the Sixth Amendment Confrontation Clause requires a showing of unavailability; and a prior opportunity for cross examination (*Crawford, supra*, at pp. 68-69.) At least one California court has held that *Crawford* does not bar admission of a PX transcript at a trial on prior conviction allegations on the ground that the defendant had an opportunity to cross examine the declarant at the PX. (*People v. Gonzales* (2005) 131 Cal.App.4th 767.) The other opinion was *Shepard v. United States* (2005) 544 U.S. 13, in which the Court held that the nature of the prior may only be proven by reference to charging documents.

5. Probation Reports

A defendant’s statements in a probation report are admissible, because they clear two hearsay exceptions: party admissions, and official records. (*People v. Monreal* (1997) 52 Cal.App.4th 670.)

6. Appellate Opinions

The “record of conviction” is not limited to the trial court record; an appellate opinion may be included. (*People v. Woodell* (1998) 17 Cal.4th 448 [appellate opinion is an “official record”]. But see, *People v. Lewis* (1996) 44 Cal.App.4th 845 [DA’s summary of the facts and a judge’s post-judgment description of a 1967 Louisiana case were inadmissible].) The appellate opinion be used to prove facts regarding the “basis of the conviction,” unless the facts are described in a way as to suggest they were disputed and unresolved. (*Ibid.* But see, *Id.*, dis. opn. of Mosk, J., [hearsay exception under Evidence Code section 1280 only establishes the fact of conviction and may not be used to prove conduct].)

D. Retrial of prior conviction allegations

So far, there is no jeopardy bar to retrying inadequately proved priors. (*Monge v. California* (1998) 524 US 721 [118 S.Ct. 2246] affirming *People v. Monge* (1997) 16 Cal.4th 826 [Scalia, Souter, Ginsburg, and Stevens, dissenting].) For an argument that

Monge cannot survive *Apprendi*, see Alex Ricciardulli's Strike Zone article in the California Defender, 1st Quarter 2001. See also, *People v. Seel* (2004) 34 Cal.4th 535 [recognizing that post-*Apprendi*, retrial of at least a premeditation allegation is barred, but maintaining a distinction for prior conviction allegations].

Nor do the Due Process Clause or the law of the case doctrine preclude retrial of prior conviction allegations found to have been insufficiently proven. (*People v. Barragan* (2004) 32 Cal.4th 236.)

Nor is there a jeopardy bar to retrying the facts about a new offense which make it a serious felony. (*People v. Hernandez* (1998) 19 Cal.4th 835 [Note: Werdegar, Mosk, and even Brown have some problems with this constitutional conclusion and would avoid reaching it since the case might be resolved on statutory grounds]. Overruled on another point in *People v. Seel* (2004) 34 Cal.4th 535, 550.)

However, where a prior conviction has been dismissed under Penal Code section 1385, the defendant may not be "retried" for it as an enhancing prior conviction in a subsequent proceeding. (*People v. Barro* (2001) 93 Cal.App.4th 62. *Contra*, *People v. Blackburn* (1999) 72 Cal.App.4th 1520 [where a "personal use" allegation in the prior proceeding was dismissed per 1385—and even where it was found not true—the prosecution can still prove in the current case that the prior was a strike, based on the fact of personal gun use].)

VI. SENTENCING

Note: A defendant with strikes may be eligible for deferred entry of judgment as well. Three Strikes prohibits "diversion" under the former program with that name. However, the deferred-entry-of-judgment program which replaced diversion in 1997 is different. A defendant in a deferred-entry program has not yet been convicted, so he is not yet subject to sentencing under Three Strikes or any other provision. The legislature has failed to amend the Three Strikes Law to prohibit DEJ. (*People v. Davis* (2000) 79 Cal.App.4th 251.)

A. Two Strikes Computations (§ 667(e)(1))

When the base term is a determinate term, it is doubled. However, the trial court has discretion under section 1170 to choose the upper, middle, or lower term before doubling it. (*People v. Keelen* (1998) 62 Cal.App.4th 813, 819, fn. 6.) The base term and subordinate terms (1/3 the middle term) are doubled, but not enhancements. (*People v. Nguyen* (1999) 21 Cal.4th 197; *People v. Hardy* (1999) 73 Cal.App.4th 1429, 1433; *People v. Dominguez* (1995) 38 Cal.App.4th 410.)

When the current offense carries an indeterminate term, one life term is imposed with a doubled minimum period of confinement for parole eligibility. For a "straight life" sentence, the 7-year minimum provided by section 3046 is doubled. Where some other law provides for a longer minimum that minimum is doubled. (*People v. Jefferson*

(1999) 21 Cal.4th 86.) Doubling the minimum term does not violate any proscription against modifying the Briggs Initiative, section 190. (See, *People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1661.) There appears to be a long-standing and unresolved split on whether an LWOP term can be doubled. (See, *People v. Hardy* (1999) 73 Cal.App.4th 1429 [Second District, Division 2 holding it can]; *People v. Smithson* (2000) 79 Cal.App.4th 480 [Third District holding it cannot].)

B. Three Strikes Computations (§ 667(e)(2)(A))

A third-striker gets an indeterminate term, with the minimum calculated as the longest of: “(i) Three times the term otherwise provided as punishment for each current felony conviction ... (ii) 25 years, or (iii) The term determined by the court pursuant to section 1170 for the underlying conviction, including any enhancement applicable under ...section 1170 ... or any period prescribed by section 190 or 3046.” (§ 667(e)(2)(A).)

Under option (i), where the current offense carries a determinate term, the trial court retains its section 1170 discretion to choose the upper, middle, or lower term before tripling. (*People v. Keelen* (1998) 62 Cal.App.4th 813.) As in second strike sentences, enhancements are excluded from the tripling calculus. (*People v. Acosta* (2002) 29 Cal.4th 105.)

Where the current offense carries an indeterminate term, under option (i), the court triples the minimum mandatory parole eligibility term. (*People v. Acosta* (2002) 29 Cal.4th 105; *People v. Mendoza* (2000) 78 Cal.App.4th 918.)

C. Conduct Enhancements and sentencing under Three Strikes

Conduct enhancements attached to consecutive life sentences under option (iii) of the Three Strikes law are served at full-strength. They are not subject to the 1/3 rule of § 1170.1, as are enhancements on subordinate determinate terms. (*People v. Lyons* (1999) 72 Cal.App.4th 1224. See also, *People v. Felix* (2000) 22 Cal.4th 651 [holding in a non-Three Strikes case that life terms – both “straight life” and “25-life”– are “indeterminate” terms, not subject to any of the DSL sentencing rules].)

D. Application of Three Strikes and other provisions aggravating or enhancing the sentence

Three Strikes may be superseded by another sentencing scheme which results in a more severe penalty. (*People v. Williams* (1995) 40 Cal.App.4th 446 [capital murder].) On the other hand, Three Strikes supersedes any sentencing statute which would result in a lesser penalty. (*People v. Espinoza* (1997) 58 Cal.App.4th 248 [Three Strikes supersedes § 664, the general attempts statute, when the new offense is an attempt].) Further, Three Strikes is applied in conjunction with any other sentencing scheme which would not alone produce as long a sentence. (*People v. Acosta* (2002) 29 Cal.4th 105, 112-128 [term under § 667.61 (“One Strike” sex offender provisions) should be calculated and then

tripled, if he has two “strikes”]; *People v. Ervin* (1996) 50 Cal.App.4th 259 [or doubled if only one prior “strike”].)

E. Application of Three Strikes and other recidivist provisions

A prior “strike” can also be used to enhance a Three Strikes sentence by an additional 5 years under subdivision (a) of §667. (*People v. Dotson* (1997) 16 Cal.4th 547.) In fact, since prosecutors and judges often overlook this, it is often a potential adverse consequence of pursuing an appeal, because an unauthorized sentence can be corrected at any time. (See, e.g., *People v. Ayon* (1996) 46 Cal.App.4th 385, 395-396 [adding recidivist enhancement]; *People v. Ingram* (1995) 40 Cal.App.4th 1397, 1411-1412 [same].) Further, where the current judgment involves multiple 25-life sentences for 3rd strike offenses, the 5-year enhancement is imposed on each new sentence, unlike its single imposition in determinate term sentences. (*People v. Williams* (2004) 34 Cal.4th 397, 404-405.)

§ 667.71 (habitual sex offender law) and Three Strikes operate cumulatively as well. (*People v. Murphy* (2001) 25 Cal.4th 136.) Even where the defendant qualifies for treatment under the “One Strike” sex offender provisions of §667.61, based on a prior conviction which is also a strike under §667(b)-(i), that same prior can be used to trigger a sentence under both the One Strike and the Three Strikes laws. Despite language in §667.61(f) that appears to state that only “surplus priors” – priors not needed to invoke a section 667.61 sentence – can be used for some other sentencing purpose, such as Three Strikes, the Supreme Court has held that section 667.61(f) does not bar this dual use. (*People v. Acosta* (2002) 29 Cal.4th 105, 128-134.)

F. Other Dual Use Issues

Where the strike prior is an element of the new offense (e.g., § 290, § 4532 or § 12021), there may still be an argument against its dual use. (*People v. Edwards* (1976) 18 Cal.3d 796 and *People v. Wilks* (1978) 21 Cal.3d 460. See, *People v. Baird* (1995) 12 Cal.4th 126 [expressly declining to overrule *Edwards* and *Wilks*]; and *People v. Coronado* (1995) 12 Cal.4th 145 [same].) However, at least in the situation where the current offense is a failure to register, the Supreme Court has rejected this argument. (*People v. Garcia* (2001) 25 Cal.4th 744 [“the plain and unambiguous language of the Three Strikes law discloses an intent to impose the enhanced, doubled sentence, despite a possible ‘dual use’ of defendant’s prior conviction”].)

Where the prior is not an element, but rather a fact raising a misdemeanor to a felony (e.g. § 666), the *Edwards* dual use bar has been held inapplicable. (*People v. Darwin* (1993) 12 Cal.App.4th 1101; see also, *People v. White Eagle* (1996) 48 Cal.App.4th 1511; *People v. Coronado* (1995) 12 Cal.4th 145 [relying on legislative intent and not mentioning *Edwards*, to hold dual use of a felony-booster prior, under § VC 23175 and § 667.5 (prison prior) was proper]. But, see, *Riggs v. California* (1999) 525 US 114 [199 S.Ct. 890] [denial cert. in which four supreme court justices expressed concerns about

punishing petty with a prior with a life sentence]; *Durden v. California* (2001) 531 US 1184 [121 S.Ct. 1183], dissent from denial of certiorari.)

A single strike prior may be used to double both the base term and any subordinate term. (*People v. McKee* (1995) 36 Cal.App.4th 540.) This double use of the strike is not an “enhancement.” (Compare, *People v. Tassell* (1984) 36 Cal.3d 77.) Even if the doubling were an “enhancement,” the statutory language “notwithstanding any other law” (§ 667(c)) abrogates *Tassell*. (See also, *People v. Hill* (1995) 37 Cal.App.4th 220 [“notwithstanding” language abrogates former rule 425(b) as a bar to doubling both terms]; *People v. Williams* (2004) 34 Cal. 4th 397 [*Tassell* does not bar imposition of multiple indeterminate terms under the Three Strikes Law]; *People v. Byrd* (2001) 89 Cal.App.4th 1373 [same].)

“Neither statute nor rule prohibits relying on the same prior conviction both to invoke an alternative sentencing scheme and impose an upper term.” (*People v. McClain* (1997) 59 Cal.App.4th 696 [no bar to using the fact of the same prior to sentence under the Three Strikes Law and to impose the upper term as the base term].)

G. Consecutive vs. concurrent terms under Three Strikes

1. Mandatory

“If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).” (Pen. Code § 667(c)(6).)

Further, where two or more of the new offenses are “serious” (Pen. Code § 1192.7(c)) or “violent” (Pen. Code § 667.5(c)) felonies, section 667(c)(7) requires the terms to be not only consecutive to each other, but also “to any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.” (*People v. Hendrix* (1997) 16 Cal.4th 508, 514.)

Note potential adverse consequence: *People v. Durant* (1999) 68 Cal.App.4th 1393 reversed a trial court’s discretionary imposition of concurrent sentences as “unauthorized” where the Court of Appeal concluded the offenses did not arise from the same set of operative facts.

Even where strikes are dismissed as to some counts under *Garcia* (see § H, below), the mandatory consecutive rule may still apply in a given case. (*People v. Casper* (2004) 33 Cal.4th 38.)

Further, if defendant is already serving a term for some other felony, the currently imposed sentence under the Three Strikes Law must be imposed consecutively, and where the sentence is an aggregate determinate term, the court must re-

consider the structure of the entire sentence under section 1170.1. (*People v. Riggs* (2001) 86 Cal.App.4th 1126; Pen. Code § 667(c)(8); *Id.*, § 667(e)(2)(B). Compare, *People v. Rosbury* (1997) 15 Cal.4th 206 [defendant on probation with imposition of sentence suspended is not already serving a sentence for purposes of section 667(c)(8)] and *People v. Davis* (1996) 48 Cal.App.4th 1105 [defendant on parole from CRC at the time a Three Strikes sentence is imposed was “serving a sentence” for purposes of section 667(c)(8)].)

2. Discretionary

Conversely, if the two new counts are committed on the “same occasion” or “arise from the same set of operative facts,” regardless of whether they are “serious,” “violent,” or not, then concurrent sentencing is within the court’s discretion. (*People v. Deloza* (1998) 18 Cal.4th 585; *People v. Hendrix* (1997) 16 Cal.4th 508.)

“[A]t least where . . . the three strikes law does not mandate consecutive sentencing, section 654 [and *Neal*, requiring staying of multiple punishment for acts committed pursuant to a single objective] applies to sentencing under the three strikes law.” (*People v. Danowski* (1999) 74 Cal.App.4th 815.)

3. Same occasion or set of operative facts

The determination of whether the offenses occurred on the “same occasion” or “arise from the same set of operative facts,” is procedurally and substantively distinct from an analysis under Penal Code section 654 and the “single objective” standard of *Neal v. California* (1960) 55 Cal.2d 11. It is also distinct from the definition of “same occasion” in sections 667.6(d) and 186.22. (*People v. Deloza* (1998) 18 Cal.4th 585.)

Where the offenses were “so closely related in time and space, and committed against the same group of victims, . . . these factors alone compel us to conclude they occurred on the ‘same occasion.’” (*People v. Deloza, supra*, 18 Cal.4th at p. 599.) However, where a defendant shoplifted from a store, ran across the street, cut into a residential backyard and assaulted the homeowner, the Supreme Court held the offenses were not committed on the same occasion—even though they were a few minutes and a couple of blocks apart – because they involved different victims. (*People v. Lawrence* (2000) 24 Cal.4th 219.) Further, the Court has suggested that in order for two offenses to arise from the same set of operative facts, they must share “common acts or criminal conduct that serves to establish the elements of the . . . offenses.” (*Id.* at p. 233. See also *People v. Durant* (1999) 68 Cal.App.4th 1393 [“same set of operative facts” is a very restrictive test; suggesting without quite holding that if one crime is legally complete before the second one is begun, they do not arise from the “same set of operative facts”]; *People v. Jenkins* (2001) 86 Cal.App.4th 699 [agreeing with *Durant*, even though

two assaults occurred under interrelated circumstances and very close in time, the majority emphasized the fact that the first assault was completed before the second began, and that defendant had time to reflect; dissent]; *People v. Jones* (1998) 67 Cal.App.4th 724 [witness intimidation, though committed in furtherance of the same objective as burglary, occurred later in time – and thus required a mandatory consecutive sentence].)

4. Calculating multiple 3rd strike terms imposed consecutively

Multiple 3rd strike terms imposed consecutively aggregate the minimum mandatory parole eligibility term (i.e., 50 or 75 to life). (See, *People v. Jenkins* (1995) 10 Cal.4th 234 [which actually construed § 667.7]; *People v. Byrd* (2001) 89 Cal.App.4th 1373 [following *Jenkins*].)

H. Sentencing Credits Limitations

“The total amount of credits awarded pursuant to Article 2.5 (commencing with section 2930) ... shall not exceed one-fifth of the total term of imprisonment and shall not accrue until the defendant is physically placed in state prison.” (§ 667(c)(5).) This limitation applies to the total aggregate determinate term. (*People v. Brady* (1995) 34 Cal.App.4th 65.) However, where a determinate term is imposed after a revocation of probation for a pre 1994 offense, credits are calculated without the 20% limitation. (*People v. Williams* (1996) 49 Cal.App.4th 1641.)

However, this limitation does not apply to pre-judgment credits, which are still governed by § 2900.5, § 4019 and *Sage*. (*People v. Thomas* (1999) 21 Cal.4th 1122; *People v. Hill* (1995) 37 Cal.App.4th 220; *People v. Caceres* (1997) 52 Cal.App.4th 106.)

The court need not advise defendant of this “collateral consequence” of a plea to a strike offense under *In re Tahl* (1969) 1 Cal.3d 122. (*People v. Barella* (1999) 20 Cal.4th 261.)

Note that more restrictive credit rules supersede application of the 20% limitation of section 667(c)(5). (*People v. Jenkins* (1995) 10 Cal.4th 234 [§ 190 restrictions applicable to murder defendant sentenced under section 667.7]; *People v. Sylvester* (1997) 58 Cal.4th 1493[§ 2933.1 15% limitation for new violent felonies]; *People v. Caceres* (1997) 52 Cal.App.4th 106 [same]. See also, *People v. Henson* (1997) 57 Cal.App.4th 1380 [rejecting argument that any third strike offense is a violent felony].)

The defendant is not entitled to any credit against a 25-life term. However, he may earn credits against a determinate term imposed consecutively to that life term. (*In re Cervera* (2001) 24 Cal.4th 1073.)

VII. JUDICIAL POWER TO STAY, STRIKE OR DISMISS STRIKE PRIORS (§ 667(f)(2))

A. Discretion to strike prior

A trial court can strike a prior “strike” under section 1385. Reasons for the decision must be stated in the minutes. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. See also, *People v. Garcia* (1999) 20 Cal.4th 490 [the court retains discretion to strike some or all of the priors, and the court can dismiss strikes allegations as to some but not all counts]; *People v. Bradley* (1998) 64 Cal.App.4th 386 [section 667(e)(2)(B), as construed in *Dotson* and *Hendrix*, does not abrogate the discretion to strike an enhancement allegation the court may otherwise strike under section 1385 – here, the court may strike term for prison prior].)

Note: in a case depublished upon grant of review on another issue, Division One of the Fourth District held that failure to state reasons on the record makes the sentence unauthorized, regardless of its merits, permitting the case to be sent back for a statement of reasons – with no guarantee that the trial court will reach the same decision. (*People v. Hammer* (January 9, 2002) D037349.)

Defendants do not have a Sixth Amendment right to a jury determination whether a strike should be dismissed under *Blakely* or *Apprendi*. (*People v. Murphy* (2004) 124 Cal.App.4th 859; *People v. Urbano* (2005) 128 Cal. App. 4th 396.)

B. Standing, Appealability and Standard of Review

Defendant cannot make a motion to strike a prior, but he can ask the trial court to exercise its discretion. Further, a defendant may appeal a trial court’s refusal or failure to exercise discretion under section 1385, and he can appeal an abuse of that discretion. “We see no valid distinction between a failure to exercise discretion, and a failure to exercise discretion in a lawful manner.” (*People v. Carmony* (2004) 33 Cal.4th 367; *People v. Gillispie* (1997) 60 Cal.App.4th 429.)

C. Establishing an abuse of discretion

There are two broad categories where a judge abuses his discretion in refusing to dismiss strikes: procedural and substantive. Procedural abuse of discretion occurs when a court is not aware of its discretion to dismiss or where the court considered impermissible factors in declining to dismiss. Substantive abuse happens when a court’s refusal to dismiss produces an arbitrary, capricious or patently absurd result under the specific facts of a particular case. (*People v. Carmony* (2004) 33 Cal.4th 367 [finding no abuse under either category]. See also, *People v. Philpot* (2004) 122 Cal.App.4th 893 [no abuse of discretion where court denied motion to dismiss strikes and sentence to less than 25-life for auto theft].)

1. Silent records

On a silent record, reversal and remand are only required where the record affirmatively demonstrates that the trial judge was unaware of his discretion and “would have exercised discretion under section 1385 to strike the prior conviction if it believed it had such discretion.” (*People v. Fuhrman* (1997) 16 Cal.4th 930.) However, in *People v. Rodriguez* (1998) 17 Cal.4th 253, the Supreme Court held that on a record which affirmatively showed only that the judge thought he had no power to strike, reversal was required, even in the absence of an affirmative showing the judge would have exercised his discretion in the defendant’s favor. (See also, *People v. Vong* (1997) 58 Cal.App.4th 1063 [if the record affirmatively shows that the trial court didn’t know it had the power to strike, defendant is entitled to a remand without any further showing that he is likely to get a shorter sentence].)

2. The *Williams* standard

“[T]he language of [Penal Code section 1385(a)], ‘in furtherance of justice,’ requires consideration both of the constitutional rights of the defendant, and the interests of society represented by the People, in determining whether there should be a dismissal. . . . At the very least, the reason for dismissal must be that which would motivate a reasonable judge. . . . Courts have recognized that society, represented by the People, has a legitimate interest in the fair prosecution of crimes properly alleged. . . . [A] dismissal which arbitrarily cuts those rights without a showing of detriment to the defendant is an abuse of discretion.” (*People v. Williams* (1997) 17 Cal.4th 148, 159, quoting *Romero*.)

“[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1997) 17 Cal.4th 148, 161, emphasis added.)

3. Application of the *Williams* standard

a. Prior not stricken or striking reversed

Where at the conclusion of the preliminary hearing on a prior, the magistrate refused to hold the defendant to answer, but the defendant later pled guilty to the prior, that is sufficient to establish his guilt of it. The magistrate’s ruling standing

alone was insufficient to take defendant “outside the spirit of the Three Strikes scheme.” (*People v. Wallace* (2004) 33 Cal.4th 738.)

Though defendant’s new offense was nothing worse than selling bunk cocaine, and most of his priors were drug and theft misdemeanors, it was an abuse of discretion to find him outside the spirit of the Three Strikes law on the ground that his single “strike” – a knife assault – was “out of character”. (*People v. Strong* (2001) 87 Cal.App.4th 328.)

The trial court’s refusal to strike defendant’s prior serious felony convictions in the interests of justice was not an abuse of discretion given the nature and circumstances of the current offense. (*People v. Poslof* (2005) 126 Cal.App.4th 92.)

Defendant’s age, diabetic condition and length of sentence in the absence of the prior were not good enough reasons to justify striking a prior. (*People v. Gaston* (1999) 74 Cal.App.4th 310. Compare, *People v. Garcia* (1999) 20 Cal.4th 490 [length of sentence without the prior such that defendant would no longer be a danger to society is relevant factor].)

In a pre-*Williams* case, the Court of Appeal reversed the striking of a prior, because the sole articulated ground was the age of the prior. However, the trial court did not consider that the defendant had not been “crime free” since that prior conviction. (*People v. Humphrey* (1997) 58 Cal.App.4th 809.)

Note: No abuse of discretion in refusing to strike a current count of conviction, which would be stayed in any event under section 654, because of the possibility that some day another court would use it as a separate strike. (*People v. Ortega* (2000) 84 Cal.App.4th 659.)

Note: The court cannot release a convicted defendant, whose priors have been found true, on “Supervised OR” prior to sentencing, to see how he does in a drug program and thus gather information whether he might be outside the spirit of the Three Strikes law. (*People v. Superior Court (Roam)* (1998) 69 Cal.App.4th 1220.)

b. Prior stricken or denial reversed

It was an abuse of discretion to refuse to strike a prior and impose 25 to life sentence for a “technical violation” of PC section 290, the sex offender registration statute. The trial court’s inferences about defendant’s conduct were not supported by substantial evidence. (*People v. Cluff* (2001) 87 Cal.App.4th 991. But see, *People v. Carmony* (2004) 33 Cal.4th 367 [upholding a 25 to life sentence for a man who failed to re-register on his birthday, although he had re-registered upon moving, a month before].)

In a case pre-dating *Williams*, the Court of Appeal upheld the trial court's striking of priors as a proper exercise of discretion. (*People v. Bishop* (1997) 56 Cal.App.4th 1245.)

D. Remand Procedure

Based on section 1260 (authorizing remands “for such further proceedings as may be just under the circumstances”), a remand for a *Romero* hearing entitles the defendant to appear in person and with counsel. (*People v. Rodriguez* (1998) 17 Cal.4th 253. See also, *In re Cortez* (1971) 6 Cal.3d 78 [constitutional right].)

VIII. JUDICIAL DISCRETION TO REDUCE TRIGGERING OFFENSE TO A MISDEMEANOR (§ 17(b))

When the new offense is a wobbler, the trial court retains discretion to reduce it to a misdemeanor under section 17(b)(1) or (3) notwithstanding the Three Strikes Law. (*People v. Superior Court (Alvarez)* (1996) 14 Cal.4th 968.) The judge must take a defendant's priors into consideration. However, that fact cannot be dispositive, and review of an exercise of discretion under section 17 is very deferential. (*Ibid.*)