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INFORMATION RE: CALIFORNIA'S THREE STRIKES LAW

(including, *People v. Vargas*, new second striker credit and parole policies, Proposition 47, Proposition 36, and *People v Johnson/Machado*)

Updated July 2015

This letter is sent in reply to your request for information about California's three strikes law (Penal Code §§ 667(b)-(i) and 1170.12). We apologize for sending this form letter, but we are unable to provide individual responses to everyone who seeks our help. This letter first discuses recent developments – Proposition 47 (section 1), the California Supreme Court case *People v. Vargas* (section 2), changes in prison sentence credits and new opportunities for early parole for people serving two strikes terms (section 3), and Proposition 36, including the recent *People v. Johnson/Machado* California Supreme Court case (section 4). Sections 5 through 8 describe the basic rules of the three strikes law and the most important court cases interpreting those rules. Section 9 summarizes steps you can take to avoid or challenge a three strikes sentence

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RECENT DEVELOPMENTS IN THE THREE STRIKES LAW

1. Could Proposition 47 Change My Two or Three-Strikes Sentence?

On November 4, 2014, the voters passed Proposition 47, which changes some felonies or "wobblers" (crimes that can be punished as either felonies or misdemeanors) into regular misdemeanors. The crimes affected by Proposition 47 are many types of drug-possession offenses and property offenses involving losses less than $950. The crimes affected by Proposition 47 can still be felonies only if the defendant has a prior conviction for a "super-strike" crime or for one of many types of sex crimes.

CDCR prisoners who were convicted and sentenced for drug possession or property felonies under the old laws can ask the superior court that sentenced them to reduce their crimes to misdemeanors under Proposition 47. Prisoners have until November 4, 2017 to file petitions requesting reduction pursuant to Proposition 47. If a person has already fully served the sentence for the Proposition 47 crime, then the court is supposed to just reduce the crime. If a person is still serving the sentence for the Proposition 47 crime, then court has the option of keeping the conviction a felony if resentencing would pose an unreasonable risk of danger to public safety. However, under Proposition 47, an unreasonable risk of danger is very narrowly limited to a risk of commission of specific "super-strike" crimes.

There are three main ways in which Proposition 47 might benefit someone who is serving a two-strikes or three-strikes term:

– Reducing the current felony commitment offense to a misdemeanor. If a person gets the commitment offense reduced to a misdemeanor, then he or she cannot be sentenced to a two- or three-strikes term for that offense. A third-striker can seek Proposition 47 resentencing even he or she is ineligible for or was denied Proposition 36 resentencing.

– Reducing prior felonies to misdemeanors. Under Proposition 47, some prior shop-lifting crimes that were charged as robberies might be eligible for reduction to misdemeanors; a reduction could mean a person is no longer a second- or third-striker. Non-strike prior felonies may also be eligible for reduction; although this probably won't affect the current sentence, having fewer prior felonies may be helpful for any future sentencing or parole suitability proceedings.

– Arguing that the narrow Proposition 47 definition of dangerousness applies to Proposition 36 resentencing cases (see section 4, below), and that cases decided before Proposition 47 must be reheard using the Proposition 47 standard. Proposition 47 states that its definition of "unreasonable risk of danger" applies "throughout this Code," and the only other section of the Penal Code that has an "unreasonable risk of danger" standard is the resentencing provision of Proposition 36. The California Supreme Court is reviewing these issues. The lead cases are *People v. Valencia*, No. S223825 and *People v. Chaney*, No. S223676. The Court is granting review of many cases raising this issue and holding those cases until *Valencia* and *Chaney* are decided.

!! There are other legal disputes about Proposition 47. For example, some district attorneys are arguing that Proposition 47 cannot be applied in cases in which defendants made plea bargains. There also are disputes about whether a person can get a one-year prior prison term enhancement for a crime that has been reduced to a misdemeanor!!

Prisoners who want more information can request a free Proposition 47 letter by writing to the Prison Law Office; the letter is also available on the Resources page at prisonlaw.com. Prisoners who might be affected by Proposition 47 should write to their criminal trial and/or appellate attorneys asking for more information or help; many criminal defense offices have procedures for helping prisoners file Proposition 47 petitions.

2. Can I Get my Sentence Reduced Under *People v. Vargas*?

In July 10 2014, the California Supreme Court ruled that two prior strike convictions arising from a single act against a single victim cannot be used to impose a life term under the Three Strikes Law. (*People v. Vargas* (2014) 59 Cal.4th 635.) For example, in *Vargas*, the defendant had two prior convictions from a 1999 case for carjacking and robbery that were based on the exact same act with one victim. The Court found that the voters' understanding was that the Three Strikes Law would apply only when someone has committed two prior serious or violent criminal acts. Thus, in this type of situation, a sentencing court *must* strike one of the priors pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 528-530.

Before the *Vargas* decision, the courts were divided about whether a sentencing judge could use a single prior act against a single victim as two strikes. In many such cases, sentencing courts did dismiss one of the strikes. However, there may be some prisoners who are serving indeterminate Three Strikes terms based on a single prior act against a single victim that was counted as two strikes. Some or all of those prisoners may be able to get resentenced to two strikes terms under *Vargas* (see section 9 of this letter for information about the legal actions that may be available to challenge a *Vargas* violation).

3. Can Second or Third Strikers Get Released Early Because of the Court Order to Reduce Prison Overcrowding?

The federal three-judge court overseeing the California prison overcrowding class action case (*Plata/Coleman v. Brown*) has issued orders that require the state to reduce prison overcrowding. Some of these orders may help second and third strikers get released early.

First, the court ordered the State to grant 33.3% credits prospectively for second strikers whose current conviction is not a violent felony. This means that eligible non-violent second strikers started earning 33.3% credit as of February 10, 2014 (the date of the court order), but do not earn more credits on the time they served before that date. Also, non-violent second strikers are now able to earn up to six weeks of "Milestone" credits per year for completing approved programs. Under the State's policy, second-strikers who have convictions that require sex offender registration are not allowed to get 33.3% conduct credits or milestone credits. There currently is no active motion to get additional credits for second-strikers with sex offenses.

Second, there is a new process through which non-violent second-strikers are eligible for parole consideration by the Board of Parole Hearings (BPH) once they have served 50% of their sentences (counted in actual years, and not counting any jail or prison conduct credits). The State is not allowing early parole consideration of any prisoners who are required to register as sex offenders. More information about the eligibility criteria and process is available on request from the Prison Law Office or on the Resources page at prisonlaw.com.

Third, the State has new programs and procedures for elderly prisoner parole consideration and medical parole consideration. These programs may help some third-strikers or second-strikers get earlier parole. Elderly prisoner parole is for lifer and determinate-term prisoners who are 60 years older and have served 25 years or more. Medical parole is for prisoners who are so medically incapacitated that they need assistance with basic activities of daily living. The decisions on whether to grant or deny parole are made by the BPH. More information about the eligibility criteria and processes is available on request from the Prison Law Office or on the Resources page at prisonlaw.com.

4. Can I Get Resentenced Under Proposition 36?

In November 2012, Proposition 36 changed the law so that many people who would have gotten three-strikes life sentences under the old law now get sentenced only to two-strikes terms. These changes are discussed in this letter in section 6a, below.

Under Proposition 36, some people who were sentenced to life terms under the old law can ask the courts to reduce their sentences. The rules are set forth in Penal Code § 1170.126. In a Proposition 36 case, there are two main issues – eligibility and dangerousness. To be eligible for re-sentencing, a prisoner must be serving an indeterminate life term and not have any current or prior convictions that would subject him or her to a life sentence under the current law. If a prisoner is eligible, the court must then decide whether resentencing the prisoner would pose an unreasonable risk of danger to public safety.

Re-sentencing is not automatic – a prisoner must file a petition in the superior court that imposed the three strikes sentence asking for re-sentencing. A prisoner whose case iThe deadline for filing a Proposition 36 petition ran out on November 6, 2014; a court can consider a petition filed after that date only if the prisoner shows good cause for not meeting the deadline. A prisoner may be able to get information or assistance for a Proposition 36 petition from the criminal trial and/or appellate attorneys who handled the three strikes case.

First, the court determines whether the prisoner meets the basic eligibility requirements or whether any of prior or current convictions exclude the prisoner from resentencing. Whether the current offense is a serious or violent felony is determined by how it was classified when Proposition 36 took effect (not when the crime occurred). (*People v. Johnson/Machado* (2015) __ Cal.4th __.) One court has held that a dismissed count cannot make a prisoner ineligible for resentencing (though the facts of the count can be used in evaluating dangerousness). *(People v. Berry* (2015) 235 Cal.App.4th 1417 [pet. for review pending as of 7/17/15].) The California Supreme Court recently decided that a prisoner who has multiple three-strikes convictions, some of which are ineligible for resentencing, can be considered for resentencing on any eligible counts. (*People v. Johnson/Machado* (2015) __ Cal.4th __.) Prisoners who have a mix of eligible and ineligible convictions should contact their criminal case or Proposition 36 case

attorneys if they were denied resentencing on eligible convictions prior to the *Johnson/Machado* decision.

Second, the court decides whether resentencing the prisoner to a lesser term would pose an unreasonable risk of danger to public safety. The court may consider the following factors when deciding whether to grant or deny the petition on dangerousness grounds:

-- the prisoner's criminal history, including the types of crimes committed, the extent of injury to victims, the length of prior prison terms, and the remoteness of the prior crimes;
-- the prisoner's disciplinary record and record of rehabilitation while incarcerated; and
-- any other evidence the court decides is relevant to public safety concerns.

If the petition is granted, the court can re-sentence the prisoner to a lower term under the current law. Even if the prisoner already has served longer than the new term, he or she must serve a period of post-release community supervision upon release. (*People v. Espinoza* (2014) 226 Cal.App.4th 635; *People v. Tubbs* (2014) 230 Cal.App.4th 578.)

If the petition is denied on either ineligibility or dangerousness grounds, the prisoner can appeal. (*Teal v. Superior Court* (2014) 60 Cal.4th 595.)

There is a lot of litigation about Proposition 36. Some of the important issues include:

– Are prisoners who were sentenced prior to Proposition 36 automatically entitled to resentencing if their cases were not yet final when Proposition 36 went into effect? This issue is under review by the California Supreme Court in *People v. Conley,* No. S211275. (see also *People v. Yearwood* (2013) 213 Cal.App.4th 161 [Prop. 36 not retroactive]. Note that prisoners whose convictions became final before Proposition 36 are definitely not entitled to automatic resentencing, and must petition for relief under section 1170.126. (*People v. Smith* (2015) 234 Cal.App.4th 1460).

-- Does either Proposition 36 itself or the Sixth Amendment right to a jury trial require that ineligibility factors have been pled and proven during the underlying three strikes case? Or can a court in a Proposition 36 proceeding make new findings of facts? If so, based on what evidence? So far, courts are being allowed to make new findings of fact by a preponderance of the evidence, relying on any part of the record of conviction. (*People v. White* (2014) 223 Cal.App.4th 512 [trial evidence]; *People v. Osuna* (2014) 225 Cal.App.4th 1020 [prior appeal opinion statement of facts]; *People v. Elder* (2014) 227 Cal.App.4th 1308 [same]; *People v. Guilford* (2014) 228 Cal.App.4th 651 [same]; *People v. Quinonones* (2014) 228 Cal.App.4th 1040 [arming enhancement that was found true, but stricken]; *People v Bradford* (2014) 227 Cal.App.4th 1322; *People v. Oehmigen* (2014) 232 Cal.App.4th 1 [discussion of factual basis for plea], *People v. Chubbuck* (2014) 231 Cal.App.4th 737 [trial transcripts and exhibits]; but see *People v. Blakely* (2014) 225 Cal.App.4th 1042 [police reports and post-conviction statements to probation officer not part of record of conviction].)

-- How should courts interpret the ineligibility criteria regarding current crimes during which the defendant was armed with a firearm or deadly weapon.? So far, courts have held that a person was armed if the firearm or deadly weapon was available for immediate offensive or defensive use. (*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979; *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007; *People v. Osuna* (2014) 225 Cal.App.4th 1020.)

-- Does a court have the power to strike a disqualifying prior conviction in the interests of justice? One court has said no. (*People v. Brown* (2014) 230 Cal.App.4th 1502.)

-- Does the prosecution have to prove ineligibility or dangerousness beyond a reasonable doubt? So far, courts have held that the prosecution need only prove ineligibility or dangerousness by a preponderance of the evidence. (See, e.g., *People v. Kaulick* (2013) 215 Cal.App.4th 1279; *People v. Losa* (2014) 232 Cal.App.4th 789.)

GENERAL RULES ABOUT THE THREE STRIKES LAW

5. What Counts as a Prior Strike Offense?

The violent and serious felonies that count as strike priors are listed in Penal Code §§ 667.5(c) and 1192.7(c). (See also Pen. Code § 667(d)(1).) An offense counts as a "prior" if the defendant was convicted (but not necessarily sentenced) in that case before he committed the new crime. (*People v. Williams* (1996) 49 Cal.App.4th 1632; *People v. Flood* (2003) 108 Cal.App.4th 504; *People v. Queen* (2006) 141 Cal.App.4th 838.) Prior offenses may be used as strikes even if they occurred before the passage of the original three strikes law or before Proposition 21 added the offense to the list of strike crimes. (*People v. Gonzales* (1995) 37 Cal.App.4th 1302; *People v. James* (2001) 91 Cal.App.4th 1147.)

A prior offense can be a strike regardless of whether the conviction was by a jury trial or a plea bargain. However, a plea from a prior case may sometimes be challenged when the offense is alleged as a strike in a new case. (*People v. Allen* (1999) 21 Cal.4th 424.) Under *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122, a defendant who enters a plea must be advised of and waive the constitutional rights to a jury trial, to confront the witnesses and to avoid self-incrimination; to keep a prior conviction from being used as a strike in a later case, a defendant can try to show that when he took the plea, he did not know of those rights and did not intelligently waive them. Note that a defendant can challenge priors from other states or the federal system on *Boykin/Tahl* grounds only if that jurisdiction, like California, requires on-the-record advisement and waiver of the constitutional rights. (*People v. Green* (2000) 81 Cal.App.4th 463.) A defendant may also be able to challenge use of a prior crime as a strike if he was misadvised by the court that his plea was not to a strike offense when the crime actually was a strike. (See *Dubrin v. California* (9th Cir. 2013) 720 F.3d 1095.)

Prior serious and violent felony convictions from jurisdictions outside California count as strikes if they have all the elements of one of the strike offenses set forth in the California Penal Code. (Pen. Code § 667(d)(2).) The court can consider both the elements of the out-of-state

crime and the defendant's actual conduct as set forth in the documents from the prior case. (*People v. Woodell* (1998) 17 Cal.4th 448.)

Some juvenile adjudications also count as strikes. The general rule is that a juvenile offense can be used as a strike if the offense (1) is a serious or violent offense under the same rules that apply in adult criminal cases, (2) is listed in Welfare and Institutions Code § 707(b), and (3) the juvenile was 16 or 17 years old at the time of the offense. (Pen. Code § 667(d)(3); *People v. Leng* (1999) 71 Cal.App.4th 1; see also *People v. Nguyen* (2009) 46 Cal.4th 1007 [juvenile offenses may be used as strikes even though there is no right to a jury trial in a juvenile case].) However, there is a special exception – if a 16 or 17 year-old juvenile commits a serious or violent offense that is listed § 707(b) and another offense that is serious or violent but is not listed in § 707(b),then both offenses count as strikes. (*People v. Garcia* (1999) 21 Cal.4th 1.)

A prior felony can be used as a strike even if it has been "expunged." (*People v. Diaz* (1996) 41 Cal.App.4th 1424 [Pen. Code § 1203.4 expungement]; *People v. Daniels* (1996) 51 Cal.App4th 520 [Welf. & Inst. Code § 1772 expungement]; *People v. Laino* (2004) 32 Cal.4th 878 [non-California prior was strike even though it was "expunged" under other state's laws].) On the other hand a count that was dismissed under Penal Code section 1385 cannot be used as a strike. (*People v. Barro* (2001) 93 Cal.App.4th 62.) Likewise, a juvenile adjudication dismissed under Welfare and Institutions Code § 782 cannot be used as a strike. (*People v. Haro* (2013) 221 Cal.App.4th 718.)

A "wobbler" (a crime that may be punished as either a misdemeanor or a felony) that is initially sentenced as a misdemeanor cannot be used as a strike. (Pen. Code § 667(d)(1); *People v. Glee* (2000) 82 Cal.App.4th 99.) A violent or serious crime that is a wobbler counts as a prior strike if it is sentenced as a felony, even if the charge is later reduced to a misdemeanor. (Pen. Code § 667(d)(1); *People v. Franklin* (1997) 57 Cal.App.4th 68.)

Most of the categories of serious and violent felonies are straight-forward. However, there are some offenses where issues may arise. One of the most important is that assault with a deadly weapon under Penal Code § 245(a)(1) is a strike, but the other crime described in that subsection – assault by "means of force likely to produce great bodily injury"– is not a strike offense. (*People v. Rodriguez* (1998) 17 Cal.4th 253*; People v. Williams* (2001) 92 Cal.App.4th 612; *People v. Winters* (2001) 93 Cal.App.4th 273; *People v. Haykel* (2002) 96 Cal.App.4th 146.) Thus, a defendant's § 245(a)(1) offense cannot be used as a strike unless documents establish that the crime qualifies as a strike. Notations in an abstract of judgment that say "Penal Code 245(a)(1)" or "ASLT GBI/DLY WPN" are not enough to prove the prior is a strike. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262.) Similarly, a prior that involved great bodily injury might not count as a strike if there is no proof that the defendant directly caused the injury (*People v. Rodriguez* (1999) 69 Cal.App.4th 341) or that the injury was not inflicted on an accomplice (*People v. Henley* (1999) 72 Cal.App.4th 555). Another rule is that a misdemeanor that was converted to a felony because it was committed on behalf of a gang (per Penal Code § 186.22(d)), does not count as a strike. (*People v. Briceno* (2004) 34 Cal.4th 451, 462.)

A defendant has a right to a jury trial on the prior offense allegations, but the jury decides only if the records presented to prove the prior conviction are true, accurate and establish that the defendant suffered the conviction. The judge determines if the prior qualifies as a strike. (*People v. Epps* (2001) 25 Cal.4th 19; *People v. Kelii* (1999) 21 Cal.4th 452; *People v. McGee*

(2006) 38Cal.4th 682.) Eyewitness testimony cannot be presented, but the court record from the prior conviction can be used to show that the offense was a strike; any document that is considered must be admissible under some exception to the hearsay rule. (See *People v. Guerrero* (1988) 44 Cal.3d 343; *People v. Reed* (1996) 13 Cal.4th 217; *People v. Bartow* (1996) 46 Cal.App.4th 1573, *People v. Henley* (1999) 72 Cal.App.4th 555.) In addition, a defendant has a constitutional right to testify to deny that the prior belongs to him or to explain why it does not qualify as a strike. (*Gill v. Ayers* (9th Cir. 2003) 342 F.3d 911.) If a prior strike allegation is overturned on appeal for lack of sufficient evidence, the District Attorney may retry the allegation. (*Monge v. California* (1998) 524 U.S. 721 [retrial of prior offense allegation is not barred by the constitutional prohibition on double jeopardy].)

Strike priors do not have to be brought and tried separately, so multiple convictions for violent or serious crimes arising from a single case will count as more than one strike. (*People v. Fuhrman* (1997) 16 Cal.4th 930.) A prior offense counts as a strike even if punishment on that offense was stayed pursuant to Penal Code § 654 (which bars multiple punishment for a single act or course of conduct). (*People v. Benson* (1998) 18 Cal.4th 24.) However, if a defendant was induced to plead guilty based entirely or partly on a promise that the plea would result in only one strike, then that promise may be enforced by the courts. (*Davis v. Woodford* (9th Cir. 2006) 446 F.3d 957, 960-963.)

6. What are the Consequences of Having One or More Prior Strike Offenses?

In general, the law requires increased sentences, with reduced opportunities to earn time credits, if the defendant has one or more prior strike convictions.

a. Increased Sentences

- A person with one or more prior strike convictions is not eligible for probation. (Pen. Code § 667(c)(2).)

- A person with one prior strike conviction (a "second-striker") is subject to a doubled sentence upon conviction of any type of felony. (Pen. Code § 667(e)(1).) Both the base term and any consecutive terms are doubled. (*People v. Nguyen* (1999) 21 Cal.4th 197.) If the current felony carries an indeterminate life term, the minimum term is doubled. (Pen Code § 667(e)(1).)

- Under the law before November 7, 2012, a person with two or more prior strike convictions (a "third-striker") was subject to a sentence of at least 25 years to life, even if the current offense was non-serious and non-violent. The minimum life term could be more depending on the nature and number of the new convictions. If the current felony carried an indeterminate life term, the minimum term was tripled. (Former Pen. Code § 667(e)(2).) Under the law on and after November 7, 2012, a person with two or more prior strike convictions is subject to a doubled term under the same rules as for "second-strikers." (Pen Code § 667(e)(2).) A person can be sentenced to a three-strikes term of 25 years to life only if the current offense is serious or violent or the prosecution proves certain enhancements or factors

The circumstances in which a life sentence may be imposed are listed in Penal Code § 667(e)(2)(C). Those circumstances are:

The current felony is:

-- a serious or violent felony under Penal Code §§ 667.5(c) or 1192.7(c);

-- a controlled substance crime involving large quantities of drugs for which an enhancement under Health & Safety Code §§ 11370.4 or 11379.8 is found true or admitted;

-- statutory or spousal rape (Pen. Code §§ 261.5 or 262) or a crime which results in mandatory sex offender registration under Penal Code § 290 *except for* violations of section 266, 285, 286(b)(1) and (e), 288a(b)(1) and (e), 311.11, and 314;

-- a crime during which the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury;

OR

At least one of the prior serious or violent felonies was for:

-- a "sexually violent offense" listed in Welf. & Inst. Code § 6600; these are serious sex offenses committed by force, duress, violence, menace, fear, or threat of retaliation;

-- oral copulation, sodomy, or sexual penetration (Pen. Code § 288a, 286, 289) with a child under 14 and more than 10 years younger than the defendant;

-- a lewd or lascivious act involving a child under 14 (Pen. Code § 288);

-- murder, attempted murder, vehicular manslaughter or attempted vehicular manslaughter (Pen. Code § 187-191) or solicitation to commit murder (Pen. Code § 653(f);

-- assault with a machine gun on a police officer or firefighter (Pen. Code § 245(d)(3));

-- possession of a weapon of mass destruction (Pen. Code § 11418); or

-- any serious or violent felony punishable by life imprisonment or death.

- The three strikes law requires that consecutive sentences be imposed in some circumstances. A person with one or more prior strikes must receive consecutive sentences on each of the new offenses unless the offenses were committed on the same occasion or arose from the same set of operative facts. The phrase 'committed on the same occasion' refers to a close temporal and spatial proximity, although it may involve other factors as well. (Pen. Code § 667(c)(6); *People v. Deloza* (1998) 18 Cal.4th 585; *People v. Hendrix* (2000) 24 Cal.4th 219; see also *People v. Caspar* (2004) 33 Cal.4th 38 [law required consecutive sentences for all current felony convictions even though court dismissed strike allegations as to all but one count].) Also, consecutive sentences must be imposed if there are current convictions for more than one serious or violent felony.

(Pen. Code § 667(c)(7).) In addition, a two-or-three strikes sentence must be consecutive to any other sentence the defendant is already serving. (Pen. Code § 667(c)(8).)

- Conduct enhancements and other prior conviction enhancements are not doubled or tripled. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 424.)

- The same prior offense can be used both as a strike and to impose one 5-year enhancement under Penal Code§ 667(a), if the current offense is a serious felony. (*People v. Ramirez* (1995) 33 Cal.App.4th 559; *People v. Dotson* (1997) 16 Cal.4th 547; *People v. Sasser* (2015) 61 Cal.4th 1.) The same prior offense can be used as both a strike and to impose a 1-year enhancement for a prior prison term under Penal Code § 667.5(b). (*People v. Cressy* (1996) 47 Cal.App.4th 981.) Likewise, the same prior can be a strike and an element of the current offense (such as felon on possession of a firearm, petty theft with a prior, or failure to register as a sex offender). (*People v. Nobleton* (1995) 38 Cal.App.4th 76; *People v. White Eagle* (1996) 48 Cal.App.4th 1511; *People v. Garcia* (2001) 25 Cal.4th 744.)

b. Reduced Ability to Earn Prison Conduct Credits

- The two strikes law provides that a person serving a doubled term can earn no more than only 20 percent prison conduct credit. (Pen. Code § 667(c)(5).) (For overcrowding-reduction measures that currently allow some second-strikers to earn more credits or get early parole consideration, see section 3, above.) However, if the defendant's current conviction is for a violent felony, prison conduct credits will be capped at 15%. (Pen. Code § 2933.2.) If the current conviction is for murder, a defendant may not earn any prison conduct credit. (Pen. Code § 2933.1.)

- A "third-striker" who is serving an indeterminate life term earns no good conduct or worktime credits in prison. (*In re Cervera* (2001) 24 Cal.4th 1073.) Prior to sentencing, a third striker serving an indeterminate life term can earn conduct credits at the same rate as people serving doubled terms (see preceding paragraph).

7. If I Have Prior Strikes, Does a Judge Have the Power to Give me a Lesser Sentence?

There are several ways in which a judge can exercise sentencing discretion and decide whether or not to give a defendant less than a full three strikes term.

a. Striking a Current Offense or Enhancement

Even in a two or three strikes case, a judge can reduce a defendant's punishment by striking the punishment for one of the current counts in the interest of justice under Penal Code § 1385. Also, courts can strike the punishment for some types of conduct or recidivist enhancements; this power depends on whether or not the statute pertaining to the enhancement specifically takes away the general power to strike set forth in § 1385. (See generally, *People v. Bradley* (1998) 64 Cal.App.4th 386; *People v. Herrera* (1998) 67 Cal.App.4th 987.) For example, the laws state that a judge cannot strike a 5-year enhancement for a prior serious felony (Pen. Code § 667(a); see Pen. Code § 1385(b)) or some types of firearm enhancements (Pen. Code §§ 12022.5 and 12022.53). However, many other types of enhancements can be stricken.

Also, if a defendant has a current drug offense, a judge may be able to grant Deferred Entry of Judgment even if the defendant has prior strikes; however, a defendant who fails to perform satisfactorily in the treatment program may end up facing sentencing on the underlying drug charge and strikes. (*People v. Davis* (2000) 79 Cal.App.4th 251.) Also, some defendants with prior strikes and current charges of drug possession or transportation for personal use may be eligible for probation and treatment under Proposition 36. (Pen. Code § 1210.1(a) and (b).)

b. Reducing a Wobbler Offense to a Misdemeanor

Where a crime is a "wobbler" offense, meaning that it can be punished either as a misdemeanor or a felony, a judge has the power to declare the crime to be a misdemeanor. (Pen. Code § 17(b).) Courts retain this power even where one or more strike priors have been proven; a court's decision will generally be upheld on appeal unless it was irrational or arbitrary or the court relied on considerations not pertinent to the specific defendant being sentenced (such as a general dislike of the three strikes law). (*People v. Alvarez* (1997) 14 Cal.4th 968.) If a wobbler offense is sentenced as a misdemeanor, the two or three strikes law will not apply to that count because that law applies only when there is a current felony conviction.

c. Striking One or More Prior Offenses

The three strikes law did not take away a judge's power under Penal Code § 1385 to strike or dismiss prior serious or violent felony convictions (meaning they will not be used to increase the sentence) when the judge believes that doing so would be "in the interests of justice." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504; see also Pen. Code § 667(f)(2), eff. 11/7/2012.)

When deciding whether a prior felony should be stricken in the interest of justice, a court must decide whether a defendant falls outside the "spirit" of the three strikes law. Factors to be considered include the nature and circumstances of the present felonies and prior serious and/or violent felony convictions, and the defendant's background, character, and prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Garcia* (1999) 20 Cal.4th 490.) Relevant facts include whether the priors arise from a single period of criminal behavior, whether the defendant cooperated with the police, and whether the defendant's history does not include any actual violence. (*People v. Garcia* (1999) 20 Cal.4th 490, 503.) Priors may be stricken where they are old, the current offense is minor and non-violent, and the defendant has a stable lifestyle. (*See In re Saldana* (1997) 57 Cal.App.4th 620, 624; *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1248; see also *People v. Cluff* (2001) 87 Cal.App.4th 991.)

If multiple prior strike convictions arise from a single act against a single victim, one of the priors must be stricken. (*People v. Vargas* (2014) 59 Cal.4th 635; see also *In re Alejandro B.* (2015) 236 Cal.App.4th 705 [multiple convictions should be stricken when they are charged as prior offenses in a three-strikes case, not at the original sentencing the current convictions].) However, if multiple prior strike convictions arise from a single act that causes injury to multiple victims, the court does not have to strike any of the priors. (*People v. Rusconi* (2015) 236 Cal.App.4th 273 [pet. for review pending as of 7/15/15.) Also, a court does not have to strike a prior when multiple priors are very closely connected but not based on the same exact act. (See *People v. Finney* (2012) 204 Cal.App.4th 1034.)

The judge's decision will be upheld on appeal so long as it is rational, not arbitrary, and is guided by the applicable legal principles and relevant facts. (See *People v. Benson* (1998) 18 Cal.4th 24, fn. 8; *People v. Carmony* (2004) 33 Cal.4th 367; see also *People v. Thimmes* (2006) 41 Cal.App.4th 1207 [remanding for new *Romero* hearing where trial court had relied on unsupported presumption that the defendant had been warned about consequences when he entered prior guilty plea].) However, in some circumstances, it may be an abuse of a discretion for a judge to refuse to dismiss a strike prior. (*People v. Cluff* (2001) 87 Cal.App.4th 991 [abuse of discretion to refuse to strike prior where current offense was technical failure to update sex offender registration, priors were from a single old case, and defendant had since been law-abiding]; *People v. Burgos* (2004) 117 Cal.App.4th 1209 [abuse of discretion to refuse to strike prior where two priors were closely connected].) In other cases, it may be an abuse of discretion to strike a prior if the defendant's current offense and prior record are so bad that the defendant falls within the "spirit" of the three strikes law. (*People v. Williams* (1998) 17 Cal.4th 148.)

8. Is a Three Strikes Sentence Ever Cruel and Unusual Punishment?

The United States Constitution's Eighth Amendment forbids punishment that is cruel or unusual. Many courts have found three strikes sentences to be constitutional, even where the defendant's current offense was very minor and the priors were old, from one brief crime spree, and/or non-violent. In such cases, the courts have decided that life sentences were not "grossly disproportionate" because they were based on histories of repeated offenses and because California lawmakers had a reasonable basis for believing the three strikes law would protect public safety and deter recidivism. (See, e.g. *Lockyer v. Andrade* (2003) 538 U.S. 63 [current crimes were petty theft with priors and strikes were three burglaries]; *Ewing v. California* (2003) 538 U.S. 11 [current crime was grand theft and strikes were three burglaries and a robbery committed during short time period]; *People v. Cooper* (1996) 43 Cal.App.4th 815, 820 [ex-felon in possession of handgun with two prior robberies over 10 years old]; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137; *Rios v. Garcia,* 390 F.3d 1082, 1086 (9th Cir.2004) [petty theft with prior and two prior robbery convictions]; *Taylor v. Lewis* (2006) 460 F.3d 1093; 460 F.3d at 1101-02 [possession of cocaine with prior offenses involving violence]; *Nunes v. Ramirez-Palmer*, 485 F.3d 432, 439 (9th Cir.2007) [petty theft with prior and defendant had extensive and serious record]; *People v. Nichols* (2009) 176 Cal.App.4th 428, 435-436 [failure to register as a sex offender that made defendant unavailable for police surveillance]; (*In re Coley* (2012) 55 Cal.4th 524 [sex offender intentionally and knowingly refused to comply with registration requirements].)

Nonetheless, a few prisoners have had three strikes sentences overturned by the courts. In *Banyard v. Duncan* (C.D. Cal. 2004) 342 F.Supp.2d 865, a federal district court overturned a three-strikes life sentence for possessing a single-use amount of cocaine base with prior convictions for a factually non-violent "robbery" and an assault stemming from a mutual fight. In *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, 772, a prisoner convinced the Ninth Circuit Court of Appeals that it was cruel and unusual punishment to sentence him to 25-years to life sentence for petty theft with a prior where his two prior robbery strikes were non-violent shopliftings. In *Reyes v. Brown* (9th Cir. 2005) 399 F.3d 964, the same court sent a case back for further hearing, indicating that a life sentence might be unconstitutional for perjury (making a mis-representation on a DMV application) if the defendant's two old prior strike offenses did not involve violence. Also, in *People v. Carmony* (2005) 127 Cal.App.4th 1066, a state court of appeal held that a life sentence for a technical failure to update a sex offender registration was

cruel and unusual punishment and the defendant's strike offenses were old and unrelated to the current offense. The Ninth Circuit Court of Appeals also found that a life sentence for a defendant's technical failure to update his registration was cruel and unusual, even though the defendant had an extensive criminal history. (*Gonzalez v. Duncan* (9th Cir. 2008) 551 F.3d 875.)

9. How Can I Avoid or Challenge a Three Strikes Sentence?

Ways to avoid or challenge a three strikes sentence may include:

- at sentencing, asking the court to strike one or more of the current charges or prior offenses and/or filing a motion asserting that a three strikes sentence would be cruel and unusual punishment. If you are currently facing criminal charges and a three-strikes sentence, you should discuss this with your defense attorney.

- challenging the sentence in a direct appeal. If you are currently appealing your criminal case, you should discuss these issues with your appellate attorney.

- challenging the sentence in a petition for writ of habeas corpus filed in state court, if your issue involves evidence not presented in the original trial court proceeding or for some other reason was not raised on direct appeal.

- filing a petition to reduce a current or prior offense to a misdemeanor per Proposition 47 (see section 1, above)

- filing a (belated) petition for resentencing under Proposition 36 (see section 4 above).

- after the issue has been raised in all levels of the California state courts, challenging the sentence in a petition for writ of habeas corpus filed in federal court.

Stanford Law School has a Three Strikes Project. The Project represents defendants charged under the three strikes law with minor, non-violent felonies at all stages of the criminal process: at trial, on appeal, and in state and federal habeas corpus proceedings. Prisoners who are interested in the Project's services should write to request a questionnaire; do not send any briefs, transcripts or other documents unless requested to do so. The address is:

Stanford Three Strikes Project
Re: Potential Client
Mills Legal Clinic at Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305-8610.

In addition, free self-help packets on direct appeals, state habeas petitions or federal habeas petitions are available upon request from The Prison Law Office or on the Resources page at prisonlaw.com. There is also information on these types of legal actions in *The California State Prisoners Handbook* (Fourth Edition 2008 and 2014 Supplement). The *Handbook* should be available in the prison law libraries.