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**INFORMATION RE:
CALIFORNIA'S TWO AND THREE STRIKES LAW**

Updated October 2017

This letter is sent in reply to your request for information about California's two strikes and 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. We hope that this letter helps answer your questions.

This letter discusses the criminal sentencing laws for second strike and third strike cases. It also discusses some reforms to the laws that allow some second and third strikes to seek resentencing to lesser terms. The letter also addresses some early parole processes by which some second-strikes and third-strikers can get released from prison before they have served their full terms.

Please be aware that there have been *many* court cases interpreting and applying the two strikes and three strikes law and the reforms to that law enacted by Proposition 36 in 2012. This letter contains only a general summary of the main laws governing second and third strike cases.

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1. What Counts as a Prior Strike?

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 person was convicted (even if not yet sentenced) in that case before they committed a 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; *People v. Stiller* (2016) 2 Cal.App.5th 1014.) 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.) Also, there is no “washout” period for strikes. This means a prior conviction counts as a strike no matter how old it is. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1514; Pen. Code § 1170.12(a)(3).)

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; *People v. Nguyen* (2009) 46 Cal.4th 1007; *People v. Arias* (2015) 240 Cal.App.4th 161) However, if a 16 or 17 year-old commits a serious or violent juvenile 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.)

Prior serious and violent felony convictions from courts 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).)

A prior offense can be a strike regardless of whether the conviction was by a jury trial or a guilty or no contest plea. However, the validity of a guilty or no contest 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.) For example, a person might argue that their rights under *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tabl* (1969) 1 Cal.3d 122 were violated because they did not know about their constitutional rights to a jury trial, to avoid self-incrimination, to confront the witnesses against them, and to present evidence, and did not intelligently waive those rights. Note that a person can challenge priors from other states or the federal courts on *Boykin/Tabl* 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 person may also be able to challenge use of a prior crime as a strike if the court that took the plea misadvised them by telling them their plea was not for a strike offense. (See *Dubrin v. California* (9th Cir. 2013) 720 F.3d 1095.)

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.) But a violent or serious offense that is a wobbler counts as a prior strike if it is sentenced as a felony, even if the charge is for a juvenile adjudication and is later reduced to a misdemeanor upon discharge from the DJJ. (Pen. Code § 667(d)(1); *People v. Franklin* (1997) 57 Cal.App.4th 68.)

A prior felony can be used as a strike even if it has been “expunged.” (*People v. Diaz* (1996) 41 Cal.App.4th 1424; *People v. Daniels* (1996) 51 Cal.App.4th 520; *People v. Laino* (2004) 32 Cal.4th 878.) On the other hand a count that was dismissed under Penal Code § 1385 or Welfare and Institutions Code § 782 cannot be used as a strike. (*People v. Barro* (2001) 93 Cal.App.4th 62; *People v. Haro* (2013) 221 Cal.App.4th 718.)

Most of the categories of serious and violent felonies are straight-forward. However, there are some offenses where it may be harder to tell if an offense was serious or violent. For example, 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. (*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 § 245(a)(1) offense cannot be used as a strike unless court documents establish that the crime qualifies as 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 person 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.)

Multiple convictions for violent or serious crimes arising from a single case usually will count as multiple strikes. (*People v. Fuhrman* (1997) 16 Cal.4th 930.) In some circumstances, a prior offense counts as a strike even if punishment on that offense was stayed pursuant to Penal Code § 654. (*People v. Benson* (1998) 18 Cal.4th 24.) However, if multiple prior strike convictions arose from a single act against a single victim, only one of the convictions can be counted as a strike. (*People v. Vargas* (2014) 59 Cal.4th 635.) Also, if a person pled guilty due to a promise that the plea would result in only one strike, that promise may be enforced. (*Davis v. Woodford* (9th Cir. 2006) 446 F.3d 957, 960-963.)

A person has a right to a jury trial on the prior offense allegations, but the jury decides only if the prosecution has shown that the person suffered the conviction. Up until recently, the courts have held that a judge can and should determine 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) 38 Cal.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. Woodell* (1998) 17 Cal.4th 448; *People v. Reed* (1996) 13 Cal.4th 217.) A person has a constitutional right to testify to deny that the prior belongs to them or explain why it does not qualify as a strike. (*Gill v. Ayers* (9th Cir. 2003) 342 F.3d 911.) However, recently some courts have held that allowing judges to make new findings beyond the fact that the prior conviction occurred violates the Sixth Amendment right to jury trial. (*People v. Wilson* (2013) 219 Cal.App.4th 500; *People v. Saez* (2015) 237 Cal.App.4th 1177; *People v. Marin* (2015) 240 Cal.App.4th 1344.) The California Supreme Court is currently reviewing whether the Sixth Amendment right to a jury trial is violated by allowing a judge to make factual findings about whether a prior conviction is a strike. (*People v. Gallardo*, No. S231260.)

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.)

2. What are the Consequences of Having One or More Prior Strikes?

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

a. Increased Sentence

The charging documents in the current case must give a person notice that they may be subject to a two or three strikes sentence. (Penal Code § 667(c); *People v. Blackburn* (1999) 72 Cal.App.4th 1520; *People v. Mancebo* (2002) 27 Cal.4th 735.)

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

Under both past and current versions of the law, a person with one prior strike conviction (a “second striker”) is subject to a doubled sentence upon a new conviction of any type of felony. (Pen. Code § 667(e)(1).) 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).) Conduct enhancements and other prior conviction enhancements are not doubled. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 424.)

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

Under the law on and after November 7, 2012, many people with two or more prior strike convictions are 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 their 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 that is subject to a Health & Safety Code §§ 11370.4 or 11379.8 enhancement
- 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 Penal Code §§ 266, 285, 286(b)(1) and (e), 288a(b)(1) and (e), 311.11, and 314; or
- a crime during which the person 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.

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 closeness, 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 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 person is already serving. (Pen. Code § 667(c)(8).)

The same prior offense can be used both as a strike and to impose a 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 and three strikes law does not limit the amount of presentence credits a person can earn. However, if the person’s current conviction is for a violent felony, presentence conduct credits are capped at 15%. (Pen. Code § 2933.5.) If a person’s current conviction is for murder, they cannot earn any presentence conduct credit. (Pen. Code § 2933.1.)

After a second or third striker is sentenced and sent to prison, the law limits the amount of good conduct and programming credits they can earn. However, the amounts of credits some second and third strikers can earn have been raised due to recent court orders and Proposition 57. Generally, the amount of credits a person is eligible to earn depends on whether they are serving a two strikes or three strikes term, whether their current crime is a violent felony, and when they serve their time. Note that earning credits is contingent on good behavior and programming; prisoners who are in Workgroup "C" status for failure to program or Workgroup "D" due to placement in segregation do not earn credits, and credits that were previously earned can be forfeited if a prisoner commits prison rule violations.

For people serving second strike terms:

- ◆ Prior to February 10, 2014, the maximum amount of prison conduct credits any second striker could earn was 20% credit. (Pen. Code § 667(c)(5).) If the person's current conviction was for a violent felony, presentence conduct credits were capped even lower, at 15%. (Pen. Code § 2933.5.) If the current conviction was for murder, the person could not earn any presentence conduct credit. (Pen. Code § 2933.1.)
- ◆ For time served on or after of February 10, 2014, a second striker whose current convictions are not violent felonies and who is not required to register as a sex offender is eligible to earn 33.3% credits (one day credit for two days served).
- ◆ For time served on or after May 1, 2017, a second striker whose current convictions are not violent felonies, including a non-violent second striker who is required to register as a sex offender, is eligible to earn 33.3% credits (one day credit for two days served). A non-violent second striker who is assigned to a fire camp or as a firefighter, or who is in Minimum A or Minimum B custody, is eligible to earn "66.6%" credits (two days credit for one day served). (15 CCR § 3043.2.)

For people serving third strike terms:

- ◆ Prior to May 1, 2017, a third-striker who was serving an indeterminate life term could not earn any good conduct or programming credits in prison. (*In re Cervera* (2001) 24 Cal.4th 1073.)
- ◆ For time served on and after May 1, 2017, a third striker lifer whose current offense is not a violent felony can earn 33.3% good conduct credit. A third striker whose current offense is a violent felony (including murder) can earn 20% good conduct credit. (15 CCR § 3043.2.)

Also, as of February 10, 2014, non-violent, non-sex-offender second strikers became eligible to earn up to six weeks of "Milestone" credits per year for completing approved programs. Effective August 1, 2017, all second and third strikers are eligible to earn additional credits for good programming. These credits include Milestone Completion Credits of up to 12 weeks per year for achieving objectives in approved programs, Rehabilitative Achievement Credits of up to four weeks per year for participation in self-help and volunteer public service activities, and Education Merit Credits of 80 days for earning a high school diploma/GED or 180 days for earning a higher education

degree or offender mentor certification (Education Merit Credits will be applied retroactively and cannot be taken away due to rule violations). (15 CCR §§3043.3-3043.5.)

3. If I Have Prior Strikes, Can a Judge Give me a Lesser Sentence?

There are several ways in which a judge can exercise sentencing discretion and decide to give a person less than a full two or three strikes term.

a. Striking a Current Offense or Enhancement

In a two or three strikes case, a judge can reduce a person'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).) Up until recently, judges also could not strike firearm use enhancements (Pen. Code §§ 12022.5 and 12022.53). However, starting January 1, 2017, judges also will have the power to strike firearm use enhancements under Penal Code § 1385. (Pen. Code §§ 12022.5 and 12022.53, as amended by SB 620).

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 have this power even if one or more strike priors have been proven. A court's decision will generally be upheld unless it was irrational or arbitrary or the court relied on considerations not relevant to the specific case (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 those convictions are not used to increase the sentence) when the judge believes that less severe punishment 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).)

When deciding whether a prior felony should be stricken, a court must decide whether the person 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 person'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 person cooperated with the police, and whether the person's history does not include any actual violence. (*People v. Garcia* (1999) 20 Cal.4th 490, 503.) Favorable facts include that the priors are old, the current offense is minor and non-violent, and the person 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.) 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.) Also, a court does not have to strike a prior when multiple priors are connected but not based on the same exact act. (See *People v. Finney* (2012) 204 Cal.App.4th 1034.)

The judge's decision about whether to strike priors 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.) 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 person had since been law-abiding]; *People v. Burgos* (2004) 117 Cal.App.4th 1209 [abuse of discretion to refuse to strike a prior where two priors were closely connected].) It may be an abuse of discretion to strike a prior if the current offense and prior record are so bad that the person falls within the "spirit" of the three strikes law. (*People v. Williams* (1998) 17 Cal.4th 148.)

d. Alternative Disposition in Some Drug Cases

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

4. 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 that three strikes sentences do not violate the Eighth Amendment, even where the person'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; *Ewing v. California* (2003) 538 U.S. 11; *People v. Cooper* (1996) 43 Cal.App.4th 815; *People v. Cartwright* (1995) 39 Cal.App.4th 1123; *Rios v. Garcia* (9th Cir. 2004) 390 F.3d 1082; *Taylor v. Lewis* (2006) 460 F.3d 1093; *Nunes v. Ramirez-Palmer* (9th Cir.2007) 485 F.3d 432; *People v. Nichols* (2009) 176 Cal.App.4th 428; (*In re Coley* (2012) 55 Cal.4th 524.)

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, a federal appellate court held that it was cruel and unusual punishment to sentence

a prisoner 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, that same court sent a case back for further hearing, indicating that a life sentence might be unconstitutional for perjury (making a misrepresentation on a DMV application) if the person'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 where the strike offenses were old and unrelated to the current offense. A federal appellate court also found that a life sentence for technical failure to update a sex offender registration was cruel and unusual, even though the person had an extensive criminal history. (*Gonzalez v. Duncan* (9th Cir. 2008) 551 F.3d 875.)

5. Can I Get Resentenced to a Lower Term?

There are three recent Propositions that reformed sentencing laws in ways that give some second and third strike prisoners an opportunity to ask a court to resentence them to lower terms. These are Propositions 36, Proposition 47, and Proposition 64. There has been a lot of litigation about Propositions 36 and 47; this letter discusses only a few main cases.

a. 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 2a, above.

Under Proposition 36, some people who were sentenced to life terms under the old law could ask the courts to reduce their sentences. The resentencing law is set forth in Penal Code § 1170.126. To get resentenced, a prisoner had to file a petition in the superior court that imposed the three strikes sentence and the court had to decide that (a) the prisoner was eligible for resentencing and (b) resentencing would not pose an unreasonable risk of danger to public safety. Prisoners who were sentenced prior to Proposition 36 had to go through this process and were subject to the same criteria even if their cases were not yet final when Proposition 36 went into effect. (*People v. Conley* (2016) 63 Cal.4th 646.) The deadline for filing a Proposition 36 petition ran out on November 6, 2014; at this late date, a court can consider a petition filed only if the prisoner shows good cause for not filing a petition earlier.

In a resentencing proceeding, the court must first determine that the prisoner is eligible, meaning that their current or prior offenses would not subject them to a life sentence under the current law. A prisoner who has multiple three strikes convictions, some of which are ineligible for resentencing, can be considered for resentencing on any of the eligible counts. (*People v. Johnson* (2015) 61 Cal.4th 674.) 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* (2015) 61 Cal.4th 674.) A court does not have the power to strike a disqualifying prior conviction in the interests of justice. (*People v. Brown* (2014) 230 Cal.App.4th 1502.) In determining eligibility, courts are allowed to make new findings of fact relying on any part of the record of conviction. (*People v. Osuna* (2014) 225 Cal.App.4th 1020; see also *People v. Blakeley* (2014) 225 Cal.App.4th 1042 [police reports and post-conviction statements to probation officer not part of record of conviction].) A court can rely on facts connected to counts dismissed as part of a plea bargain, but only if those facts also underlie a count

to which the person pleaded guilty. (*People v. Estrada* (2017) 3 Cal.5th 661.) Some courts have held that the prosecution must prove ineligibility beyond a reasonable doubt. (*People v. Arevalo* (2016) 244 Cal.App.4th 836.) Others have held that ineligibility need only be shown by a preponderance of the evidence. (*People v. Osuna* (2014) 225 Cal.App.4th 1020.) The California Supreme Court is reviewing the issue of what burden of proof applies to ineligibility. (*People v. Frierson*, No. S236728.)

If a prisoner is eligible, the court must decide whether resentencing to a lesser term would pose an “unreasonable risk” of danger to public safety. The court may consider the prisoner’s criminal history, the prisoner’s disciplinary record and record of rehabilitation while incarcerated, and any other evidence the court decides is relevant to public safety concerns. The court does *not* have to find that there is an unreasonable risk that the person will commit a “super-strike” crime if released (which is the standard applied in Proposition 47 resentencing cases, see section 5.b, below). (*People v. Valencia* (2017) 3 Cal.5th 347.) The prosecution must prove dangerousness by a preponderance of the evidence. (*People v. Kaulick* (2013) 215 Cal.App.4th 1279.)

If the court grants the petition, it will re-sentence the prisoner to a second strike term under the current law. However, the court can reconsider all of the sentencing components and can impose enhancements that had previously been stricken. (*People v. Garner* (2016) 244 Cal.App.4th 1113.) The court cannot impose a longer total term than the original sentence. (See *People v. Bean* (1989) 213 Cal.App.3d 639.) Every prisoner who is granted re-sentencing under Proposition 36 must serve a period of parole or post-release community supervision upon release, **without any credits for excess time served in prison; this applies even if the time the prisoner has already served is more than the length of the new term.** (*People v. Espinoza* (2014) 226 Cal.App.4th 635; *People v. Tubbs* (2014) 230 Cal.App.4th 578; *People v. Superior Court (Rangel)* (2016) 4 Cal.App.5th 410.)

If the petition is denied, the prisoner can appeal. (*Teal v. Superior Court* (2014) 60 Cal.4th 595.) The California Supreme Court is considering how much a court of appeal must defer to a trial court’s eligibility or ineligibility findings. (*People v. Perez*, No. S238354.)

Local public defenders offices should be able to provide forms, information, or assistance for Proposition 36 petitions.

b. Proposition 47

In 2014, Proposition 47 changed some felonies or “wobblers” (crimes that can be punished as either felonies or misdemeanors) into 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 are still felonies only if the person has a prior conviction for a “super-strike” crime or for one of many types of sex crimes.

People 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, 2022 to file petitions requesting reduction pursuant to Proposition 47, unless they can show good cause for filing a petition after the deadline. The laws about resentencing petitions and proceedings are in Penal Code § 1170.18

A second-striker or third-striker can seek resentencing if their current crime is for one of the crimes affected by Proposition 47, even if they are ineligible for or were denied Proposition 36 resentencing. When a person is still serving the sentence for the Proposition 47 crime, the court has

the option of keeping the conviction a felony if resentencing would pose an unreasonable risk of danger to public safety. However, an unreasonable risk of danger under Proposition 47 is limited to an unreasonable risk that the person will commit a “super-strike” crime. If the court grants resentencing, the commitment offense is reduced to a misdemeanor and the person cannot be sentenced to a two- or three-strikes term for that offense.

If a person has already fully served the sentence for a prior crime affected by Proposition 47, the person can petition the court to re-designate the prior crime as a misdemeanor. The court must reduce the crime without any consideration of danger to public safety. Some second-strikers’ and third-strikers’ prior non-strike felonies may be eligible for reduction. Although this won’t affect any prior strikes, having fewer prior felonies may be helpful for any future sentencing or parole suitability proceedings. Also, reducing a prior non-strike felony to a misdemeanor might affect various types of enhancements that are based on that prior.

Local public defenders offices can provide forms, information, or assistance for Proposition 47 petitions. Californians for Safety and Justice has very good Proposition 47 resources on its website at www.myprop47.org, including links to the specific forms and processes used in some counties and contact information for local courts and attorneys.

c. Proposition 64

In November 2016, Proposition 64 legalized possession and sale of small amounts of marijuana and concentrated cannabis for nonmedical use by adults over the age of 21 (this does not apply to prisoners or jail inmates) and reduced many marijuana and concentrated cannabis crimes and juvenile offenses from felonies to misdemeanors or infractions. Some crimes for planting, harvesting, processing, possession for sale, transportation, importation, gifts, and sales remain felonies; generally, felony punishment applies to these crimes if a person has one, two, or more prior convictions for the same type of offense, for any offense that requires sex offender registration, for any “super strike” offense as defined in the current Three Strikes Law, or in a few other circumstances. Proposition 64 does not change the penalties for driving a vehicle while under the influence of marijuana. The new laws are set forth in Health & Safety Code §§ 11357-11362.3.

People who were convicted and sentenced for drug felonies for violating Health & Safety Code §§ 11357, 11358, 11359, or 1160 under the old laws can ask to have their convictions reduced to misdemeanors or vacated entirely in accord with the new laws. This applies to second-strikers and third-strikers whose current offense is one of the listed drug crimes. To start the process, the person must file a petition in the court in which the conviction occurred. There is no deadline for filing a petition. The resentencing rules are in Health & Safety Code § 11631.8.

A prisoner can petition for Proposition 64 re-sentencing if they are serving a felony sentence for activities that are now legal or are only a misdemeanor or infraction. If the prisoner is eligible, the court may still deny the petition if resentencing would pose an unreasonable risk of danger to public safety. An unreasonable risk of danger to public safety means an unreasonable risk that the person will commit a “super strike” felony. A person who is resentenced will get credit for time already served, but will be subject to either parole, PRCS, or probation for up to one year following release unless the court decides not to impose a supervision requirement.

A person who has already completed their sentence for marijuana activities that are now legal or subject to lesser penalties can petition to have the old conviction dismissed or re-designated as a misdemeanor or infraction. Second strikers and third strikers can get their eligible prior non-strike felonies reduced or dismissed. Although this won't affect any prior strikes, having fewer prior felonies may be helpful for future sentencing or parole suitability proceedings.

Local public defenders offices can provide forms, information, or assistance for Proposition 64 petitions. There is also a helpful guide and forms on the website of the Drug Policy Alliance at www.drugpolicy.org. Petition forms (CR-400 & CR-401) are on the California Courts website at www.courts.ca.gov.

6. Can I be Considered for Early Parole?

There are at least two processes through which some second-strikers and third-strikers may be considered by the Board of Parole Hearings (BPH) for discretionary early release on parole.

First, *Nonviolent Offender Parole (Proposition 57)* provides for early parole consideration for some “determinately sentenced nonviolent offenders.” Lifers (including three-strikers) currently are *not* eligible; there may be legal challenges to this policy. An eligible prisoner will be considered for parole when they have served the “full term” for their “primary offense,” minus pre-sentence and pre-prison credits (but not CDCR good conduct or programming credits). This appears to mean that an eligible prisoner serving a doubled term under the two-strikes law (which is an alternative sentencing law) for a nonviolent offense should be considered for parole after serving just the ordinary base term (without doubling or any enhancements). To be eligible, a prisoner must be serving a sentence for a non-violent crime and must not have any past or current conviction for an offense that requires sex offender registration. In addition, the prisoner must have good behavior in prison and their Nonviolent Parole Eligible Date must be at least 180 days before their regular Earliest Possible Release Date (EPRD). If a prisoner is eligible, the BPH will consider whether releasing the prisoner would pose an “unreasonable risk of violence to the community.” (15 CCR §§ 2449.1-2449.5, 3490-3493.)

Second, some very ill second and third strikers may be released from prison on *Medical Parole* (unless they were convicted of first-degree murder of a peace officer). To be eligible for medical parole, a prisoner must be permanently incapacitated with a medical condition that renders them permanently unable to perform activities of basic daily living and in need of 24-hour care; the incapacitation must not have existed at the time of sentencing. If a prisoner meets this requirement, the case will then be sent to the BPH to determine whether the prisoner’s release would “reasonably” pose a threat to public safety. (Penal Code § 3550(b); 15 CCR §§ 3359.1-3359.5; BPH, *Memorandum: Expanded Medical Parole*, dated June 16, 2014.)

There have been changing rules about whether second and third strikers may be eligible for the *Elderly Parole Program*. Generally, prisoners with sentences of life with the possibility of parole or long-determinate sentences are eligible for elderly parole consideration if they are age 60 years or older and have been incarcerated 25 years or more on their current sentence. If a prisoner is eligible, the BPH will consider whether their release would pose an unreasonable risk of danger to public safety, considering how age, time served, and any diminished physical condition reduce the risk for future violence. Under a court order that went into effect in 2015, second-strikers and third-strikers were not excluded, and could be considered for elderly prisoner parole. (See BPH, *Memorandum: Elderly Parole Program*, dated June 16, 2014.) However, effective January 1, 2018, a new law states that second and

third strikers (and anyone convicted of killing a peace officer) are *not* eligible. (Penal Code § 3055.) It is not yet known how the difference between the court order and the new law will be resolved.

Unfortunately, second and third strikers are *not* eligible for early release under the *Youth Offender Parole* program for prisoners who committed their crimes when they were less than 25 years old. (Penal Code § 3051.)

More information about the eligibility criteria and processes for the various types of early parole is available on request from the Prison Law Office or on the Resources page at prisonlaw.com.

7. How Can I Challenge a Two Strikes or Three Strikes Sentence?

Ways to challenge a three strikes sentence may include:

- ◆ challenging the sentence in a direct appeal. If you are currently appealing your criminal case, you should discuss these issues with your appellate attorney. You can also file a direct appeal from the denial of a Proposition 36, 47 or 64 resentencing petition.
- ◆ 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. You can also use a state court petition for writ of habeas corpus to challenge the denial of Nonviolent Offender Parole, Elderly Prisoner Parole, or Medical Parole; in some situations, you will need to first pursue some type of CDCR or BPH administrative appeal before filing a habeas petition.
- ◆ after an 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 people 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 administrative appeals, direct appeals, state habeas petitions, and federal habeas petitions are available upon request from The Prison Law Office or on the Resources page at www.prisonlaw.com. There is also information on these types of legal actions in *The California State Prisoners Handbook*. The *Handbook* should be available in the prison law libraries.