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DEERING'S CALIFORNIA CODES ANNOTATED
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*** THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED ***
THROUGH 2007-2008 THIRD EXTRAORDINARY SESSION CH. 6 AND
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PENAL CODE
Part 1. Of Crimes and Punishments
Title 16. General Provisions

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Pen Code § 667 (2007)

§ 667. Habitual criminals; Enhancement; Exceptions

(a)

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

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

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

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

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

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

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

Cal Pen Code § 667

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

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

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

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

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

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

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

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

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

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

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

(B) The stay of execution of sentence.

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

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

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

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

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

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

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

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

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

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

(2)

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

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

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

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

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

(f)

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

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

(g) Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to

strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (f).

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

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

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

HISTORY:

Initiative adopted June 8, 1982. Amended Stats 1986 ch 85 § 1.5, effective May 6, 1986; Stats 1989 ch 1043 § 1; Stats 1994 ch 12 § 1 (AB 971), effective March 7, 1994.

NOTES:

Former Sections:

Former § 667, similar to present *Pen C* § 666, was added Stats 1909 ch 236 § 1, amended Stats 1931 ch 481 § 3, Stats 1935 ch 754 § 1, Stats 1941 ch 106 § 11, Stats 1963 ch 1905 § 1, and repealed Stats 1976 ch 1139 § 267, operative July 1, 1977.

Former § 667, similar to present *Pen C* § 666, was enacted Stats 1872, and repealed Stats 1903 ch 96 § 1.

Amendments:

1986 Amendment:

Added "In compliance with subdivision (b) of Section 1385," at the beginning of subd (a).

1989 Amendment:

(1) Added subd (e); and (2) redesignated former subd (e) to be subd (f).

1994 Amendment:

(1) Added subdivision designation (a)(1); (2) redesignated former subds (b)-(e) to be subds (a)(2)-(a)(5); (3) substituted "subdivision" for "section" wherever it appears in subds (a)(2)-(a)(4); (4) substituted "This subdivision" for "Subdivision (a); in subd (a)(5); (5) added subds (b)-(i); and (6) redesignated former subd (j) to be subd (f).

Note

Stats 1986 ch 85 provides:

SEC. 3. It is the intent of the Legislature to abrogate the holding in *People v. Fritz (1985) 40 Cal 3d 227, 219 Cal Rptr 460, 707 P2d 833, 1985 Cal LEXIS 404*, and to restrict the authority of the trial court to strike prior convictions of serious felonies when imposing an enhancement under *Section 667 of the Penal Code*.

Cross References:

Enhancement for prior prison term resulting from commission of violent felony: *Pen C § 667.5*.

Enhancement upon conviction of certain sex offenses: *Pen C § 667.6*.

Punishment of habitual offenders: *Pen C § 667.7*.

Enhancement for prior conviction upon conviction of lewd act with child: *Pen C § 667.51*.

Career Criminal Prosecution Program: *Pen C §§ 999b et seq.*

Trial court sentencing: *Pen C §§ 1170 et seq.*

Execution of sentence of imprisonment: *Pen C §§ 2900 et seq.*

Aggravation, mitigation, and enhancement of punishment: *Cal. Rules of Court, Rule 4.421 et seq.*

Limitations on enhancements: *Cal. Rules of Court, Rule 4.447*.

Collateral References:

Witkin & Epstein, *Criminal Law* (3d ed), *Criminal Trial* §§ 211, 213, 418.

Witkin & Epstein, *Criminal Law* (3d ed), *Introduction To Crimes* §§ 14, 15, 60, 68, 102.

Witkin & Epstein, *Criminal Law* (3d ed), *Pretrial Proceedings* §§ 276, 277, 278.

Witkin & Epstein, *Criminal Law* (3d ed), *Punishment* §§ 120, 121, 122, 256, 257, 258, 259, 314, 315, 318, 333, 334, 335, 336, 340, 341, 342, 343, 345, 346, 374.

10 Witkin Summary (10th ed) *Parent and Child* §§ 837, 895, 944.

Cal Jur 3d (Rev) *Criminal Law* §§ 526, 1206.

Cal Criminal Defense Prac., ch 91, "Sentencing".

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*

Law Review Articles:

Career Criminals Targeted: The Verdict is in, California's Three Strikes Law Proves Effective. *37 Golden Gate LR 461.*

Prior Juvenile Adjudication and the Three Strikes Law. *26 J Juvenile L 189.*

Gannscam: A guide through the Prop 8 minefield. *9 Cal Attorneys for Criminal Justice Forum 9.*

Prop 8: Dealing the undealable. *10 Cal Attorneys for Criminal Justice Forum 9.*

Prop 8 casts uncertainty over vast areas of criminal law. *2 Cal Law 43.*

Striking down "three strikes." *14 Cal Law No. 11, p. 26.*

Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises Punishment and Democracy: Three Strikes and You're Out in California. *90 Cal LR 257.*

Juvenile Justice and the Punishment of Recidivists Under California's Three Strikes Law. *90 Cal LR 1157.*

Strike One, Ready for More?: The Consequences of Plea Bargaining "First Strike" Offenders under California's "Three Strikes" Law. *36 Cal Western LR 545.*

People v Superior Court (Romero). *43 Dicta, No. 11, p. 19.*

Three strikes and you're out! Analysis and sentence calculation. *21 Forum (CACJ) No. 3, p. 38.*

Pinch hit, anyone? *21 Forum (CACJ) No. 3, p. 91.*

Jury nullification in the three strikes era. *22 Forum (CACJ) No. 4, p. 29.*

The implications of Romero on your three strikes cases, past and present. *23 Forum (CACJ) No. 3-4, p. 18.*

Eighteen ways to avoid 3 strikes. *21 Forum No. 2, p. 102.*

Three strikes and you're out! *21 Forum No. 2, p. 110.*

Childhood's end. *24 Forum No. 4 (CACJ) p. 45.*

California's Foul Strike: a Single Act Punished with Two Strikes. *29 Golden Gate LR 579.*

Eighth Amendment: Andrade v. Attorney General of the State of California. *32 Golden Gate LR 95.*

The "Spirit" of the Three Strikes Law: from the Romero Myth to the Hopeful Implications of Andrade. *32 Golden Gate LR 169.*

A tale of three strikes: slogan triumphs over substance as our bumper-sticker mentality comes home to roost. *28 Loyola of LA LR 1047.*

"Three strikes" and the Romero case: the Supreme Court restores democracy. *30 Loyola of LA LR 1643.*

Symposium: The Rampart Scandal: Policing the Criminal Justice System: Unnerving the Judges: Judicial Responsibility for the Rampart Scandal. *34 Loyola U of LA LR 787.*

A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy. *38 Loyola U of LA LR 903.*

- California's Three Strikes Law: History, Expectations, Consequences. 32 McGeorge LR 1.
- Victims' rights symposium. 23 *Pacific LJ* 815.
- Enhancing sentences with prior felony convictions: The limits of "without limitation." 23 *Pacific LJ* 1051.
- California's three strikes law: desperate times require desperate measures-but will it work? 26 *Pacific LJ* 881.
- Populism, democratic government, and the decline of expert authority: some reflections on "three strikes" in California. 28 *Pacific LJ* 243.
- Ewing v. California: Upholding California's Three Strikes Law. 32 *Pepp. L. Rev.* 191.
- California's "Three Strikes" law: an unconstitutional infringement upon the power of the judiciary? 3 San Diego Justice Journal 535.
- California's three strikes law-should a juvenile adjudication be a ball or a strike? 32 San Diego LR 1297.
- The "three strikes" dilemma: crime reduction at any price? 36 *Santa Clara LR* 107.
- Proposition 8 (the "Victims' Bill of Rights") and the California Supreme Court: Interpretation run riot? 60 *SCLR* 539.
- California's "three strikes" debacle: a volatile mixture of fear, vengeance, and demagoguery will unravel the criminal justice system and bring California to its knees. 25 *Southwestern LR* 129.
- The wrongs of victim's rights. 37 *Stan LR* 937.
- The unprincipled punishment of repeat offenders: A critique of California's habitual criminal statute. 43 *Stan LR* 193.
- Where to Commit a Crime If You Can Only Spare a Few Days to Serve the Time: the Constitutionality of California's Wobbler Statutes as Applied in the State Today. 33 *Southwestern U LR* 497.
- One Strike and You're Out: "Double-Counting" and Dual Use Undermines the Purpose of California's Three Strikes Law. 34 *USF LR* 99.
- California Evidence Code - Federal Rules of Evidence: I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules. 37 *USF LR* 351.
- Symposium-three strikes and you're out legislation. 26 *UWLA LR* 239.
- What is the meaning of three strikes and you are out legislation? 26 *UWLA LR* 303.
- A swing and a miss: California's three strikes law. 17 *Whittier LR* 651.
- A year later, '3 strikes' clogs jails, slows trials. *Cal Bar Journal*, March '95, p 1.
- The experts interpret the effect of the tough law. *Cal Bar Journal*, March '95, p 7.

Annotations:

What constitutes former "conviction" within statute enhancing penalty for second or subsequent offense. 5 ALR2d 1080.

Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction. 11 ALR2d 870.

Pardon as affecting consideration of earlier conviction in applying habitual criminal statute. 31 ALR2d 1186.

Effect of invalidation of sentence upon separate sentence which runs consecutively. 68 ALR2d 712.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 ALR2d 1196.

Power of court to make or permit amendment of indictment with respect to allegations as to prior convictions. 17 ALR3d 1265.

State court's power to place defendant on probation without imposition of sentence. 56 ALR3d 932.

Consideration of accused's juvenile court record in sentencing for offense committed as adult. 64 ALR3d 1291.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes. 7 ALR5th 263.

Use of prior military conviction to establish repeat offender status. 11 ALR5th 218.

Voluntary absence of accused when sentence is pronounced. 59 ALR5th 135.

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment. 27 ALR Fed 110.

What constitutes "violent felony" for purposes of sentence enhancement under Armed Career Criminal Act (*18 USCS § 924(e)(1)*). 119 ALR Fed 319.

What constitutes three previous convictions for offenses committed on occasions different from one another for purpose of sentence enhancement under Armed Career Criminal Act (*18 USCS § 924(e)*). 123 ALR Fed 397.

Supreme Court's views as to propriety, under Federal Constitution, of using, as basis for enhancing accused's noncapital sentence, accused's uncounseled conviction for prior offense. *128 L Ed 2d 963*.

Hierarchy Notes:

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1. In General

Pen C § 667, which was adopted by the voters as Proposition 8, and which provides for a five-year sentence enhancement for prior convictions of serious felonies, clearly applies to prior convictions that occurred before the enactment of the statute. That the initiative was plainly intended to take account of antecedent crimes is shown by its inclusion of crimes that were repealed prior to its effective date. There is no constitutional bar to such an application of the statute. Moreover, the basic purpose of the statute, which is the deterrence of recidivism, would be frustrated by a construction that did not take account of prior criminal conduct, for in the context of habitual criminal statutes, increased penalties for subsequent offenses are attributable to the defendant's status as a repeat offender and arise as an incident of the subsequent offense, rather than constituting a penalty for the prior offense. *People v. Jackson (1985) 37 Cal 3d 826, 210 Cal Rptr 623, 694 P2d 736, 1985 Cal LEXIS 237*.

The specific purpose of *Pen C § 667*, which provides for a five-year sentence enhancement for any person convicted of a serious felony who previously has been convicted of a serious felony, is to punish recidivism so as to discourage persons who commit serious felonies from doing so again. *People v. Kane (1985, Cal App 3d Dist) 165 Cal App 3d 480, 211 Cal Rptr 628, 1985 Cal App LEXIS 1737*.

Since the intent of the electorate was clearly indicated by the general rule expressed in *Pen C § 667(b)*, which states that where some other punishment could be imposed under some other provision of law the longer term of imprisonment applies, the fact that neither § 667 nor the ballot pamphlet argument for Proposition 8 made specific reference to Cal. Rules of Court, former rule 441 (see now Rule 4.420), did not prevent § 667 from limiting the trial court's discretion to dismiss an enhancement which would otherwise exist under *Cal. Rules of Court, rule 441(b)*. *People v. Keys (1985, Cal App 2d Dist) 175 Cal App 3d 431, 220 Cal Rptr 760, 1985 Cal App LEXIS 2845*.

Pen C § 667, subd. (a) (providing for the imposition of five-year enhancements for prior serious felony convictions), is not discretionary. Unless the prior serious felony is stricken, the court is required to impose the five-year enhancement. *People v. Santana (1986, Cal App 2d Dist) 182 Cal App 3d 185, 227 Cal Rptr 51, 1986 Cal App LEXIS 1697*.

In enacting *Pen C § 667*, as part of Proposition 8 in June 1982, the electorate made clear its intent that in the case of a § 667 prior, a trial court does not have discretion under Cal. Rules of Court, former Rule 441 (see now Rule 4.420), to avoid the five-year enhancement simply by using the fact of enhancement to impose a more lenient upper prison term instead. *People v. Santana (1986, Cal App 2d Dist) 182 Cal App 3d 185, 227 Cal Rptr 51, 1986 Cal App LEXIS 1697*.

The purpose of *Pen C § 667* (enhancement for prior serious felony), is to punish repeat offenders regardless of whether they were imprisoned for their previous felony. An offender who was placed on probation for conviction of a prior serious felony could have his or her sentence enhanced for five years under *Pen C § 667*, subd. (b), even though the offender never served a day in prison. *People v. Medina (1988, Cal App 5th Dist) 206 Cal App 3d 986, 254 Cal Rptr 89, 1988 Cal App LEXIS 1195*.

Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source. Where the language of an initiative statute uses terms that have been judicially construed, the presumption is almost irresistible that the terms have been used in the precise and technical sense which had been placed upon them by the courts. Thus the term "on charges brought and tried separately" in the voter-enacted *Pen C § 667* (habitual criminals), is presumed to carry the same meaning as "upon charges separately brought and tried" in former *Pen C § 644*, the source of § 667. *In re Harris (1989) 49 Cal 3d 131, 260 Cal Rptr 288, 775 P2d 1057, 1989 Cal LEXIS 1535*.

Pen C § 667, subd. (a) clearly provides that the terms of the present offense and each sentence enhancement shall run consecutively. Thus, a trial court has no discretion to order enhancement terms to run concurrent to one another rather than consecutively. *People v. Valencia (1989, Cal App 4th Dist) 207 Cal App 3d 1042, 255 Cal Rptr 180, 1989 Cal App LEXIS 95*.

A criminal defendant was properly given an enhanced sentence pursuant to *Pen C § 667*, even though the initiative of which it was a part (Prop. 8) received fewer votes than another proposition (Prop. 4). Although *Cal. Const., art. II, § 10*, subd. (b), provides an initiative is inoperative in its entirety if the voters adopt by a higher vote an alternative comprehensive regulatory scheme governing the same subject, Proposition 8 was a comprehensive scheme governing the rights of potential and actual crime victims, while Proposition 4 only addressed the issue of bail, a single aspect of the same general subject. Thus, the bail provisions of Proposition 8 never went into effect, but its other provisions did. *People v. Barrow (1991, Cal App 1st Dist) 233 Cal App 3d 721, 284 Cal Rptr 679, 1991 Cal App LEXIS 973*, review denied (1991, Cal) *1991 Cal LEXIS 5495*.

While a criminal defendant may be charged with both a *Pen C § 667* (habitual offenders), sentence enhancement and a *Pen C § 667.5* (enhancement for prior prison term), enhancement arising from a single conviction, imposition of punishment for both enhancements will be barred by *Pen C § 654* (restriction on multiple punishment for single act). However, where the prior prison term arose out of multiple serious felony convictions, *Pen C § 667*, and *Pen C § 667.5*, enhancements may both be imposed without offending *Pen C § 654*. *People v. Cortez (1992, Cal App 6th Dist) 6 Cal App 4th 1202, 8 Cal Rptr 2d 580, 1992 Cal App LEXIS 668*, review denied (1992, Cal) *1992 Cal LEXIS 4061*.

Pen C § 667(a), compels a court to impose a five-year enhancement for each prior serious felony separately brought and tried. The determination of guilt by a jury verdict or by plea of guilty suffices to convict a person for purposes of the serious felony statute. The admission of an enhancement made with full knowledge of the consequence also serves to determine the nature of the offense it modifies and constitutes the conviction of a serious felony. *People v. Shirley (1993, Cal App 3d Dist) 18 Cal App 4th 40, 22 Cal Rptr 2d 340, 1993 Cal App LEXIS 872*.

In a prosecution alleging defendant escaped while charged with a felony, the amendment of the complaint, under *Pen C § 667*, subd. (d), part of the three strikes law, which became effective on March 7, 1994, to allege defendant's 1993 burglary conviction was a "strike," was not a retroactive application of the 1994 law. A statute is not retroactive in operation merely because it draws upon facts antecedent to its enactment for its operation. With habitual criminal statutes, increased penalties for subsequent offenses are attributable to the defendant's status as a repeat offender and arise as an incident of the subsequent offense; they do not constitute a penalty for the prior offense. Also, it was constitutional to use pre-March 7, 1994, prior convictions as "strikes" without advising defendants who pleaded guilty to those convictions of that possibility. Future use of a current conviction is not a direct consequence of that conviction, so no such advisement is necessary. This is so despite *Pen C § 667*, subd. (d)(1), which states the determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i) of that section shall be determined "upon the date of the prior conviction." The determination referred to in that section is simply whether the prior conviction was for a felony or a misdemeanor. The prior conviction does not have effect as a "strike" unless the defendant commits a new felony. This future use of the conviction is not a direct consequence requiring advisement. *People v. Sipe (1995, Cal App 3d Dist) 36 Cal App 4th 468, 42 Cal Rptr 2d 266, 1995 Cal App LEXIS 610*, review denied (1995, Cal) *1995 Cal LEXIS 5979*, cert den (1996) *516 US 1131, 133 L Ed 2d 875, 116 S Ct 951, 1996 US LEXIS 1223*.

The clearly stated intent of the Legislature in enacting the three strikes legislation (*Pen C § 667*) is to ensure longer prison sentences and greater punishment for serious recidivists, that is, those felony defendants who have previously been convicted of serious and/or violent crimes. Further, the new law which amended § 667 added a separate sentencing scheme. *People v. Superior Court (Perez) (1995, 4th Dist) 38 Cal App 4th 347, 45 Cal Rptr 2d 107, 1995 Cal App LEXIS 899*.

Recidivist punishment schemes such as the three strikes law (*Pen C § 667*) provide more severe sentences for repeat offenders when a defendant with a recidivist criminal history has a present conviction for a qualifying felony. It is thus the status or nature of the current crime which must be determined to be a "conviction of a felony" before the more severe provisions of the three strikes law apply in a particular case due to qualifying prior strike convictions. And until the trial court pronounces sentence on the new offense, it cannot be determined if a predicate current "felony" exists for application of the three strikes law. *People v. Superior Court (Perez) (1995, 4th Dist) 38 Cal App 4th 347, 45*

Cal Rptr 2d 107, 1995 Cal App LEXIS 899.

A defendant with one or two qualifying violent or serious prior felony convictions must be sentenced under *Pen C* § 667, subd. (e), of the three strikes law. That sentencing is in addition to any other enhancement or punishment provisions which may apply. This language evinces the legislative intent that *Pen C* § 667, subd. (a), enhancements for prior felony convictions apply to defendants sentenced under the three strikes law. This result is consistent with the expressed legislative intent to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious or violent felony offenses. *People v. Cartwright (1995, Cal App 3d Dist) 39 Cal App 4th 1123, 46 Cal Rptr 2d 351, 1995 Cal App LEXIS 1054*, review denied (1996, Cal) *1996 Cal LEXIS 1016*.

That the Legislature intended consecutive sentences to be mandatory in certain situations (*Pen C* § 667, subd. (c)(6)), in no way indicates that it meant for those situations to be the only ones in which consecutive sentences are permissible. The clear intent behind the three strikes law is to ensure longer prison sentences and greater punishment for recidivist violent felons (*Pen C* § 667, subd. (b)). Thus, reading into the statute by implication a restriction that the Legislature intended that consecutive sentences should not be imposed if the offenses in question were committed on the same occasion or arose from the same set of operative facts runs counter to this clear intent and is, therefore, untenable. *People v. Cartwright (1995, Cal App 3d Dist) 39 Cal App 4th 1123, 46 Cal Rptr 2d 351, 1995 Cal App LEXIS 1054*, review denied (1996, Cal) *1996 Cal LEXIS 1016*.

Even though the first and third minimum sentence alternatives of *Pen C* § 667, subd. (e)(2)(A), when applied on a count-by-count basis, may not apply often, they are not mere surplusage. The first alternative (three times term otherwise provided as punishment for each current felony conviction subsequent to two or more prior felony convictions) will apply where the term otherwise provided as punishment exceeds eight years. This includes such offenses as murder (*Pen C* § 190), the middle or upper term for continuous child molestation (*Pen C* § 288.5), the upper term for manslaughter (*Pen C* § 193, subd. (a)), certain forms of kidnapping (*Pen C* § 208, subs. (b) and (d)), and carjacking (*Pen C* § 215, subd. (b)). The third alternative (term determined by court under *Pen C* § 1170, for underlying conviction, including any applicable enhancements) will apply where the defendant has numerous enhancements. *People v. Cartwright (1995, Cal App 3d Dist) 39 Cal App 4th 1123, 46 Cal Rptr 2d 351, 1995 Cal App LEXIS 1054*, review denied (1996, Cal) *1996 Cal LEXIS 1016*.

The three strikes law (*Pen C* § 667, former subs. (b)-(j)), did not change the duties of judges and prosecutors so as to preclude its enactment as urgency legislation (*Cal. Const., art. IV, § 8, subd. (d)*). Not all changes in the duties of an office preclude implementation of a statute as an emergency measure. An addition or subtraction in relation to the volume of the duties required to be performed by an officer, which does not substantially affect the primary duties of his or her office, is not such a change of duties as would prevent immediate effectiveness of legislation properly declared to be urgent. The extent to which *Pen C* § 667, subs. (g) and (f), might affect the exercise of a prosecutor's discretion in charging and dealing with prior serious felony convictions, or the court's power to dismiss such charges in furtherance of justice, cannot reasonably be characterized as substantially affecting the primary duties of either the prosecutorial or judicial office. *People v. Spears (1995, Cal App 5th Dist) 40 Cal App 4th 1683, 48 Cal Rptr 2d 634, 1995 Cal App LEXIS 1222*, review denied (1996, Cal) *1996 Cal LEXIS 1512*.

As with a plea of guilty, when a defendant admits prior convictions for sentencing purposes, he or she must be admonished about three constitutional rights: (1) the privilege against compulsory self-incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers. In addition, the defendant must waive those rights knowingly and voluntarily. In addition to admonition of these constitutional rights, there is a judicially declared rule of criminal procedure that an accused is entitled to be advised of (1) any habitual criminal consequences, (2) the precise increase in term that might be imposed, and (3) the effect on eligibility for parole. The failure to secure an express waiver of each enumerated right, however, is not reversible per se. The test is whether or not the record indicates that the admission was voluntary and intelligent under the totality of the circumstances. *People v. Witcher (1995, Cal App 1st Dist) 41 Cal App 4th 223, 48 Cal Rptr 2d 421, 1995 Cal App LEXIS 1241*.

The Legislature did not intend in its enactment of the three strikes law (*Pen C* § 667, subs. (b)-(i)) to give prosecuting attorneys the power to veto judicial decisions to dismiss prior felony conviction allegations in furtherance of justice pursuant to *Pen C* § 1385. Given the grave constitutional questions that would follow from the recognition of a prosecutorial veto power, the absence of a clear legislative direction to grant that power is determinative of a contrary legislative intent. The Legislature assumed that a court would at least have the power to grant the prosecutor's motion to strike a prior felony allegation (*Pen C* § 667, subd. (f)(2)); that section's express reference to *Pen C* § 1385, is best and most simply read to provide that *Pen C* § 1385, applies in full force and effect in three strikes cases. In view of the prominent and contentious judicial history of *Pen C* § 1385, the Legislature's express authorization of a prosecutor's motion made "pursuant to [*Penal Code*] section 1385" (*Pen C* § 667, subd. (f)(2)) evinces a clear legislative intent that courts retain their powers under that section. *People v. Superior Court (Romero)* (1996) 13 Cal 4th 497, 53 Cal Rptr 2d 789, 917 P2d 628, 1996 Cal LEXIS 3025, modified, rehearing denied (1996) 13 Cal 4th 1016, 1996 Cal LEXIS 4445.

In construing a statute, a court must ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining that intent, it considers the statute read as a whole, harmonizing the various elements by considering each clause and section in the context of the overall statutory framework. The court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. *People v. Ruiz* (1996, Cal App 5th Dist) 44 Cal App 4th 1653, 52 Cal Rptr 2d 561, 1996 Cal App LEXIS 399, review denied (1996, Cal) 1996 Cal LEXIS 4646.

Although a sentence imposed, under *Pen C* § 667, subd. (c)(8) (if defendant convicted of felony and has one or more prior felony convictions, sentence will be consecutive to other sentence already being served), clearly must be served consecutively with another sentence previously imposed when a defendant is already incarcerated for a different offense, a more difficult determination is whether *Pen C* § 667, subd. (c)(8), applies when a defendant has been sentenced in a previous proceeding; at the time of the sentencing under *Pen C* § 667, subd. (c)(8), the defendant is on California Rehabilitation Center (CRC) parole subject to the previously imposed sentence, against which defendant will receive CRC custody credits; and after sentence is imposed under *Pen C* § 667 (sentence enhancements for habitual criminals), defendant's CRC status is revoked and sentence is executed. Although the state has a compelling interest in the treatment of drug addiction, and this interest justifies treating CRC inmates differently, the Legislature is clear in *Pen C* § 667, that it does not intend persons committed to CRC to be treated differently from other recidivist offenders. It is not likely that the Legislature sought to treat those committed to CRC differently in *Pen C* § 667, subd. (c)(8), yet treat them equally in the rest of *Pen C* § 667. *People v. Davis* (1996, Cal App 5th Dist) 48 Cal App 4th 1105, 56 Cal Rptr 2d 28, 1996 Cal App LEXIS 794.

On appeal in a three strikes law case (*Pen C* § 667), where the record indicated the trial court was not affirmatively asked to exercise its discretion to strike a prior felony allegation and the court did not otherwise indicate during sentencing its understanding of its power to strike, the applicable rules of appellate review were that a trial court's order or judgment is presumed to be correct, that error is never presumed, and that the appealing party must affirmatively demonstrate error on the face of the record, was applicable. Accordingly, defendants were required to affirmatively demonstrate that the trial court misunderstood its sentencing discretion under *Pen C* § 1385. Since the record was completely silent, that burden was not sustained. The appropriate disposition was to affirm the judgment and relegate defendants to the remedy of habeas corpus if they could affirmatively demonstrate error. *People v. Davis* (1996, Cal App 1st Dist) 50 Cal App 4th 168, 57 Cal Rptr 2d 659, 1996 Cal App LEXIS 991, review denied (1997, Cal) 1997 Cal LEXIS 650.

The three strikes law (*Pen C* § 667, subs. (b)-(i)), does not preclude use of the same prior conviction to double the base term and to enhance the sentence imposed (*Pen C* § 667, subd. (a)(2)). *People v. Green* (1996, Cal App 2d Dist) 50 Cal App 4th 1076, 58 Cal Rptr 2d 259, 1996 Cal App LEXIS 1053, review denied (1997, Cal) 1997 Cal LEXIS 1131.

The three strikes law (*Pen C* § 667, subs. (b)-(i)) did not change the duties of judges and prosecutors to such an extent it could not properly be enacted as urgency legislation (*Cal. Const., art. IV, § 8, subd. (d)*). An addition to or

subtraction from the volume of the duties required to be performed by an officer that does not substantially affect the primary duties of his or her office is not such a change of duties that would prevent immediate effectiveness of legislation properly declared to be urgent. The three strikes law did not change the primary duties of the office of trial judge or prosecutor. Their discretion in sentencing or prosecuting defendants never has been absolute. Since the restrictions on the duties of judges and prosecutors in the three strikes law are not substantially different from those already imposed, they did not constitute a change in duties so as to preclude enactment of the statute by urgency legislation. *People v. Green* (1996, Cal App 2d Dist) 50 Cal App 4th 1076, 58 Cal Rptr 2d 259, 1996 Cal App LEXIS 1053, review denied (1997, Cal) 1997 Cal LEXIS 1131.

The court may look to the entire record in determining whether a prior conviction under Pen C former § 245, subd. (b) (now Pen C § 245, subd. (c)) (assault on a peace officer), involved an assault with a deadly weapon or instrument and, thus, is a serious felony under Pen C § 1192.7, subd. (c)(11), within the meaning of Pen C § 667, subds. (c)-(j) (three strikes law). *People v. Williams* (1996, Cal App 5th Dist) 50 Cal App 4th 1405, 58 Cal Rptr 2d 517, 1996 Cal App LEXIS 1072.

The fact that a wobbler offense originated as a three strikes filing owing to a defendant's prior serious felony convictions (Pen C § 667, subds. (b)-(i)) will not invariably or inevitably militate against reducing the charge to a misdemeanor at the time of sentencing pursuant to Pen C § 17, subd. (b). Nevertheless, the current offense cannot be considered in a vacuum; given the public safety considerations underlying the three strikes law, the record should reflect a thoughtful and conscientious assessment of all relevant factors, including the defendant's criminal history. Furthermore, in evaluating the severity of a three strikes sentence relative to the gravity of the charge, the court must remain cognizant that the present violation of law only triggers the mandated penalty, which ultimately is the consequence of both that offense and the defendant's recidivist status. The determination to reduce a wobbler under Pen C § 17, subd. (b), can be properly made only when the sentencing court focuses on considerations that are pertinent to the specific defendant being sentenced, not an aversion to a particular statutory scheme; the record must demonstrate a reasoned consideration. *People v. Superior Court (Alvarez)* (1997) 14 Cal 4th 968, 60 Cal Rptr 2d 93, 928 P2d 1171, 1997 Cal LEXIS 7, rehearing denied (1997, Cal) 1997 Cal LEXIS 1229.

In a prosecution for theft or unauthorized use of a vehicle, in which it was found that defendant had suffered prior felony convictions, the trial court did not err in declining to answer the jury's question as to whether defendant was subject to the three strikes law and in admonishing the jury not to consider punishment in its deliberations. The trial court was correct in admonishing the jury that punishment must not enter into its deliberations. Without such an admonishment, a jury may permit its consideration of guilt to be deflected by a dread of seeing the accused suffer the statutory punishment. Further, even if the jury's query was an implicit request for guidance to ignore the evidence in the interest of justice, that is, whether it should exercise its recognized power of jury nullification, a trial court is not required to instruct on the power of jury nullification even if the jury asks whether it has that power. Since the trial court was not required to instruct on the jury's power of nullification, it was not required to provide the jury with otherwise irrelevant information, such as the likely punishment, simply to encourage the jury to exercise that power. *People v. Nichols* (1997, Cal App 1st Dist) 54 Cal App 4th 21, 62 Cal Rptr 2d 433, 1997 Cal App LEXIS 270, review denied (1997, Cal) 1997 Cal LEXIS 4436.

A trial court's authority under Pen C § 17, subd. (b), to declare "wobbler" offenses to be misdemeanors was not abrogated by the three strikes law (Pen C § 667, subds. (b)-(i)). *People v. Bishop* (1997, Cal App 2d Dist) 56 Cal App 4th 1245, 66 Cal Rptr 2d 347, 1997 Cal App LEXIS 624.

The state has a compelling interest in controlling crime and preventing and punishing recidivism. California courts have repeatedly held that when a defendant's criminal conduct has been proven to be immune from ordinary modes of punishment, one of the duties of the judiciary is to protect the public by utilizing recidivist sentencing statutes to incarcerate such persons. The habitual offender finding concerns the status of the defendant as one who has not in the past obeyed the law. The three strike laws were enacted to promote this compelling interest in the protection of public safety and in punishing recidivism. (Pen C §§ 667, subds. (b)-(j), 1170.12). *People v. Castello* (1998, Cal App 4th Dist)

65 Cal App 4th 1242, 77 Cal Rptr 2d 314, 1998 Cal App LEXIS 691, review denied (1998, Cal) 1998 Cal LEXIS 7374.

Trial courts commonly rely on the existence of prior felony convictions to increase the sentences meted out to criminal defendants (see, e.g., *Penal C* §§ 667(a)(1) [five-year enhancement for prior serious felony conviction], 667.51 [five-year enhancement for prior sex crime if presently convicted of lewd acts with a child in violation of *Penal C* § 288], 667.6 [five-year enhancement for prior sex crime if presently convicted of enumerated sex crime], 667.71(b) [term of 25 years to life for habitual sex offenders]). However, a trial court, when sentencing a criminal defendant, may not rely on a prior felony conviction obtained in violation of the defendant's constitutional rights. *People v. Allen* (1999) 21 Cal 4th 424, 87 Cal Rptr 2d 682, 981 P2d 525, 1999 Cal LEXIS 5310, rehearing denied (1999, Cal) 1999 Cal LEXIS 7035.

Penal C § 667(a)(1) requires a five-year sentence enhancement when a defendant convicted of a "serious felony" offense listed in § 1192.7(c) has been previously convicted of a serious felony. Section 1170.12 (the Three Strikes law) provides for an increased sentence when a defendant convicted of any felony has been previously convicted of either a serious felony under § 1192.7(c) or a "violent felony" under § 667.5(c). The lists of serious and violent felonies include both specific, enumerated crimes and descriptions of criminal conduct. *People v. Ruiz* (1999, Cal App 2d Dist) 69 Cal App 4th 1085, 82 Cal Rptr 2d 139, 1999 Cal App LEXIS 100, review denied (1999, Cal) 1999 Cal LEXIS 3221.

The three strikes law is the Legislature's attempt to address the threat to society posed by the class of persons previously convicted of serious or violent felonies and who have therefore not been rehabilitated or deterred from further criminal activity as a result of their prior imprisonment. There is no invidious classification or equal protection violation involved in that lawmaking. *People v. Leng* (1999, Cal App 5th Dist) 71 Cal App 4th 1, 83 Cal Rptr 2d 433, 1999 Cal App LEXIS 301, rehearing denied (1999, Cal App 5th Dist) 71 Cal App 4th 1259, 1999 Cal App LEXIS 426.

A jury convicted defendant of possession of methamphetamine for sale (*H & S C* § 11378) and possession of narcotics paraphernalia (*H & S C* § 11364). Defendant was found to have suffered two prior serious or violent felony convictions within the meaning of *Penal C* § 667 and § 1170.12 and had served two prior prison terms within the meaning of § 667.5. He was sentenced to 26 years to life and a concurrent 6-month term for his misdemeanor count. Defendant contended the search of his motel room and the briefcase found inside violated his Fourth Amendment protection against unreasonable searches and seizures. He had opened his door as a result of the exercise of police authority which could not be supported by the erroneous parole information. In this case it was undisputed defendant was not on parole at the time the officers entered the motel room in order to conduct a "parole search." The officers' good faith reliance on the erroneous parole information did not, by itself, preclude application of the exclusionary rule. However, it was certainly reasonable for the officer to conclude it was necessary to secure the motel room in order to prevent the destruction of evidence until such time as he either had the parole condition confirmed or was able to obtain a warrant. The officers were authorized to "freeze" the motel room while they waited. The evidence defendant sought to have suppressed was not the fruit of an unlawful parole search, but instead of prudent lawful police work. Thus, even though the officers' original entry of the motel room was unconstitutional, the evidence later obtained was not necessarily tainted and inadmissible. *People v. Willis* (1999, Cal App 5th Dist) 71 Cal App 4th 530, 83 Cal Rptr 2d 895, 1999 Cal App LEXIS 337, review gr, depublished (1999, Cal) 88 Cal Rptr 2d 281, 982 P2d 152, 1999 Cal LEXIS 5317, rev'd, superseded (2002) 28 Cal 4th 22, 120 Cal Rptr 2d 105, 46 P3d 898, 2002 Cal LEXIS 3563.

While a strike allegation was dismissed as to 34 of the 35 counts against defendant, defendant nevertheless remained subject to the consecutive sentencing requirements of *Pen C* § 667(c) by virtue of the one count that retained the strike allegation; thus, the trial court was required to impose consecutive sentences. *People v. Casper* (2004) 33 Cal 4th 38, 14 Cal Rptr 3d 43, 90 P3d 1203, 2004 Cal LEXIS 4785, rehearing denied (2004, Cal) 2004 Cal LEXIS 6460.

Sentencing court has discretion to impose a concurrent term under the Three Strikes statutes only if the court finds the current crimes were committed on the same occasion and arose from the same set of operative facts; these statutes confer no right on defendant to concurrent sentencing. The usual statutory maximum penalty for two offenses is the principal term on one plus a subordinate, consecutive sentence of one-third the midterm for the other offense; there is no

Apprendi problem in imposing a consecutive sentence based on facts not found by the jury so long as the total sentence is within this statutory maximum for the two crimes. *People v. Jaffe* (2004, Cal App 6th Dist) 122 Cal App 4th 1559, 19 Cal Rptr 3d 689, 2004 Cal App LEXIS 1711, modified, rehearing denied (2004, Cal App 6th Dist) 2004 Cal App LEXIS 1885, review gr, depublished (2005, Cal) 23 Cal Rptr 3d 695, 105 P3d 115, 2005 Cal LEXIS 845, review dismissed (2005, Cal) 34 Cal Rptr 3d 194, 119 P3d 959, 2005 Cal LEXIS 9984.

The petitioner's sentence to 25 years to life for violating the California three strikes law, Cal. Penal Code §§ 667(b) - (i), 1170.12(a) - (d), based on a conviction for a petty theft offense violated the Eighth Amendment, regardless of the defendants' prior criminal records. *Hawkins v. Cambra* (2002, CD Cal) 2002 US Dist LEXIS 17048.

Court rejected defendant's contention that the legislative intent of Pen C §§ 667(f)(1), 1025(b), 1158 essentially precluded a retrial of a strike allegation against defendant; the court found nothing in the pleading and proof requirement of the statutes that suggested a legislative intent to preclude retrial after an appellate court reversed, for insufficient evidence, a factfinder's true finding on a prior conviction allegation, and permitting a retrial of a prior conviction allegation in such an instance was not fundamentally unfair. *People v. Barragan* (2004) 32 Cal 4th 236, 9 Cal Rptr 3d 76, 83 P3d 480, 2004 Cal LEXIS 679.

Where inmate's sentence for his three shoplifting offenses was more severe than the sentence he would have faced had any one of his three crimes been murder, manslaughter, or rape, considering the objective factors of the case and performing the fact-specific analysis of the inmate's criminal history, the sentence imposed was grossly disproportionate to the crimes committed, in violation of the Eighth Amendment and the state appellate court's decision was an objectively unreasonable application of clearly established federal law. Thus, the court affirmed the district court's grant of a writ of habeas corpus. *Ramirez v. Castro* (2004, 9th Cir Cal) 365 F3d 755, 2004 US App LEXIS 7471.

Three strikes law permits use of juvenile adjudications as strikes under some circumstances. *People v. Beck* (2005, Cal App 5th Dist) 126 Cal App 4th 518, 24 Cal Rptr 3d 228, 2005 Cal App LEXIS 182, rehearing denied (2005, Cal App 5th Dist) 2005 Cal App LEXIS 180, review denied (2005, Cal) 2005 Cal LEXIS 4066.

Unambiguous purpose of the Three Strikes law is to provide greater punishment for recidivists, under Pen C § 667(b), and this purpose is not served by treating a single act as separate offenses, nor should this result rest solely upon the charging discretion of the prosecutor; enhancements should be considered in determining whether there are necessarily included offenses and multiple convictions are improper. *People v. Sloan* (2005, Cal App 3d Dist) 126 Cal App 4th 1148, 24 Cal Rptr 3d 497, 2005 Cal App LEXIS 234, rehearing granted, depublished (2005, Cal) 29 Cal Rptr 3d 739, 113 P3d 533, 2005 Cal LEXIS 5958, rev'd, superseded (2007, Cal) 2007 Cal LEXIS 8704.

Although defendant's sentences for assault and battery under Pen C §§ 245(a)(1), 243(d) were stayed under Pen C § 654, there was a serious potential consequence of multiple convictions, and because of the great bodily injury allegations under Pen C § 12022.7(c), each of the offenses was a serious felony and would have qualified as a strike in a subsequent prosecution for any felony; by assaulting and personally inflicting great bodily injury upon defendant's spouse in violation of Pen C § 273.5, defendant necessarily committed both aggravated assault and battery with serious bodily injury, and in keeping with the purpose of the Three Strikes Law, Pen C § 667(b), enhancements were to be considered in determining whether there were necessarily included offenses and multiple convictions were improper, as in this case. *People v. Sloan* (2005, Cal App 3d Dist) 126 Cal App 4th 1148, 24 Cal Rptr 3d 497, 2005 Cal App LEXIS 234, rehearing granted, depublished (2005, Cal) 29 Cal Rptr 3d 739, 113 P3d 533, 2005 Cal LEXIS 5958, rev'd, superseded (2007, Cal) 2007 Cal LEXIS 8704.

2. Construction

Under Pen C § 667, subd. (a), a sentence of a defendant convicted of a serious felony may only be enhanced based on a prior conviction for a serious felony if the prior conviction is "for an offense which includes all of the elements" of a felony or enhancement under state law. The term "offense" refers to a specific crime as defined by law and not simply

to the actual conduct of the defendant. *People v. Alfaro* (1986) 42 Cal 3d 627, 230 Cal Rptr 129, 724 P2d 1154, 1986 Cal LEXIS 268, overruled in part as stated *People v. Trujillo* (2006) 40 Cal 4th 165, 51 Cal Rptr 3d 718, 146 P3d 1259, 2006 Cal LEXIS 14358, overruled *People v. Guerrero* (1988) 44 Cal 3d 343, 243 Cal Rptr 688, 748 P2d 1150, 1988 Cal LEXIS 25.

In construing *Pen C* § 667, subd. (a), which provides for a five-year enhancement for any person convicted of a serious felony who previously has been convicted of a serious felony as enumerated in *Pen C* § 1192.7, subd. (c), the court should consider the consequences that will flow from a particular interpretation, and the interpretation should lean strongly to avoid absurd consequences, and even great inconvenience. Therefore, § 667, subd. (a), limits proof of a conviction for a prior serious felony to matters established by collateral estoppel. The proof of a prior conviction establishes only the minimum elements of the crime, even if the charging pleading contained additional, superfluous allegations; and, the prosecution cannot go behind the record of the prior conviction and relitigate the circumstances of the offense to prove some fact which was not an element of the crime. *People v. Alfaro* (1986) 42 Cal 3d 627, 230 Cal Rptr 129, 724 P2d 1154, 1986 Cal LEXIS 268, overruled in part as stated *People v. Trujillo* (2006) 40 Cal 4th 165, 51 Cal Rptr 3d 718, 146 P3d 1259, 2006 Cal LEXIS 14358, overruled *People v. Guerrero* (1988) 44 Cal 3d 343, 243 Cal Rptr 688, 748 P2d 1150, 1988 Cal LEXIS 25.

The terms "convicted" or "conviction" do not have a uniform or unambiguous meaning in California. Sometimes they are used in a narrow sense signifying a verdict or guilty plea, some other times they are given a broader scope so as to include both the jury verdict (or guilty plea) and the judgment pronounced thereon. However, under statutes (e.g., *Pen C* § 667) which impose more severe penalties for second and subsequent criminal offenses, "conviction" means the ascertainment of guilt, whether by plea or verdict. *People v. Shirley* (1993, Cal App 3d Dist) 18 Cal App 4th 40, 22 Cal Rptr 2d 340, 1993 Cal App LEXIS 872.

It was the intent of the Legislature that the five-year sentence enhancement of *Pen C* § 667, subd. (a), which is applicable to a defendant convicted of a serious felony who suffered a prior serious or violent felony conviction, is to be applied cumulative to the terms of *Pen C* § 667, subd. (e)(1), under which the underlying sentence of such a defendant must be doubled. The statute expressly states that such sentence shall be doubled "in addition to any other enhancement or punishment provisions which may apply." The words of the statute are clear and unambiguous and require no interpretation or construction, and there can be no doubt as to their meaning. The language prescribes a doubling of the sentence for the current felony offense in addition to the five-year enhancement if the current offense is a serious felony. The language is consistent with the expressed purpose of the statute "to ensure longer prison sentences and greater punishment" for convicted felons who have suffered prior serious felonies (*Pen C* § 667, subd. (b)) and the mandate that the legislation is to be applied notwithstanding any other law. (*Pen C* § 667, subd. (f)(1)). Thus, construing the statute to mean that either the sentence must be doubled or a five-year enhancement imposed, whichever is greater, would be contrary to the clear legislative intent. *People v. Ramirez* (1995, Cal App 2d Dist) 33 Cal App 4th 559, 39 Cal Rptr 2d 374, 1995 Cal App LEXIS 282, review denied (1995, Cal) 1995 Cal LEXIS 3739.

Pen C § 667, subd. (d)(1), which provides that "the determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor," was intended by the Legislature to ensure that the qualifying status of a conviction under the three strikes law would be fixed on the date of the prior conviction, so that no subsequent actions could alter that status. By specifically distinguishing those status reductions that occur upon the initial sentencing, the Legislature was clearly contemplating those status reductions that may occur later and declaring that they would have no effect on the crime's status for the purposes of *Pen C* § 667, subs. (b) to (i). The Legislature did not intend that the qualifying status need be declared on the date of conviction, only that the status would be determined in reference to that date. It was not the Legislature's intent that the words of the statute prohibit the use of qualifying convictions that predate enactment of the three strikes law. *People v. Anderson* (1995, Cal App 1st Dist) 35 Cal App 4th 587, 41 Cal Rptr 2d 474, 1995 Cal App LEXIS 504, review denied (1995, Cal) 1995 Cal LEXIS 5175.

In sentencing defendant, who had been convicted of selling rock cocaine, the trial court properly determined that defendant's prior 1987 first degree burglary conviction qualified as a "first strike" under the recently enacted "three strikes" statute (*Pen C § 667*, subds. (b)-(i)), and thus the court properly doubled defendant's sentence pursuant to the "three strikes" law. Although *Pen C § 667*, subd. (d)(1), states that the determination of whether a prior conviction qualifies "shall be made upon the date of that prior conviction," applying this language literally would produce the absurd result that there would never need to be a determination of a "strike" until a subsequent offense occurs. The "three strikes" law was enacted as emergency legislation to ensure greater punishment for those who commit a felony and have been previously convicted of serious or violent felony offenses. Thus, prior offenses which took place before the Mar. 7, 1994, enactment of the "three strikes" law can qualify as a "strike" if, at the time of the conviction of the past offense, the past offense qualified as a serious or violent offense under *Pen C § 1192.7*, subd. (c), or *Pen C § 667.5*, subd. (c). This interpretation is necessary to carry out the stated intent of the statute. *People v. Green (1995, Cal App 2d Dist) 36 Cal App 4th 280, 42 Cal Rptr 2d 249, 1995 Cal App LEXIS 598*, review denied (1995, Cal) *1995 Cal LEXIS 6092*.

In a prosecution in which defendant pleaded guilty to escape while charged with a felony (*Pen C § 4532*, subd. (b)), and in which he admitted a prior burglary conviction, the use of the same prior conviction both to convict him of felony escape and to increase his sentence under *Pen C § 667*, did not constitute an enhancement, and thus did not result in a prohibited dual use of facts. A prior conviction does not enhance the crime of escape. Rather, defendant's status was an element of the crime. The prior offense is necessary to establish a basis for custody; without custody, there is no crime of escape. A defendant need not have a prior conviction, but need only be in custody. Nor did his prior conviction serve as an enhancement under *Pen C § 667*, subd. (e). An enhancement is an additional term of imprisonment added to the base term. Nothing in *Pen C § 667*, subd. (e), provides for an added term; instead, it defines the term for the crime itself, providing an alternate sentencing scheme where the felon has a prior serious or violent felony. Nor does the title to *Pen C § 667*, or the language of *Pen C § 667*, subd. (e) ("in addition to any other enhancement or punishment provisions which may apply..."), establish that it is an enhancement. The language simply permits the addition of enhancements to the term provided under *Pen C § 667*, subd. (e). *People v. Sipe (1995, Cal App 3d Dist) 36 Cal App 4th 468, 42 Cal Rptr 2d 266, 1995 Cal App LEXIS 610*, review denied (1995, Cal) *1995 Cal LEXIS 5979*, cert den (1996) *516 US 1131, 133 L Ed 2d 875, 116 S Ct 951, 1996 US LEXIS 1223*.

In a prosecution in which defendant pleaded guilty to escape while charged with a felony (*Pen C § 4532*, subd. (b)), and in which he admitted a prior burglary conviction, the use of the same prior conviction to convict him of felony escape and to increase his sentence under *Pen C § 667*, subd. (e)(1) (three strikes law), was not barred under *Pen C § 654* (act or omission punishable by different provisions may be punished under either provision, but not more than one). The use of defendant's prior conviction did not fall within the prohibition of *Pen C § 654*, because it was not an "act or omission." Instead, it was defendant's status as a recidivist offender that brought *Pen C § 667*, subd. (e), into play. *Pen C § 654*, does not apply to a defendant's status. *People v. Sipe (1995, Cal App 3d Dist) 36 Cal App 4th 468, 42 Cal Rptr 2d 266, 1995 Cal App LEXIS 610*, review denied (1995, Cal) *1995 Cal LEXIS 5979*, cert den (1996) *516 US 1131, 133 L Ed 2d 875, 116 S Ct 951, 1996 US LEXIS 1223*.

In sentencing defendant, who pleaded no contest to possession of cocaine and petty theft with a prior theft-related conviction and who admitted a prior conviction for robbery, the trial court erred in failing to award defendant presentence conduct credits. Defendant was entitled to an award of presentence conduct credits against his prison sentence in accordance with *Pen C §§ 2900.5, 4019*, even though he was sentenced under the three strikes law (*Pen C § 667*, subd. (b)-(i)). *Pen C § 667*, subd. (c)(5), which limits the amount of prison credits and precludes their accrual until a defendant is physically placed in prison, does not expressly refer or apply to presentence custody credits. Although the legislative intent of the three strikes law is to ensure longer prison terms, this intent does not require the elimination of presentence conduct credit, and a court may not add to a statute what the Legislature omitted. Also, the Legislature declined to clarify any ambiguity concerning presentence conduct credits in *Pen C § 667*, subd. (c)(5), after passage of the three strikes law, and since the language is ambiguous, defendant was entitled to the benefit of any doubt. *People v. Hill (1995, Cal App 3d Dist) 37 Cal App 4th 220, 44 Cal Rptr 2d 11, 1995 Cal App LEXIS 719*, review denied (1995,

Cal) 1995 Cal LEXIS 6982, cert den (1996) 517 US 1170, 134 L Ed 2d 672, 116 S Ct 1574, 1996 US LEXIS 2875.

Because provisions of the three strikes law specifically include within the definition of prior felony convictions those in which imposition of sentence or judgment has been suspended, execution of sentence has been stayed, or the defendant has been committed to specified institutions other than state prison (*Pen C* § 667, subd. (d)(1)(A)-(D)), at a minimum, the intent of the Legislature concerning the continued viability of the trial court's use of at least *Pen C* § 17, subd. (b)(3) (reduction of "wobbler" offense to misdemeanor when granting probation), is in question, is ambiguous, and should be construed as favorably to the defendant as reasonably possible considering the language and the circumstances. Therefore, such limiting language in *Pen C* § 667, subd. (d)(1), must be construed to merely nullify the portion of a court's power under *Pen C* § 17, subd. (b)(3), that previously could be exercised after the initial sentencing to reduce a felony to a misdemeanor. This interpretation is consistent with the Legislature's intent to impose longer prison terms for those more serious repeat offenders who commit a new crime which is serious enough to be classified a felony at the initial sentencing hearing. *People v. Superior Court (Perez)* (1995, 4th Dist) 38 Cal App 4th 347, 45 Cal Rptr 2d 107, 1995 Cal App LEXIS 899.

In a prosecution for first degree murder and second degree murder (*Pen C* § 187), the three strikes statute (*Pen C* § 667, subds. (b)-(i)) did not supersede the death penalty and special circumstance statutes (*Pen C* §§ 190, 190.2), whereby defendant was sentenced to life without the possibility of parole. Although *Pen C* § 667, subd. (c), states "Notwithstanding any other law..." and *Pen C* § 667, subd. (e), prescribes punishment for defendants with one or more qualifying prior felony convictions, the prescribed punishments include neither death nor life without parole. Equal protection did not require application of the three strikes law to defendant. The Legislature declared their purpose in enacting the three strikes law: "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses" (*Pen C* § 667, subd. (b)). Insulating capital murderers who have one or more prior felony convictions from a sentence of death or life without parole does not further that declared legislative purpose. In construing a statute, the court must avoid an interpretation that renders related provisions nugatory or would result in absurd consequences which the Legislature did not intend. An intention to legislate by implication is not to be presumed. *People v. Williams* (1995, Cal App 2d Dist) 40 Cal App 4th 446, 46 Cal Rptr 2d 730, 1995 Cal App LEXIS 1128, review denied (1996, Cal) 1996 Cal LEXIS 1150.

Pen C § 667 (three strikes, habitual criminal sentence enhancement) does not prohibit the dual use of a prior felony both as a strike and as an enhancement. In view of *Pen C* § 667, subd. (a)(1) (five-year enhancement when current charge is serious felony and defendant previously convicted of serious felony), and *Pen C* § 667, subd. (e)(1) (if defendant has prior serious or violent felony, "in addition to any other enhancement or punishment provisions which may apply," base term is doubled), *Pen C* § 667 thus requires the doubling of the base term when there is a prior serious felony; and since such sentence is to be "in addition to any other enhancement," also requires the addition of five years for any *Pen C* § 667, subd (a)(1) enhancement. These words of the statute are clear and unambiguous. They require no interpretation or construction. There can be no doubt as to their meaning. This construction is consistent with the legislative intent expressed in *Pen C* § 667, subd. (b) (statute designed "to ensure longer prison sentences and greater punishment" for those who commit felony and have been previously convicted of serious and/or violent offenses). *People v. Nelson* (1996, Cal App 2d Dist) 42 Cal App 4th 131, 49 Cal Rptr 2d 361, 1996 Cal App LEXIS 75, review denied (1996, Cal) 1996 Cal LEXIS 2157.

In sentencing defendant, who had previously had her sentence suspended and had been committed to California Rehabilitation Center (CRC), and who had pleaded nolo contendere to another felony in a second case, the trial court correctly ordered mandatory consecutive sentences, under *Pen C* § 667, subd. (c)(8) (if defendant, convicted of felony, has one or more prior felony convictions, sentence is consecutive to sentence defendant "already serving") of the three strikes law, after executing the sentence from the first case. The sentence in the second case was the first sentence executed, and the commitment in the CRC case was the first sentence imposed, but the second executed. A trial court executing a second sentence normally has a choice to impose either concurrent or consecutive terms. The intent of the three strikes law is to ensure longer prison sentences and greater punishment for those previously convicted of certain felonies. The phrase "any other sentence which the defendant is already serving" (*Pen C* § 667, subd. (c)(8)) should not

be construed narrowly, but should include a sentence previously imposed and not yet fulfilled, which has been suspended for a CRC commitment, and is subsequently executed. *People v. Davis* (1996, Cal App 5th Dist) 48 Cal App 4th 1105, 56 Cal Rptr 2d 28, 1996 Cal App LEXIS 794.

The language of the three strikes law requires consecutive sentencing for each conviction that is "not committed on the same occasion, and not arising from the same set of operative facts" (*Pen C* § 667, subd. (c)(6), (7)). *Pen C* § 667, subd. (c), does not mention *Pen C* § 654 (prohibition against multiple punishment). Furthermore, the language of the three strikes law ("same occasion...same set of operative facts" does not match the language of *Pen C* § 654 ("an act or omission"). The language of the three strikes law is also different from that employed in judicial interpretations of *Pen C* § 654 ("intent and objective" or "indivisible course of conduct"). Hence, the three strikes law should not be read to require consecutive sentences for all current serious felony convictions regardless of when they were committed, unless the circumstances surrounding the conviction give rise to the *Pen C* § 654, bar against multiple punishment. *People v. Newsome* (1997, Cal App 3d Dist) 57 Cal App 4th 902, 67 Cal Rptr 2d 438, 1997 Cal App LEXIS 734, rehearing denied (1997, Cal App 3d Dist) 1997 Cal App LEXIS 788.

In a prosecution for robbery (*Pen C* § 211) of two defendants subject to the sentencing provisions of the three strikes law (*Pen C* § 667, subds. (b)-(i)), the trial court did not err when it added enhancements for prior serious felonies (*Pen C* § 667, subd. (a)) to defendants' indeterminate life sentences computed under *Pen C* § 667, subd. (e)(2)(A)(ii). The prefatory language of *Pen C* § 667, subd. (e), providing that the three strikes law applies "in addition to any other enhancement or punishment provisions which may apply," clearly prescribes that terms of enhancement, including the five-year enhancement under *Pen C* § 667, subd. (a), be imposed in addition to the indeterminate term. *People v. Newsome* (1997, Cal App 3d Dist) 57 Cal App 4th 902, 67 Cal Rptr 2d 438, 1997 Cal App LEXIS 734, rehearing denied (1997, Cal App 3d Dist) 1997 Cal App LEXIS 788.

Pen C § 667, subd. (c)(7) applies when there is more than one current serious or violent felony, and the reference to paragraph (6) in subdivision (c)(7) is to subdivision (c)(6). So construed, more than one serious or violent felony as described in paragraph (6) refers to multiple current convictions for serious or violent felonies not committed on the same occasion, and not arising from the same set of operative facts. Thus, when a defendant is convicted of two or more current serious or violent felonies not committed on the same occasion, and not arising from the same set of operative facts, not only must the court impose the sentences for these serious or violent offenses consecutive to each other, it must also impose these sentences consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law. By implication, consecutive sentences are not mandated under subdivision (c)(7) if all of the serious or violent current felony convictions are committed on the same occasion or arise from the same set of operative facts. Therefore, *Pen C* § 667, subd. (c)(7) does not mandate that the trial court impose consecutive sentences. Rather, the trial court retains discretion to impose either concurrent or consecutive sentences. *People v. Deloza* (1998) 18 Cal 4th 585, 76 Cal Rptr 2d 255, 957 P2d 945, 1998 Cal LEXIS 4037.

In a narcotics prosecution, the trial court properly sentenced defendant under the three strikes law (*Pen C* § 667, subds. (b)-(i)), even though one of the prior burglary convictions on which the sentence was based was committed before the effective date of *Pen C* § 1192.7, which defines "serious felony." A prior serious felony conviction sustained before the effective date of *Pen C* § 1192.7, may qualify as a strike. The three strikes law applies to felony convictions which were neither "serious" nor "violent" felonies at the time of conviction, but which fit the definition of "serious" or "violent" felonies on the relevant date, June 30, 1993. *Pen C* § 667, subd. (d)(1) (determination of whether prior conviction is prior felony conviction under three strikes law must be made upon date of prior conviction), does not require a contemporaneous characterization of a conviction as a serious or violent felony conviction. In this case, the prior conviction qualified as a strike, since substantial evidence supported the trial court's finding that the conviction was for the burglary of a building that was a residence, and on June 30, 1993, burglary of an inhabited dwelling house or inhabited portion of any other building was a serious felony, pursuant to *Pen C* § 1192.7, subd. (c)(18). *People v. Moenius* (1998, Cal App 2d Dist) 60 Cal App 4th 820, 70 Cal Rptr 2d 579, 1998 Cal App LEXIS 11.

The three strikes law did not repeal the death penalty in California. *People v. Hart* (1999) 20 Cal 4th 546, 85 Cal

Rptr 2d 132, 976 P2d 683, 1999 Cal LEXIS 2977, rehearing denied People v. Hart (1999) Supreme Court Minute 07-21-1999, 21 Cal. 4th 85c, 1999 Cal. LEXIS 4860, 99 Cal. Daily Op. Service 5823, 99 D.A.R. 7437, cert den (2000) 528 U.S. 1085, 120 S. Ct. 811, 145 L. Ed. 2d 683, 2000 U.S. LEXIS 264, 68 U.S.L.W. 3430.

The trial court's options for disposition of a defendant who comes within the ambit of the three strikes law are strictly limited by statute. When a defendant is convicted of a felony, and it is pleaded and proved that he has committed one or more prior felonies defined as violent or serious, sentencing must proceed under the three strikes law. If the defendant has two or more prior convictions which qualify as "strikes," the required sentence is an indeterminate term of life imprisonment. Probation is not an option for the convicted three strikes defendant. However, the trial court may elect to remove the defendant from the three strikes scheme in the furtherance of justice. On its own motion, the court may exercise its discretion to dismiss or "strike" prior felony conviction allegations under *Penal C § 1385(a)*. *People v. Superior Court(Roam) (1999, Cal App 6th Dist) 69 Cal App 4th 1220, 82 Cal Rptr 2d 119, 1999 Cal App LEXIS 109.*

Defendant was found guilty of second degree murder (*Penal C §§ 187(a), 189*), in the commission of which she used a deadly weapon, a knife (*Penal C § 12022(b)*). The court found true the allegations defendant previously had been convicted of two serious or violent felonies (*Penal C §§ 667 (a-i), 1170.12*), after which the court sentenced defendant to state prison for a triple term of 45 years to life. Although defendant argued that the word "term" in § 667(e)(2)(A) meant determinate terms, defendant's interpretation would lead to absurd results. A first degree murderer with only one prior strike would receive an indeterminate term of 50 years to life under (e)(1), which doubles the minimum term of an indeterminate sentence for a "second strike" defendant. But if the same murderer had two or more strikes, he could receive only an indeterminate term of 25 years to life. Adopting an interpretation which does not limit the use of the work "term" to determinate terms would serve the object of the three strikes law, which is to provide longer sentences for those with histories of serious or violent recidivism. The trial court did not err in imposing a tripled sentence. *People v. Bolden (1999, Cal App 2d Dist) 71 Cal App 4th 730, 84 Cal Rptr 2d 111, 1999 Cal App LEXIS 356, review gr, depublished Supreme Court Minute 08-11-1999 (1999, Cal) 88 Cal Rptr 2d 281, 982 P2d 152, 1999 Cal LEXIS 5316.*

Penal C § 667(e)(1) describes how a sentence is calculated under the legislative version of the three strikes law if the defendant has one prior strike. *Penal C § 1170.12(c)(1)*, in language virtually identical, governs sentencing of a defendant under the initiative version of the three strikes law when the defendant has one prior strike. Neither section expressly describes how a second-strike defendant is to be sentenced if the current offense is one for which a defendant with no prior strike would receive a sentence of life without possibility of parole. In construing the two statutes, the reviewing court is guided by the stated purpose of the three strikes law, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses. A doubled sentence of life without possibility of parole is consistent with *Penal C § 669*, which provides in pertinent part that life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another. Here, by doubling the sentence of life without possibility of parole, the court essentially sentenced appellant to two consecutive terms of life without possibility of parole. Nor was doubling a sentence of life without possibility of parole absurd. It is a remote but real possibility that one or another of the sentences might be commuted by the governor; imposing multiple such sentences will ensure that a defendant will still serve one of them in the unlikely event that all but one should be commuted. *People v. Hardy (1999, Cal App 2d Dist) 73 Cal App 4th 1429, 87 Cal Rptr 2d 278, 87 Cal Rptr 2d 279, 1999 Cal App LEXIS 734, review denied (1999, Cal) 1999 Cal LEXIS 7278.*

In a prosecution in which defendant was convicted of attempted robbery and attempted willful, deliberate, and premeditated murder, *Penal C § 654* prohibited multiple punishment under the three strikes law. The trial court erred in imposing separate consecutive sentences for the attempted murder and attempted robbery that occurred when defendant demanded all of the victim's money outside of a fast food restaurant, then shot him in the stomach when he refused. The trial court also erroneously believed that the three strikes law required mandatory consecutive sentencing. Although the three strikes law does provide that the sentence on each current conviction must be imposed "in addition to any other enhancement or punishment provisions which may apply," this language does not create an exception to § 654 applicable to two or more current convictions. *People v. Danowski (1999, Cal App 4th Dist) 74 Cal App 4th 815, 88 Cal Rptr 2d 471, 1999 Cal App LEXIS 806, review denied (1999, Cal) 1999 Cal LEXIS 8111.*

Since there is no ambiguity, the usual and ordinary meaning of the term "same occasion" used in *Pen C* § 667(c)(6) must control. *People v. Lawrence* (2000) 24 Cal 4th 219, 99 Cal Rptr 2d 570, 6 P3d 228, 2000 Cal LEXIS 6688, rehearing denied (2000, Cal) 2000 Cal LEXIS 7888.

Term "operative facts" in *Pen C* § 667(c)(6) relates to the facts underlying the charged offenses. *People v. Lawrence* (2000) 24 Cal 4th 219, 99 Cal Rptr 2d 570, 6 P3d 228, 2000 Cal LEXIS 6688, rehearing denied (2000, Cal) 2000 Cal LEXIS 7888.

In a murder prosecution in which defendant admitted five prior convictions, the trial court did not err in calculating his sentence under the three strikes law by tripling the minimum parole eligibility date of 25 years (*Pen C* § 667(e)(2)(A)). The applicability of option (i) under subsection (e)(2)(A) includes crimes for which the punishment otherwise prescribed by law is an indeterminate term. The fact that option (i) uses the word "term" but does not use the word "period" does not mean that it applies only to determinate sentences. *People v. Mendoza* (2000, Cal App 4th Dist) 78 Cal App 4th 918, 93 Cal Rptr 2d 216, 2000 Cal App LEXIS 141, review or rehearing denied (2000, Cal) 2000 Cal LEXIS 4996.

Under *Pen C* § 667(e)(1), only two types of sentence terms are doubled: a determinate term and the minimum term of an indeterminate term. Since a life without possibility of parole sentence is not a determinate term and does not contain a minimum term, it is not subject to the doubling requirement of subdivision (e)(1). *People v. Smithson* (2000, Cal App 3d Dist) 79 Cal App 4th 480, 94 Cal Rptr 2d 170, 2000 Cal App LEXIS 238, review denied (2000, Cal) 2000 Cal LEXIS 5919.

In order to determine the scope of its sentencing discretion under the Three Strikes law (*Pen C* §§ 667, 1170.12), a trial court must know the factual basis of each conviction. If the jury could have based its verdicts upon a number of unlawful acts and the trial court could not determine beyond a reasonable doubt the particular acts the jury selected, the trial court should assume that the verdicts were based on those acts that would give it the most discretion to impose concurrent terms. *People v. Coelho* (2001, Cal App 6th Dist) 89 Cal App 4th 861, 107 Cal Rptr 2d 729, 2001 Cal App LEXIS 424, review denied (2001, Cal) 2001 Cal LEXIS 6464.

Because *Pen C* § 667(b) limited application of the Three Strikes law to persons who had committed a felony and who had been previously convicted of serious and/or violent felony offenses, the law did not apply to defendant, who had committed the present offense in September 2000, and had been subsequently, not previously, convicted of the purported strike offense in November 2000. *People v. Flood* (2003, Cal App 3d Dist) 108 Cal App 4th 504, 133 Cal Rptr 2d 516, 2003 Cal App LEXIS 658, review denied (2003, Cal) 2003 Cal LEXIS 4588.

There can be no doubt after examining the language of *Pen C* § 667(c) but that consecutive sentences are required for all current felony convictions, regardless of whether a strike allegation attaches to them, if the crimes did not arise on the same occasion or under the same set of operative facts; reaching a different conclusion as to this requirement would distort the statutory language, eviscerate the three strikes law, and return to trial judges a discretion in sentencing both the legislature and the electorate sought to severely curtail. *People v. Casper* (2004) 33 Cal 4th 38, 14 Cal Rptr 3d 43, 90 P3d 1203, 2004 Cal LEXIS 4785, rehearing denied (2004, Cal) 2004 Cal LEXIS 6460.

Three Strikes Law, *Pen C* §§ 667(b)-(i), 1170.12, unlike *Pen C* § 1170.1, does not draw any distinction between status enhancements, based on the defendant's record, and enhancements based on the circumstances of the current offenses, and the Three Strikes Law generally discloses an intent to use the fact of recidivism to separately increase the sentence imposed for each new offense, and accordingly, under the Three Strikes Law, *Pen C* § 667(a) enhancements are to be applied individually to each count of a third strike sentence; thus, defendant's sentence under the Three Strikes Law regarding convictions for forcible rape, oral copulation, and sodomy in violation of *Pen C* §§ 261(a)(2), 264.1, 288a(d), 286(d) was affirmed. *People v. Williams* (2004) 34 Cal 4th 397, 19 Cal Rptr 3d 619, 98 P3d 876, 2004 Cal LEXIS 9658.

Five-year enhancement under *Pen C* § 667(a) of the Three Strikes Law, *Pen C* §§ 667(b)-(i), 1170.12, for a prior serious felony conviction was added as part of a statutory and constitutional scheme enacted by the voters, and the voters' intent was to increase sentences for recidivist offenders; adding the five-year enhancement separately to the third strike sentence for each new serious felony conviction is not inconsistent with this intent, and adding the five-year enhancement to the sentence for each new serious felony conviction is also consistent with the logic of the *Three Strikes Law*. *People v. Williams* (2004) 34 Cal 4th 397, 19 Cal Rptr 3d 619, 98 P3d 876, 2004 Cal LEXIS 9658.

California's Three Strikes law permitted the state trial court to impose an enhanced sentence on petitioner because the State pled and proved that petitioner previously had been convicted of certain felonies in Illinois that were the equivalent of convictions for rape and robbery in California; as a result, the State established the necessary two predicate "serious felonies" for imposing Three Strikes sentencing when petitioner was convicted of a felony drug sale offense. *Hughes v. Galaza* (2004, ND Cal) 2004 US Dist LEXIS 2975, aff'd (2005, 9th Cir Cal) 129 Fed Appx 340, 2005 US App LEXIS 3990.

Imposition of two prior serious felony enhancements, one on a determinate term imposed on an assault count and the other on an indeterminate term imposed on a torture count, was consistent with the intent of the Three Strikes law to use the fact of recidivism to separately increase the sentence imposed for each new offense; *Pen C* § 667(a) enhancements are to be applied individually to each count of a recidivist's sentence. *People v. Misa* (2006, Cal App 4th Dist) 140 Cal App 4th 837, 44 Cal Rptr 3d 805, 2006 Cal App LEXIS 913, modified, rehearing denied (2006, Cal App 4th Dist) 2006 Cal App LEXIS 1090, review denied (2006, Cal) 2006 Cal LEXIS 14157.

Three strikes statute is not intended to reward defendants for over-eagerness in committing new offenses. To the contrary, both the letter and spirit of the three strikes law is maintained when a defendant who commits a new offense after his or her guilt has been determined on prior conduct is punished accordingly. *People v. Queen* (2006, Cal App 3d Dist) 141 Cal App 4th 838, 46 Cal Rptr 3d 332, 2006 Cal App LEXIS 1145, review denied (2006, Cal) 2006 Cal LEXIS 13558.

3. Constitutionality

Where defendant was charged with the crime of petty theft with a prior conviction of a felony, in violation of *Pen C* § 667, and he admitted the facts that he had stolen the clothing in question and that he had suffered a prior felony conviction for forgery of fictitious name for which he had served time, the trial court was not required to make a finding as to defendant's prior conviction before imposing an enhanced sentence. Statutes that provided for an increased penalty for subsequent offenses, former *Pen C* §§ 644 and 667, do not result in double jeopardy or cruel or unusual punishment, nor do they violate due process or equal protection. *People v. McDaniels* (1958, Cal App 2d Dist) 165 Cal App 2d 283, 331 P2d 450, 1958 Cal App LEXIS 1288.

The imposition of a five-year sentence enhancement for each prior serious felony, as mandated by *Pen C* § 667, does not violate the constitutional prohibition against cruel and unusual punishment. *People v. Lopez* (1983, Cal App 2d Dist) 147 Cal App 3d 162, 195 Cal Rptr 27, 1983 Cal App LEXIS 2178.

The five-year enhancement, under *Pen C* § 667, to the sentence of defendant, who pleaded nolo contendere to a charge of robbery, for a prior robbery conviction, was not unconstitutional as cruel and unusual punishment or as violative of due process of law. Although a defendant twice convicted for murder receives the same mandatory enhancement under the statute as a defendant twice convicted for selling narcotics to minors, this disparity is neither arbitrary nor oppressive. The same enhancement time does not mean the same punishment time for defendants twice convicted for different offenses. Moreover, the offenses which bring *Pen C* § 667, into play are all serious felonies. The statute has a reasonable and proper purpose in discouraging recidivism and punishing those who commit serious offenses. *People v. Villasenor* (1984, Cal App 2d Dist) 152 Cal App 3d 30, 199 Cal Rptr 349, 1984 Cal App LEXIS 1644.

Defendant was not denied equal protection of the law by the imposition of a five-year sentence enhancement under *Pen C § 667*, which provides for such an enhancement for a recidivist serious offender, even though § 667 does not apply to other defendants who are not recidivists, or are charged with different crimes. Defendant was not similarly situated with others not subject to § 667. A recidivist offender is not similarly situated to a first offender with respect to the legitimate purpose of § 667 to protect the public safety (*Cal. Const., art. I, § 28, subd. (a)*) by discouraging persons who commit serious felonies from doing so again. Nor was defendant similarly situated to persons convicted of other crimes. The offenses which bring § 667 into play are all serious, mostly violent, offenses which are obviously dangerous to society, and such differences warrant different treatment. *People v. Jacobs (1984, Cal App 2d Dist) 157 Cal App 3d 797, 204 Cal Rptr 234, 1984 Cal App LEXIS 2247.*

Application of *Pen C § 667*, an enhancement provision added by Proposition 8, to enhance the sentence for a crime committed after Proposition 8 because of a pre-Proposition 8 prior conviction for a serious felony does not violate U.S. Const., art. I, § 9 or *Cal. Const., art. I, § 9*, as being an ex post facto determination of criminal liability. Increased penalties for subsequent offenses are attributable to the defendant's status as a repeat offender and arise as an incident of the subsequent offense rather than constituting a penalty for the prior offense. For this reason, statutes imposing such penalties are not ex post facto laws. *People v. Weaver (1984, Cal App 1st Dist) 161 Cal App 3d 119, 207 Cal Rptr 419, 1984 Cal App LEXIS 2644.*

A defendant who was convicted of attempted burglary of a residence (*Pen C §§ 664, 459*) with three prior serious felony convictions and was sentenced to prison for the middle base term of one year, plus three consecutive five-year terms for the prior serious felonies under *Pen C § 667*, was not subjected to cruel and unusual punishment by the § 667 enhancements. In general, the constitutionality of the habitual criminal law is well established; when a person has proven himself immune to the ordinary modes of punishment, then it becomes the duty of government to seek some other method to curb his criminal propensities so that he may not continue to further inflict himself upon law abiding members of society. Specifically, in view of the seriousness of the crime of residential burglary and its high degree of danger to society, together with the character of defendant, who, at thirty-nine, had seven prior felony convictions and four prior misdemeanors and a history of drug abuse, § 667 did not impose cruel and unusual punishment on him. *People v. Weaver (1984, Cal App 1st Dist) 161 Cal App 3d 119, 207 Cal Rptr 419, 1984 Cal App LEXIS 2644.*

Although *Pen C § 667, subd. (a)*, dealing with persons convicted of serious felonies, requires a five-year sentence enhancement for a prior serious felony conviction only where it was based on charges "brought and tried separately," whereas *Pen C § 667.6, subd. (a)*, dealing with persons convicted of violent sex offenses, permits a five-year sentence enhancement for "each such prior conviction" of a violent sex offense, even if the convictions were obtained in a single criminal action, failure to apply the two provisions in an identical manner to insure that persons previously convicted of violent sex offenses are accorded the same treatment as persons previously convicted of violent felonies, does not constitute a violation of a defendant's right to equal protection, since violent sex offenders are not similarly situated with other offenders and thus may be treated differently. *People v. Baker (1985, Cal App 1st Dist) 169 Cal App 3d 58, 215 Cal Rptr 293, 1985 Cal App LEXIS 1977.*

In a prosecution for murder and assault with a deadly weapon, enhancement of defendant's sentence by five years pursuant to *Pen C § 667* (enhancement for previous conviction of serious felony), did not violate defendant's equal protection rights, even though under *Pen C § 667.5, subd. (b)* (one-year enhancement for each prior separate prison term served for any felony), which overlaps with § 667, he could have received an enhancement of only one year, where there was no claim that the prosecutor, in exercising discretion as to which statute would be charged, had engaged in intentional and purposeful invidious discrimination. *People v. Wallace (1985, Cal App 5th Dist) 169 Cal App 3d 406, 215 Cal Rptr 203, 1985 Cal App LEXIS 2010.*

California's interest in including within the definition of "serious felony" in *Pen C § 667* (sentence enhancements for those who are convicted of serious felonies and have previously been convicted of such felonies), arson of personal property with intent to defraud is the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts show that they are simply incapable of conforming to the norms of society as

established by its criminal laws; it is not unreasonable, arbitrary, or capricious to decide that arson of personal property with either intent to defraud or injury to another person, another person's structure, forest land or property poses a serious danger to society. Thus, in a prosecution in which defendant was convicted of arson of his own property with intent to defraud, and in which defendant admitted two prior serious felony convictions, defendant's sentence, which included two five-year enhancements under *Pen C* § 667, was not so disproportionate to the crime he committed as to rise to the level of a violation of the constitutional prohibition against cruel and unusual punishment. *People v. Jameson* (1986, Cal App 2d Dist) 177 Cal App 3d 658, 223 Cal Rptr 108, 1986 Cal App LEXIS 2582.

There is no requirement that the Legislature or electorate penalize all culpable conduct or precisely structure penal sanctions so that all degrees of culpability are omnisciently placed in their proper place in some continuum of penalties. Thus, in a prosecution for burglary (*Pen C* § 459), the enhancement of defendant's sentence on the basis of a prior attempted robbery conviction (*Pen C* §§ 664, 211) within the meaning of *Pen C* § 667, subd. (a), was not unconstitutional, even though the statute imposes the same penalty for offenses dissimilar in severity. *People v. Chandler* (1986, Cal App 2d Dist) 186 Cal App 3d 200, 230 Cal Rptr 492, 1986 Cal App LEXIS 2098.

Where two sentence enhancement statutes overlap, no state or federal equal protection violation necessarily occurs when, in the exercise of prosecutorial discretion, a defendant is charged with and sentenced under the more severe of the two statutes. Thus, in a prosecution for armed robbery with prior serious felony convictions, defendant's equal protection rights were not violated by the imposition of sentence enhancements under *Pen C* § 667, which the trial court has no discretion to dismiss (*Pen C* § 1385, subd. (b)), rather than under *Pen C* § 667.5, which can be stayed, in the absence of any contention that the prosecutor's choice was the product of intentional and purposeful invidious discrimination. *People v. Valencia* (1989, Cal App 4th Dist) 207 Cal App 3d 1042, 255 Cal Rptr 180, 1989 Cal App LEXIS 95.

Pen C § 667, subd. (a), which mandates that any person convicted of a "serious felony" must receive a consecutive five-year enhancement for each such prior conviction on charges brought and tried separately, satisfies a strict scrutiny standard of equal protection review. The state has a compelling interest in the protection of public safety and in preventing and punishing recidivism. Its focus on "serious" felonies furthers that interest, and the limitation of § 667 to only those cases which were brought and tried separately does not result in a denial of equal protection. Thus, in a prosecution for second degree robbery, the trial court did not violate equal protection guarantees in imposing, pursuant to *Pen C* § 667, subd. (a), two five-year enhancements for two prior convictions, even though the prior offenses might have been brought and tried together in a single proceeding. Defendant was a member of a class of recidivist serious offenders whose prior felonies were brought and tried separately, and defendant was treated the same as all others in that class. *People v. Jerez* (1989, Cal App 2d Dist) 208 Cal App 3d 132, 256 Cal Rptr 31, 1989 Cal App LEXIS 151.

Defendant's equal protection rights were not violated by the imposition of two sentence enhancements under *Pen C* § 667, subd. (a), based on two prior felony convictions, even though the charges in both prior proceedings could have been brought and tried together, which would have resulted in only one § 667 enhancement. Prosecutors have great discretion in filing criminal charges, including the choice of maximizing the available sentence (including enhancements) resulting from conviction, and the timing of filing unrelated charges. Such discretion does not violate equal protection. Further, it would be impractical for appellate courts to determine which prior felony charges could have been consolidated. Here, while defendant's conduct leading to the prior convictions had occurred over a short period, the relevant factor was the relationship between the present case and the prior cases; defendant had ignored the lesson of those convictions, which occurred years before, so that the legislative purpose of deterring recidivist behavior was satisfied by imposing an enhancement for each one. *People v. Bizieff* (1990, Cal App 5th Dist) 226 Cal App 3d 130, 276 Cal Rptr 235, 1990 Cal App LEXIS 1298, review denied (1991, Cal) 1991 Cal LEXIS 1145.

In a prosecution for robbery (*Pen C* § 211), which included allegations of two prior serious felony convictions for enhancement purposes (*Pen C* § 667), the trial court properly denied defendant's motion to strike the prior convictions, notwithstanding defendant's claim that the convictions were unconstitutional at the time he pleaded guilty to them in that he was not advised that they could be used to enhance his sentence in the event of a subsequent conviction. The

trial court had no duty to advise defendant that in the event he committed a subsequent felony he would be subject to an enhanced punishment as a result of his plea. An enhanced sentence in a future prosecution for a yet uncommitted crime was clearly an indirect, collateral consequence of defendant's guilty plea to the earlier charges. The trial court should not be required, even before imposing sentence for one crime, to inform the defendant what the sentence may be for committing another crime. *People v. Crosby* (1992, Cal App 1st Dist) 3 Cal App 4th 1352, 5 Cal Rptr 2d 159, 1992 Cal App LEXIS 220, review denied (1992, Cal) 1992 Cal LEXIS 2348.

Pen C § 667 (habitual offenders), enacted as part of Prop. 8, is not unconstitutional by reason that *Pen C* § 667 subd. (f), allows amendment of the statute without voter approval only if the Legislature meets a two-thirds majority requirement. Extraordinary majority provisions applicable to legislative bodies have less constitutional implications than those applicable to individual voters because legislators have no constitutionally protected voting rights. Consequently, a supermajority requirement may be imposed on a legislative body without offending the Constitution. Also, the supermajority requirement does not offend *Cal. Const., art. IV, § 8, subd. (b)*, which requires a majority of the Legislature to enact a statute. A bill that obtains the approval of two-thirds of the membership of each house has also obtained the approval of the majority. Therefore, the Legislature's 1986 amendment of *Pen C* § 667, to remove the trial court's discretion to strike enhancements, approved by the requisite supermajority, was effective. *People v. Cortez* (1992, Cal App 6th Dist) 6 Cal App 4th 1202, 8 Cal Rptr 2d 580, 1992 Cal App LEXIS 668, review denied (1992, Cal) 1992 Cal LEXIS 4061.

The federal Constitution does not confer a right to have a jury determine any aspect of a sentence enhancement imposed upon a defendant for previously having been convicted of a serious felony set forth in *Pen C* § 667, subd. (a)(1), including whether each prior conviction was based "on charges brought and tried separately." Generally there is no *U.S. Const., 6th Amend.*, right to jury sentencing, even where the sentence turns on specific findings of fact. Neither does the California Constitution grant a right to have a jury determine the truth of prior conviction allegations that relate to sentencing. The pertinent provision of *Cal. Const., art. I, § 16*, simply states: "Trial by jury is an inviolate right and shall be secured to all." Nothing in the text or history of this provision purports to require a jury determination of all factual issues involved in a criminal trial. It is within the province of the court to resolve factual issues that arise in many contexts in a criminal proceeding. Thus, the ability of courts to make factual findings in conjunction with the performance of their sentencing functions never has been questioned. *People v. Wiley* (1995) 9 Cal 4th 580, 38 Cal Rptr 2d 347, 889 P2d 541, 1995 Cal LEXIS 703.

The use of a prior serious felony conviction occurring prior to Mar. 7, 1994, the effective date of statutory amendments to *Pen C* § 667, subds. (b)-(i), that increased sentence enhancements for prior convictions, to enhance defendant's sentence for a narcotics offense committed Apr. 1, 1994, did not violate the ex post facto provisions of the federal and state Constitutions (*U.S. Const., art. I, §§ 9, 10; Cal. Const., art. I, § 9*). In varying circumstances, courts have repeatedly upheld the use of a prior conviction occurring prior to the adoption of an enhancing provision such as *Pen C* § 667, subds. (b)-(i). *People v. Hatcher* (1995, Cal App 1st Dist) 33 Cal App 4th 1526, 39 Cal Rptr 2d 801, 1995 Cal App LEXIS 338, review denied (1995, Cal) 1995 Cal LEXIS 4468.

In a prosecution in which it was alleged that defendant escaped while charged with a felony, and that defendant's prior burglary conviction was a "strike" under the new three strikes law (*Pen C* § 667, subds. (b)-(i)), defendant failed to prove that the three strikes law violated due process on the basis that it did not bear a rational relationship to a legitimate state interest. Defendant's attack upon the three strikes law, although phrased as a due process challenge, essentially questioned the wisdom of the law. In arguing the law was irrational, defendant cited its severe punishment for nonviolent offenders, its potential triple life sentences, and its high cost. However, it is not the function of the courts to decide whether the Legislature properly weighed the evidence offered by proponents and opponents of a law, or whether it selected the "correct" remedy for a given problem. Whether a law is "wise" is a matter of public policy for the Legislature, not the courts. Habitual criminal statutes have long been considered a rational response to the problem of recidivist crime. The three strikes law is reasonably related to a proper legislative goal of curbing recidivist criminal activity. As such, it does not violate due process. *People v. Sipe* (1995, Cal App 3d Dist) 36 Cal App 4th 468, 42 Cal Rptr 2d 266, 1995 Cal App LEXIS 610, review denied (1995, Cal) 1995 Cal LEXIS 5979, cert den (1996) 516 US 1131,

133 L Ed 2d 875, 116 S Ct 951, 1996 US LEXIS 1223.

In a prosecution in which defendant pleaded guilty to escape, and in which he admitted a prior burglary conviction, the fact that he could not, pursuant to *Pen C* § 667, subd. (c)(5), part of the three strikes law, receive a credit of more than one-fifth of the total term of imprisonment imposed did not result in a denial of equal protection. Defendant relied on a prior Court of Appeal case to support his claim that murderers with prior serious or violent felonies were sentenced under *Pen C* § 190, making them eligible for a one-third sentence reduction for credits under *Pen C* § 2931. He asserted there was no rational reason for treating habitual criminals who commit murder more leniently than those who commit less serious crimes, such as escape. However, the premise underlying his argument, that all murderers must be sentenced under *Pen C* § 190, was doubtful, since the California Supreme Court had recently disapproved the case he relied on. Moreover, the first prerequisite for an equal protection claim is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. However, defendant was sentenced to a four-year determinate sentence, and thus was not similarly situated with murderers who receive an indeterminate life sentence. Any credits he received would reduce his sentence and move up his release date, while any credits a murderer receives are applied against his or her minimum parole eligibility date (*Pen C* § 190), and do not necessarily result in an earlier release date. *People v. Sipe* (1995, Cal App 3d Dist) 36 Cal App 4th 468, 42 Cal Rptr 2d 266, 1995 Cal App LEXIS 610, review denied (1995, Cal) 1995 Cal LEXIS 5979, cert den (1996) 516 US 1131, 133 L Ed 2d 875, 116 S Ct 951, 1996 US LEXIS 1223.

The use of the same prior conviction to convict defendant of felony escape (*Pen C* § 4532, subd. (b)), and to increase his sentence under *Pen C* § 667, subd. (e)(1) (three strikes law), did not violate the double jeopardy clauses of *U.S. Const.*, 5th Amend., and *Cal. Const.*, art. I, § 15. To determine if a defendant is being punished twice for the same offense, the court looks to both statutory provisions to see if each requires proof of an additional fact that the other does not. Even accepting defendant's dubious characterization of *Pen C* § 667, as defining an offense, he still failed to show a double jeopardy violation. The protection against multiple punishments for the same offense does not mean that a Legislature cannot provide for cumulative punishment under two statutes. With respect to cumulative sentences imposed in a single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the Legislature intended. *Pen C* § 667, subd. (f)(1), provides that "subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d)." This absolute language permits only the interpretation that the Legislature intended more severe punishment for recidivist felons, regardless of whether a prior conviction is a component of their current felony. Even if such punishment can be considered cumulative, it survives constitutional challenge due to the legislative authorization. *People v. Sipe* (1995, Cal App 3d Dist) 36 Cal App 4th 468, 42 Cal Rptr 2d 266, 1995 Cal App LEXIS 610, review denied (1995, Cal) 1995 Cal LEXIS 5979, cert den (1996) 516 US 1131, 133 L Ed 2d 875, 116 S Ct 951, 1996 US LEXIS 1223.

A defendant convicted of possessing cocaine base who admitted a prior serious felony pursuant to *Pen C* § 667, subds. (d) and (e), a provision of the three strikes law, was not denied equal protection by the fact that persons who commit current serious or violent felonies, but who do not have qualifying priors under the three strikes law, can earn more prison credits than those who have such qualifying priors. A violation of equal protection requires a showing that the state has adopted a classification that affects similarly situated groups in an unequal manner. However, defendant and the class he compared himself with are not similarly situated. The Legislature has seen fit to increase the severity of punishment for recidivists who have committed serious or violent felonies and who again commit felony offenses. Regardless of whether the new crime committed by such persons is serious or nonserious, it cannot be said that harsher treatment for such recidivists is irrational or arbitrary such that it denies them equal protection under the law. *People v. McCain* (1995, Cal App 4th Dist) 36 Cal App 4th 817, 42 Cal Rptr 2d 779, 1995 Cal App LEXIS 646, review denied (1995, Cal) 1995 Cal LEXIS 6273.

A defendant convicted of possessing cocaine base who admitted a prior serious felony pursuant to *Pen C* § 667, subds. (d) and (e), a provision of the three strikes law, did not show that he was denied equal protection by the allegation that certain recidivist murderers would be able to earn greater prison credits than he could, based on a Court

of Appeal opinion that had held that all murderers are sentenced pursuant to *Pen C § 190*, providing for one-third credits, and defendant could only earn 20 percent of the available credits. However, that decision was disapproved by the California Supreme Court, which determined that recidivist murderers who qualify under *Pen C § 667.7*, a three strikes law provision must be sentenced thereunder and will receive the limited credits against their prison sentences as provided in *Pen C § 667*, subd. (c)(5). Hence, defendant would be treated the same as those persons who are similarly situated (persons who qualify as second or third strike offenders) and was not denied equal protection of the law. *People v. McCain* (1995, Cal App 4th Dist) 36 Cal App 4th 817, 42 Cal Rptr 2d 779, 1995 Cal App LEXIS 646, review denied (1995, Cal) 1995 Cal LEXIS 6273.

The three strikes law (*Pen C § 667*, subd. (b)) is valid urgency legislation. The Legislature enacted the three strikes law as an urgency measure to ensure longer prison sentences and greater punishment for felons who have previously committed violent or serious felonies, in order to protect the public from the imminent threat posed by those repeat offenders. Under the California Constitution, an urgency statute becomes effective immediately upon enactment, but it may not create or abolish any office or change the salary, term, or duties of any office. An addition or subtraction in relation to the volume of the duties required to be performed by an officer, which does not substantially affect the primary duties of his or her office, is not such a change of duties as would prevent immediate effectiveness of legislation properly declared to be urgent. The primary duties of the office of trial judge and prosecutor have not been changed by the three strikes law. Their discretion in sentencing or prosecuting defendants has never been absolute. Since the new restrictions in the three strikes law are not unduly or materially and substantially different from those already imposed, they do not constitute a change in duties. *People v. Cartwright* (1995, Cal App 3d Dist) 39 Cal App 4th 1123, 46 Cal Rptr 2d 351, 1995 Cal App LEXIS 1054, review denied (1996, Cal) 1996 Cal LEXIS 1016.

In sentencing defendant, a violent recidivist with 19 current felony convictions including weapon use enhancements arising from his sexual assault of 3 women, to 15 indeterminate terms of 25 years to life plus a determinate term of 53 years in prison under the three strikes law (*Pen C § 667*, subd. (b)), the trial court did not violate the *U.S. Const., 8th Amend.*, proscription against cruel and unusual punishment. The United States Supreme Court recently upheld a life sentence without the possibility of parole for possessing 672 grams of cocaine. Thus, defendant's similar sentence for his more serious violent crimes was not grossly disproportionate, and due to the gravity of the crimes, his sentence was constitutional. *People v. Cartwright* (1995, Cal App 3d Dist) 39 Cal App 4th 1123, 46 Cal Rptr 2d 351, 1995 Cal App LEXIS 1054, review denied (1996, Cal) 1996 Cal LEXIS 1016.

The trial court did not violate the California Constitution's (*Cal. Const., art. I, § 17*) prohibition against cruel or unusual punishment in sentencing defendant, a violent recidivist with 19 current felony convictions including weapon use enhancements, arising from his sexual assault of 3 women, to 15 indeterminate terms of 25 years to life plus a determinate term of 53 years in prison under the three strikes law (*Pen C § 667*, subd. (b)). Even if defendant's crimes left no permanent physical injury on his victims, the essential guilt of rape consists in the outrage to the person and feelings of the rape victim. Also, even if murderers, including serial killers, may be treated more leniently because they may be eligible for parole, the three strikes law punishes not only a defendant's current offenses, but also his or her recidivism. Moreover, since defendant had spent most of his adult life in custody, was recently on parole when he committed these offenses, and had committed numerous and often violent past crimes, his punishment did not shock the conscience so as to violate the *California Constitution*. *People v. Cartwright* (1995, Cal App 3d Dist) 39 Cal App 4th 1123, 46 Cal Rptr 2d 351, 1995 Cal App LEXIS 1054, review denied (1996, Cal) 1996 Cal LEXIS 1016.

In the case of a defendant convicted of possession of cocaine base, who was sentenced pursuant to the provisions of the three strikes law (*Pen C § 667*, subds. (c)-(j)), the limitation of defendant's conduct credits mandated by that sentencing statute (*Pen C § 667*, subd. (c)), did not violate his right to equal protection (*U.S. Const., 14th Amend.*; *Cal. Const., art. I, § 7*, subd. (a)). Defendant was similarly situated only to those persons who are recidivist felony offenders sentenced under the determinate sentencing law (DSL) and the three strikes law. Because *Pen C § 667*, subd. (c)(5), treats all such persons the same, and since the Legislature may properly limit the application of laws to a uniform class of persons such as previously convicted felons, defendant was not denied equal protection. "Second strike" murderers are not treated less harshly than persons convicted of other "second strike" felonies: the limited time credits provision

expressly overrides any more generous time credit statute applicable to murderers (*Pen C § 667*, subd. (c)(5)). Furthermore, although the three strikes law does not supersede the habitual offender scheme of *Pen C § 667.7*, the two measures are similar in several respects. Moreover, defendant was sentenced under the determinate sentence law, whereas murderers sentenced under *Pen C § 190*, receive an indeterminate term: since conduct credits have meaning only within the context of a fixed term, equal protection principles are not violated by affording different time credits to those two different groups. *People v. Applin* (1995, *Cal App 5th Dist*) 40 *Cal App 4th* 404, 46 *Cal Rptr 2d* 862, 1995 *Cal App LEXIS* 1123.

It was not cruel or unusual punishment under *Cal. Const., art. I, § 17*, to sentence defendant, who was convicted of two counts of residential burglary, to sixty-one years-to-life imprisonment under the three strikes law (*Pen C § 667*, subds. (b)-(i)). The sentence was not disproportionate to the crimes defendant committed. Defendant had used drugs and alcohol extensively since a young age and was a heroin addict, he was on parole at the time he committed the current offenses, he had a lengthy criminal record, including a recent burglary at knifepoint, and he conceded that he was a habitual offender and that there was a danger he would steal or burglarize again if not incarcerated. Further, even though a defendant convicted of first degree, premeditated murder with a firearm could receive a lesser sentence than defendant, defendant's sentence could not properly be compared with the punishment for first degree, premeditated murder, since the maximum punishment for that offense is much greater than defendant's maximum punishment under *Pen C § 667*. In addition, since the seriousness of the threat a particular offense poses to society is not solely dependent upon whether it involves physical injury, the commission of a single act of murder cannot be compared with the commission of multiple serious felonies. Finally, California's three strikes scheme is consistent with the nationwide pattern of substantially increasing sentences for habitual offenders. *People v. Ingram* (1995, *Cal App 5th Dist*) 40 *Cal App 4th* 1397, 48 *Cal Rptr 2d* 256, 1995 *Cal App LEXIS* 1212, review denied (1996, Cal) 1996 *Cal LEXIS* 1568, overruled *People v. Dotson* (1997) 16 *Cal 4th* 547, 66 *Cal Rptr 2d* 423, 941 *P2d* 56, 1997 *Cal LEXIS* 4416 .

The three strikes law (*Pen C § 667*, subds. (b)-(i)), is not vague and did not fail to give adequate notice of the punishment to be imposed on a defendant found guilty of petty theft with a prior, with an alleged prior serious felony, a "strike," found true, and who was sentenced to a four-year state prison term. *Pen C § 667*, subd. (e)(1), provides that "If a defendant has one prior felony conviction that has been pled and proved, the determinate term...shall be twice the term otherwise provided as punishment." The trial court imposed the two-year midterm for defendant's current conviction (*Pen C § 666*) and, pursuant to *Pen C § 667*, subd. (e)(1), and doubled that term, as agreed to by defendant, the district attorney, and the trial court as part of the jury-waiver-sentence-bargain. *People v. Hamilton* (1995, *Cal App 2d Dist*) 40 *Cal App 4th* 1615, 47 *Cal Rptr 2d* 749, 1995 *Cal App LEXIS* 1225, review denied (1996, Cal) 1996 *Cal LEXIS* 1554.

The three strikes law (*Pen C § 667*, subds. (b)-(i)) did not violate equal protection principles of defendant who had been convicted of petty theft with a prior, by the alleged fact that *Pen C § 667*, subd. (b)(5), limits custody credits to one-fifth of the total term of imprisonment imposed, and had defendant "committed a murder instead of robbery," he would be able to earn credits in an amount up to one-third of his term. However the statute relied on by defendant, *Pen C § 2931*, subd. (d), restricts this "one-third" credits opportunity to persons who committed their crimes no later than Jan. 1, 1983. Accordingly, if instead of committing theft on July 19, 1994, (the date of the instant crime) defendant had committed murder, state prison custody credits would have been limited to one-fifth the imprisonment term (*Pen C §§ 667*, subd. (c)(5), 2931, subd. (d)). *People v. Hamilton* (1995, *Cal App 2d Dist*) 40 *Cal App 4th* 1615, 47 *Cal Rptr 2d* 749, 1995 *Cal App LEXIS* 1225, review denied (1996, Cal) 1996 *Cal LEXIS* 1554.

The three strikes law (*Pen C § 667*, subds. (b)-(i)), an urgency measure, did not violate *Cal. Const., art. IV, § 8*, subd. (d), providing that an urgency statute may not change the duties of any office, by allegedly changing the duties of prosecutors and judges. Urgency legislation is a process that is part and parcel of the state's constitutionally sanctioned legislative process. The Legislature has authority to determine when urgency measures are necessary and recitals of necessity and public interest in legislation must be given great weight and every presumption made in favor of their constitutionality. An addition or subtraction of the duties which does not substantially affect the primary duties of an office, is not such a change of duties as would prevent immediate effectiveness of legislation properly declared to be urgent. There is nothing in *Pen C § 667*, subds. (b)-(i), which substantially affects the primary duties of either

prosecutors or judges. *People v. Kinsey* (1995, Cal App 2d Dist) 40 Cal App 4th 1621, 47 Cal Rptr 2d 769, 1995 Cal App LEXIS 1218, review denied (1996, Cal) 1996 Cal LEXIS 1550.

The three strikes law (*Pen C* § 667, subs. (b)(i)), is not vague and did not fail to give adequate notice of the punishment (29-year-to-life state prison term) to be imposed on a defendant found guilty of attempted injury upon a cohabitant (*Pen C* §§ 664, 273.5, subd. (a)), battery, and assault, and as to whom 3 serious felony allegations were found true: a 1986 attempted robbery conviction, a 1987 robbery conviction, and a 1989 attempted robbery conviction. *People v. Kinsey* (1995, Cal App 2d Dist) 40 Cal App 4th 1621, 47 Cal Rptr 2d 769, 1995 Cal App LEXIS 1218, review denied (1996, Cal) 1996 Cal LEXIS 1550.

Pen C § 667, subd. (c)(5), which severely limits sentence credits available to defendants sentenced under the three strikes legislation, was not, as applied to defendant sentenced under this provision, arbitrary and violative of the equal protection and due process clauses of the state and federal Constitutions, by putting him on a different footing from (a) a defendant with an identical record but whose offense preceded enactment of the three strikes legislation, and from (b) a defendant whose offense was far more serious, but who lacked a prior "strike." The equality guaranteed by equal protection is equality under the same conditions and among persons similarly situated. The Legislature may make reasonable classifications of persons and other activities, provided the classifications are based upon some legitimate object to be accomplished. Defendant was not "similarly situated" to a hypothetical defendant who had no prior "strike" convictions. The Legislature stated its intent in modifying § 667 was "to ensure longer prison sentences and greater punishment for" recidivists, and it did so with a legitimate objective in mind. Nor was defendant "similarly situated" to those defendants whose "current" crimes predated passage of the three strikes legislation. The Legislature's power to change sentencing schemes for crimes committed after a certain date is manifest. *People v. Spears* (1995, Cal App 5th Dist) 40 Cal App 4th 1683, 48 Cal Rptr 2d 634, 1995 Cal App LEXIS 1222, review denied (1996, Cal) 1996 Cal LEXIS 1512.

A sentence of 25 years to life imposed on a three strikes defendant (*Pen C* § 667, subs. (b)-(i)) convicted of being an ex-felon in possession of a firearm with 2 prior robbery convictions was neither cruel nor unusual according to the federal constitutional standard (*U.S. Const., 8th Amend.*). Imposition of a mandatory term does not violate the Eighth Amendment. Furthermore, under the three strikes law, defendants are punished not just for their current offense but for their recidivism. By enacting the three strikes law, the Legislature acknowledged the will of Californians that the goals of retribution, deterrence, and incapacitation be given precedence in determining the appropriate punishment for crimes: those goals were best achieved by ensuring longer prison sentences and greater punishment for second and third "strikers." Such determinations are questions of legislative policy. Therefore, even if under the three strikes law California's recidivists are punished more severely than other recidivists, such severity does not render the punishment grossly disproportionate to the crime. *People v. Cooper* (1996, Cal App 5th Dist) 43 Cal App 4th 815, 51 Cal Rptr 2d 106, 1996 Cal App LEXIS 247, review denied (1996, Cal) 1996 Cal LEXIS 3420.

The three strikes law (*Pen C* § 667, subs. (b)-(i)) was neither cruel nor unusual according to the federal constitutional standard (*U.S. Const., 8th Amend.*) as applied to a defendant sentenced to 25 years to life on conviction of being an ex-felon in possession of a firearm (*Pen C* § 12021, subd. (a)) with 2 prior robbery convictions. The intent underlying *Pen C* § 12021, subd. (a), was to limit the use of instruments commonly associated with criminal activity and to minimize the danger to public safety arising from the free access to firearms that can be used for crimes of violence; the law properly presumes the danger is greater when the person possessing the firearm has previously been convicted of felony. Thus, the Legislature could with good reason conclude that appellant's crime was felonious and deserving of a substantial punishment. Furthermore, defendant was punished not just for his current offense but for his recidivism. The imposition of a 25-year-to-life term for a recidivist offender convicted of a nonviolent, nonserious felony but with at least 2 prior convictions for violent or serious felonies is not grossly disproportionate to the crime. *People v. Cooper* (1996, Cal App 5th Dist) 43 Cal App 4th 815, 51 Cal Rptr 2d 106, 1996 Cal App LEXIS 247, review denied (1996, Cal) 1996 Cal LEXIS 3420.

The three strikes law (*Pen C* § 667, subs. (b)-(i)) was neither cruel nor unusual according to the state

constitutional standard (*Cal. Const., art. I, § 17*) as applied to a defendant sentenced to 25 years to life on conviction of being an ex-felon in possession of a firearm with 2 prior robbery convictions. Although defendant's current offense was not violent, society's interest in deterring criminal conduct or punishing criminals is not always determined by the presence or absence of violence. Defendant's intractable recidivism, coupled with the severity of the firearm offense, justified the term imposed. Furthermore, a greater penalty is available for a murder conviction and the commission of a single act of murder cannot be compared with the commission of multiple felonies. Although comparative punishments for defendant's recidivist offense in other states may be less severe, the needs and concerns of a particular state may induce it to treat certain crimes or particular repeat offenders more severely than any other state. In view of the danger to the safety and peaceful enjoyment of life and property that an offender like defendant poses to society, his sentence did not shock the conscience or offend fundamental notions of human dignity. *People v. Cooper (1996, Cal App 5th Dist) 43 Cal App 4th 815, 51 Cal Rptr 2d 106, 1996 Cal App LEXIS 247*, review denied (1996, Cal) 1996 Cal LEXIS 3420.

A sentence of twenty-five years to life imposed on a three strikes defendant (*Pen C § 667*, subds. (b)-(i)) convicted of being an ex-felon in possession of a firearm with two prior robbery convictions did not violate his constitutional guaranty to equal protection and due process, even though he would have been sentenced as a "second striker" to a six-year prison term had he been convicted of robbery and firearm possession as priors with his current conviction for robbery. The threshold prerequisite to an equal protection claim is unequal treatment of persons who are similarly situated; a recidivist previously convicted of a serious or violent felony is dissimilar from a recidivist previously convicted of a nonserious felony in that the former has previously demonstrated a much greater danger to society than the latter. There is no invidious classification or equal protection violation involved in that lawmaking. Persons with two prior "strike" felony convictions are not similarly situated with persons with fewer or no prior "strike" convictions, regardless of the character or their present offense. *People v. Cooper (1996, Cal App 5th Dist) 43 Cal App 4th 815, 51 Cal Rptr 2d 106, 1996 Cal App LEXIS 247*, review denied (1996, Cal) 1996 Cal LEXIS 3420.

The sentence imposed on defendant as a "second striker" pursuant to *Pen C § 667*, subd. (e)(1) (15-year-to-life sentence prescribed by *Pen C § 190*, for second degree murder, doubled to 30 years to life), did not constitute cruel or unusual punishment by allegedly exceeding the sentence he would have received had he been sentenced as a "third striker" pursuant to *Pen C § 667*, subd. (e)(2)(A)(iii), or because it equaled the sentence he would have received had he been a "third striker" convicted of first degree murder. A correct reading of the three strikes laws does not produce that result. It would be contrary to the clear intent of the Legislature for three strikes defendants to receive less severe punishment under the three strikes law than they would have received prior to the law's enactment. The correct analysis renders operative each provision of *Pen C § 667*, subd. (e)(2)(A) (third strike defendants), and also comports with the intent of the three strikes law. Thus, defendant's punishment was not disproportionate compared to more serious crimes. *People v. Ruiz (1996, Cal App 5th Dist) 44 Cal App 4th 1653, 52 Cal Rptr 2d 561, 1996 Cal App LEXIS 399*, review denied (1996, Cal) 1996 Cal LEXIS 4646.

Pen C § 667, subd. (c)(5), of the three strikes law, which limits in-prison credits to "one-fifth of the total term," was not unconstitutionally vague as applied to defendant, who was sentenced to two concurrent terms of twenty-five years to life under the three strikes law. Since defendant failed to show that the limitation on credits is fatally vague in all situations, he could challenge the statute only as applied to his case. The limitation did not apply to the sentence he received. *Pen C § 667*, subd. (c)(5), refers to "credits awarded pursuant to" *Pen C § 2930 et seq.*, and the relevant section was *Pen C § 2933*. That section allows credits greater than the one-fifth limitation, but it expressly applies to persons sentenced to state prison under *Pen C § 1170*, which by its terms applies to "determinate sentences." Defendant's term of 25 years to life was indeterminate. Further, in several situations the Penal Code allows credits to apply in some indeterminate life terms with parole minimums by a clear statement in the relevant subdivision or section that effectively allows an earlier minimum eligible parole date. However, the statement regarding credits in the three strikes law is different from statements in those other statutes. It does not say that the credits "shall apply" to any specified life or minimum term; it simply limits "the total amount of credits awarded," without mention of indeterminate terms. In these circumstances, the general rule that release on parole is barred until a specified minimum term has

elapsed operated. *People v. Stofle* (1996, Cal App 1st Dist) 45 Cal App 4th 417, 52 Cal Rptr 2d 829, 1996 Cal App LEXIS 427, rehearing denied (1996, Cal App 1st Dist) 1996 Cal App LEXIS 428, review denied (1996, Cal) 1996 Cal LEXIS 3472.

Defendant, convicted of attempted first degree burglary under *Pen C § 664* and having suffered three prior felony convictions, was sentenced to a term of 25 years to life in state prison, based on his status as a repeat offender; the three strikes law, *Pen C § 667*, did not require that defendant's prior convictions be brought and tried separately and that it was not unconstitutionally vague, but gave defendant adequate notice of the punishment to be imposed. *People v. Askey* (1996, Cal App 2d Dist) 49 Cal App 4th 381, 56 Cal Rptr 2d 782, 1996 Cal App LEXIS 869.

For equal protection purposes, a compelling state interest necessitates the classification whereby a petty thief who has two prior serious felony convictions, including or in addition to a prior theft-related conviction that resulted in confinement, is subject to punishment under the three strikes law (*Pen C § 667*, subs. (b)-(i)), and may receive a term of twenty-five years to life, whereas a petty thief who has two prior serious felony convictions but no prior theft-related convictions is subject only to misdemeanor punishment. The commission of a new theft offense by an individual with a history which connects theft-related crimes with serious or violent criminal conduct is a much more serious event and poses a much greater threat to society than the commission of a petty theft offense by an individual whose criminal history does not disclose such a connection. In the absence of this connection, an individual's commission of petty theft does not reflect a continuation of his or her pattern of serious misconduct. The state has a strong and compelling interest in protecting its citizens from the harm associated with serious or violent criminal conduct. An individual who has previously been convicted of and incarcerated for committing a serious theft-related offense and has not been deterred from committing a new theft crime can only be deterred from this course of serious misconduct by harsh punishment. Thus, the classification does not violate equal protection. *People v. Nguyen* (1997, Cal App 6th Dist) 54 Cal App 4th 705, 63 Cal Rptr 2d 173, 1997 Cal App LEXIS 324, review denied (1997, Cal) 1997 Cal LEXIS 5298.

Defendant, who was convicted of petty theft with a prior theft conviction (*Pen C § 666*) and was sentenced under the three strikes law (*Pen C § 667*, subs. (b)-(i)) on the basis of two prior serious or violent felonies, and who challenged his three strikes conviction on equal protection grounds, met his burden of making a "prerequisite" showing that a petty thief such as himself, who has two prior serious felony convictions, including or in addition to a prior theft-related conviction that resulted in confinement, and who is subject to enhanced punishment under the three strikes law, is similarly situated to a petty thief who has two prior serious felony convictions but no prior theft-related convictions and is subject only to misdemeanor punishment. Each member of these groups has two prior serious felony convictions and a current petty theft conviction. While the classification of the current offense as a felony or misdemeanor differed based on distinctions in the criminal backgrounds of the two individuals, it was this distinction that defendant challenged as not justified by the purpose of the three strikes law. Thus, the two groups were sufficiently similar to merit application of some level of scrutiny to the unequal treatment. Moreover, strict scrutiny was the appropriate level of scrutiny to be applied. The challenged classification affected a fundamental interest, since the personal liberty interest of the individual offender facing an extended period of incarceration was significantly affected by this classification. *People v. Nguyen* (1997, Cal App 6th Dist) 54 Cal App 4th 705, 63 Cal Rptr 2d 173, 1997 Cal App LEXIS 324, review denied (1997, Cal) 1997 Cal LEXIS 5298.

Where the defendant was convicted by a jury of possession of cocaine base in violation of *H & S C § 11350*, subd. (a), and two related misdemeanors, and the trial court found true four prison priors within the meaning of *Pen C § 667.5*, subd. (b), and three serious/violent felony prior convictions within the meaning of *Pen C § 667*, subs. (b) through (i), the trial court properly sentenced the defendant to an indeterminate term of 25 years to life pursuant to *Pen C § 667*, subdivision (e)(2). The defendant claimed he had been denied equal protection of the law because his case would not have been prosecuted as a third strike case in another county. A defendant may not claim a denial of equal protection because the district attorney of the county in which the prosecution occurs complies more strictly with the three strikes law (*Pen C § 667*, subs. (b)-(i)) than would be the case in another county. Differences in the application of the law by local prosecutors, not based on invidious discrimination, do not rise to the level of a denial of equal protection. *People v. Andrews* (1998, Cal App 4th Dist) 65 Cal App 4th 1098, 76 Cal Rptr 2d 823, 1998 Cal App LEXIS

674.

It was permissible under the due process clause of the federal Constitution and under the double jeopardy provisions of the state Constitution (*Cal. Const., Art. I, § 15*) for the trial court at the second sentencing to impose four years for burglary when at the initial sentencing it had imposed only two years for that offense. The defendant had been convicted after jury trial of first degree burglary. He was sentenced to twenty-seven years: the mitigated term of two years for the burglary and five years for each of five prior serious felony convictions (*Pen C § 667*). That conviction was reversed. After retrial before the same judge the defendant was found guilty once more of first degree burglary. Although five serious felony priors were again alleged, only three of them were found true at the second trial. The defendant was sentenced to a term of nineteen years: the midterm of four years for the burglary and five years for each of the three prior serious felony convictions. The defendant contended that double jeopardy protected him from receiving a midterm sentence for the burglary in place of the mitigated term he initially received for that crime. Double jeopardy analysis did not require the trial court to break the defendant's aggregate sentence, which was no greater than his original sentence, into components so as to limit his sentence vulnerability on the burglary conviction to the mitigated term which was originally imposed. *People v. Craig* (1998, *Cal App 1st Dist*) 66 *Cal App 4th* 1444, 78 *Cal Rptr 2d* 659, 1998 *Cal App LEXIS* 825, review or rehearing denied (1999, Cal) 1999 *Cal LEXIS* 259.

It has long been the law that the constitutional guarantee against double jeopardy is inapplicable where evidence of prior criminal activity is introduced in a subsequent trial as an aggravating factor for consideration by a penalty phase jury. The presentation of evidence of past criminal conduct at a sentencing hearing does not place the defendant in jeopardy with respect to the past offenses. He is not on trial for the past offense, is not subject to conviction or punishment for the past offense, and may not claim double jeopardy protection against introduction of such evidence. Similarly, one is not placed twice in jeopardy for the same offense when the details of misconduct which has already resulted in dismissal pursuant to a plea bargain are presented in a later proceeding on the separate issue of the appropriate penalty for a subsequent offense. Further, double jeopardy principles do not apply to the retrial of a sentencing allegation, even in the same prosecution. Thus, in the present case, involving whether a prior personal firearm use enhancement could be alleged and proved as a serious felony strike under the three strikes law even though it had been stricken pursuant to a plea bargain, even if there had been a finding in the prior proceeding that defendant did not personally use a firearm, double jeopardy would not bar proof, for purposes of sentencing in the current proceeding, that defendant did personally use a firearm. *People v. Blackburn* (1999, *Cal App 4th Dist*) 72 *Cal App 4th* 1520, 86 *Cal Rptr 2d* 134, 1999 *Cal App LEXIS* 608, review denied (1999, Cal) 1999 *Cal LEXIS* 7366.

Following conviction by a jury of possession of a firearm by a felon with findings that he suffered two prior felony convictions, defendant was sentenced to prison for 25 years to life. Although the case was remanded because of insufficient evidence that defendant's conviction for discharging a firearm from a motor vehicle was a prior felony conviction for purposes of the three strikes law, the Court of Appeal held that defendant's sentence did not constitute cruel or unusual punishment. Defendant's probation report reflected a previous robbery conviction and a sentence of prison for five years. Defendant also had other arrests and convictions. The report listed as aggravating factors that the planning, sophistication, or professionalism with which the crime was carried out, or other facts, indicated premeditation, and defendant's prior convictions as an adult or adjudications of commission of crimes as a juvenile were numerous or of increasing seriousness. *People v. Cortez* (1999, *Cal App 2d Dist*) 73 *Cal App 4th* 276, 86 *Cal Rptr 2d* 234, 1999 *Cal App LEXIS* 635, review denied (1999, Cal) 1999 *Cal LEXIS* 7063.

In a prosecution of defendant for inflicting corporal injury resulting in traumatic injury to his wife (*Penal C § 273.5(a)*), the trial court erred in failing to properly advise defendant of his rights before he admitted the truth of four prior conviction allegations, on the basis of which the court enhanced defendant's sentence under the three strikes law. Trial courts are constitutionally required to advise defendants who intend to admit prior convictions that they have the right to a jury trial on the prior, the right to confront and cross-examine witnesses, and the right against self-incrimination (Boykin/Tahl rights). Error involving Boykin/Tahl admonitions should be reviewed under the test used to determine the validity of guilty pleas under the federal Constitution. Under that test, a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances. Here, there were no

admonitions with respect to any of the three constitutional rights. All that preceded defendant's admission of the priors was the district attorney reading the allegation and the court asking defendant if he wanted to admit it. This record was inadequate to support a voluntary and intelligent waiver of rights on the part of defendant. *People v. Campbell* (1999, Cal App 4th Dist) 76 Cal App 4th 305, 90 Cal Rptr 2d 315, 1999 Cal App LEXIS 1002, review denied (2000, Cal) 2000 Cal LEXIS 1141.

Neither California law nor federal constitutional principles required that evidence supporting "Three Strikes" prior conviction allegations (*Pen C* §§ 667, 1170.12) be presented at preliminary hearings. In addition, since Three Strikes defendants were not similarly situated to defendants charged with offenses in which a specified prior conviction was an element of the charged offense, or elevated the charged offense to a felony, there was no violation of equal protection rights. *Thompson v. Superior Court* (2001, Cal App 2d Dist) 91 Cal App 4th 144, 110 Cal Rptr 2d 89, 2001 Cal App LEXIS 602.

Respondent inmate's sentence under *Pen Code* § 667(e)(2)(A), a "third strike" statute, to two consecutive prison terms of 25 years to life, after being found guilty of two counts of petty theft with a prior conviction under *Pen Code* § 666, for stealing video tapes valued under \$200, where his prior convictions included three prior convictions that qualified as serious or violent felonies, was not contrary to, or an unreasonable application of, clearly established federal law under 28 *USCS* § 2254(d)(1); it was not objectively unreasonable for the state court to conclude that the contours of the proportionality principle as to cruel and unusual punishment under the Eighth Amendment permitted an affirmance of the sentence. *Lockyer v. Andrade* (2003) 538 *US* 63, 155 *L Ed* 2d 144, 123 *S Ct* 1166, 2003 *US LEXIS* 1950.

Petitioner's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under California's three strikes law, was not grossly disproportionate and therefore did not violate the Eighth Amendment's prohibition on cruel and unusual punishments, since petitioner's sentence reflected a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated. *Ewing v. California* (2003) 538 *US* 11, 155 *L Ed* 2, 123 *S Ct* 1179, 2003 *US LEXIS* 1952.

Petitioner's sentence under the three strikes law, *Pen C* §§ 667, 1170.12, to 25 years to life in prison for his convictions of one count of second degree burglary and one count of petty theft for stealing blue jeans at a department store was disproportionate to the offense. The allegation that petitioner punched a security guard after stealing the merchandise could not be considered as evidence of violence justifying the sentence; petty theft and second degree burglary did not require any proof of violence, and any violence of which a defendant was not convicted was not relevant under the Eighth Amendment analysis. *Pinkston v. Lamarque* (2003, ND Cal) 247 *F Supp* 2d 1145, 2003 *US Dist LEXIS* 2769.

Trial court properly determined that enhancement allegations were true and sentenced defendant to 10 years for selling marijuana, where defendant waived his right to a jury trial on the prior prison term allegations and submitted to a court trial in which the aggravating factor was proved beyond a reasonable doubt. There was not a problem with an overlap between the aggravating circumstance used to impose the upper term and the facts used to impose four one-year enhancements. *People v. Earley* (2004, Cal App 4th Dist) 122 Cal App 4th 542, 18 Cal Rptr 3d 694, 2004 Cal App LEXIS 1569, review denied (2004) 2004 Cal. LEXIS 10740.

Inmate was entitled to federal habeas relief on the ground of gross disproportionality where he received a "third strike" sentence of 25 years to life under *Pen C* § 667 for possessing a fraction of a gram of rock cocaine in violation of *H & S C* § 11350(a); moreover, there was insufficient evidence that an assault conviction under *Pen C* § 245(a) constituted a strike, and trial and appellate counsel were ineffective for failing to investigate and address these issues. *Banyard v. Duncan* (2004, CD Cal) 342 *F Supp* 2d 865, 2004 *US Dist LEXIS* 20634.

California's three strikes law, *Pen C* § 667, is not constitutionally infirm. Punishing recidivists with serious prior crimes more severely than other recidivists is rationally related to the legitimate government interest in discouraging recidivism. *Fausto v. Hickman* (2003, ND Cal) 2003 *US Dist LEXIS* 9744.

Petitioner's contention that his sentence of 50 years to life under California's Three Strikes Law, *Pen C § 667*, constituted cruel and unusual punishment was foreclosed by United States Supreme Court's decisions upholding the constitutionality of the statute. *Grayson v. Castro* (2003, 9th Cir Cal) 68 Fed Appx 794, 2003 US App LEXIS 11958.

California's Three Strikes Law is not constitutionally infirm and states may deal in a harsher manner with repeat offenders. *Barnes v. Hamlet* (2004, ND Cal) 2004 US Dist LEXIS 6037.

Petition for a writ of habeas corpus pursuant to 28 USCS § 2254 was denied on the prisoner's claim that California's Three Strikes Law constituted punishment for the prisoner's status as a recidivist and violated the Double Jeopardy Clause where (1) the claim was not based on United States Supreme Court precedent, as was required by 28 USCS § 2254(d)(1), (2) to the extent the Supreme Court addressed recidivist sentencing schemes such as the Three Strikes Law, it did not consider them to be punishment for the prior crimes or for the defendant's "status" as a recidivist, rather it was the repetitive nature of the present offense that the enhancement punished, (3) to the extent the Three Strikes Law punished the prisoner for the repetitive nature of the prisoner's current offense, it punished the prisoner for the prisoner's conduct, not the prisoner's status, and consequently, did not implicate double jeopardy, and (4) the analogous federal Three Strikes Law was facially constitutional in general. *Barnes v. Hamlet* (2004, ND Cal) 2004 US Dist LEXIS 6037.

Inmate's sentence for his three shoplifting offenses was more severe than the sentence he would have faced had any one of his three crimes been murder, manslaughter, or rape; considering the objective factors of the case and performing the fact-specific analysis of the inmate's criminal history, the appellate court held that this was an "exceedingly rare" case in which the sentence imposed was grossly disproportionate to the crimes committed, in violation of the Eighth Amendment and that the state appellate court's decision was an objectively unreasonable application of clearly established federal law. Thus, the court affirmed the district court's grant of a writ of habeas corpus. *Ramirez v. Castro* (2004, 9th Cir Cal) 365 F3d 755, 2004 US App LEXIS 7471.

Amendment to the Three Strikes law did not violate the state and federal constitutional contract clauses by doubling defendant's sentence, even though his plea agreement in a prior case provided for a different enhancement. The plea bargain incorporated not only the existing law but the reserve power of the state to amend the law for the public good. *People v. Gipson* (2004, Cal App 6th Dist) 117 Cal App 4th 1065, 12 Cal Rptr 3d 478, 2004 Cal App LEXIS 562, review denied (2004) 2004 Cal. LEXIS 6709.

Inmate who was convicted of four robberies was not entitled to habeas relief based on a sentence of 107 years to life under California's three strikes law; as the three strikes law had been upheld as constitutional, the sentence did not constitute cruel and unusual punishment. *Harbans v. Lamarque* (2004, ND Cal) 2004 US Dist LEXIS 16664.

Appeals court withdrew its prior memorandum of decision, vacated a district court's dismissal of an inmate's 28 USC § 2254 habeas corpus petition, and remanded his case back for further proceedings because the record did not contain the facts necessary to evaluate the inmate's *U.S. Const. amend. VIII* proportionality challenge to the sentence imposed on him under California's "Three Strikes" law, *Pen C § 667*; although Eighth Amendment challenges to § 667 would only be rarely sustained, in order to conduct the proper analysis, the district court had to examine the details of the inmate's prior offenses to determine their seriousness, including whether they involved the use of a weapon and whether they were targeted at individuals. The record was not sufficiently developed before the district court with regard to the specific circumstances underlying all three of the inmate's prior felony convictions, which were obtained under *Pen C §§ 118, 211, 459*. *Reyes v. Brown* (2005, 9th Cir Cal) 399 F3d 964, 2005 US App LEXIS 3630, cert den *Ornoski v. Reyes* (2006, US) 126 S Ct 2887, 165 L Ed 2d 938, 2006 US LEXIS 4873.

Three-strikes sentence constituted cruel and unusual punishment on a charge of failing to provide duplicate information for sex-offender registration; defendant had registered his address a month before his birthday but failed to "update" the same information within five days of his birthday. A 25-year recidivist sentence imposed solely for failure to provide duplicate registration information is grossly disproportionate to the offense, shocks the conscience of the court and offends notions of human dignity; it therefore constitutes cruel and unusual punishment under both the state

and federal constitutions. *People v. Carmony* (2005, Cal App 3d Dist) 127 Cal App 4th 1066, 26 Cal Rptr 3d 365, 2005 Cal App LEXIS 460, review denied (2005, Cal) 2005 Cal LEXIS 7132.

Where a prisoner was sentenced under California's Three Strikes Law, *Pen C* § 667(b)-(i), to 25 years to life in prison for failing to register as a sex offender in violation of *Pen C* § 290(g)(2), the sentence was not cruel and unusual under the Eighth Amendment because the prisoner had a lengthy criminal history and the prisoner's strike convictions and non-strike prior crimes included crimes of violence directed against other persons. *Chavez v. Kernan* (2005, ND Cal) 2005 US Dist LEXIS 12483.

Recidivist sentencing scheme set forth in California's Three Strikes Law, *Pen C* § 667(b)-(i), does not violate the Double Jeopardy Clause of the Fifth Amendment or the Ex Post Facto Clause. *Chavez v. Kernan* (2005, ND Cal) 2005 US Dist LEXIS 12483.

Where the Three Strikes sentencing provision gives a person of ordinary intelligence fair notice that it would apply to the conduct contemplated, namely, that if one previously had been convicted of a felony, he will be sentenced to an enhanced prison term if convicted of another felony, the court concluded that a prisoner's argument that the Three Strikes law was unconstitutionally vague and overbroad lacked merit. *Holmes v. Valadez* (2005, ND Cal) 2005 US Dist LEXIS 31403.

Inmate was not entitled to habeas relief, because the use of a nonjury juvenile adjudication as a sentencing enhancement did not violate Apprendi under circuit law, and federal law was not clearly established. *Boyd v. Newland* (2006, 9th Cir Cal) 455 F3d 897, 2006 US App LEXIS 16032, amended, rehearing denied (2006) 467 F.3d 1139, 2006 U.S. App. LEXIS 26672, reprinted as amended 467 F.3d 1139 (2006) 2006 U.S. App. LEXIS 26667.

4. Relation to Other Statutes

Since the provision in *Cal. Const., art. I, § 28*, subd. (f) (added by initiative in 1982 as Proposition 8), that all felony convictions should be used "without limitation" for enhancement of sentences is qualified by the language of *Pen C* § 667, subd. (a) (also added by Proposition 8), which applies to enhancements for prior convictions but is limited to "serious" felonies, the voters' intent as to the scope of the constitutional amendment is ambiguous. Thus, in a prosecution in which defendant was convicted of robbery of two people and sentenced to a ten-year term-three years for robbery of the first person, one year for the second, plus a one-year enhancement under *Pen C* § 667.5, subd. (b) for a prior prison term for receiving stolen property and a five-year enhancement under *Pen C* § 667, subd. (a) for a prior robbery conviction-the ambiguity required interpretation of *Cal. Const., art. I, § 28*, subd. (f) in defendant's favor as not abrogating the limitations set by *Pen C* § 1170.1, subd. (g), generally restricting a term of imprisonment to no more than twice the base term. Under this interpretation, on remand for sentencing enhancements could be imposed without limitation, but execution would have to be stayed to the extent there was a violation of the restriction of *Pen C* § 1170.1, subd. (g). Power to strike or stay the *Pen C* § 667, subd. (a) enhancement was afforded by *Pen C* § 1385, which permits dismissal "in furtherance of justice." *People v. Whigam* (1984, Cal App 4th Dist) 158 Cal App 3d 1161, 205 Cal Rptr 227, 1984 Cal App LEXIS 2393, superseded by statute as stated in *People v. Mason* (1988, Cal App 5th Dist) 200 Cal App 3d 1502, 247 Cal Rptr 217, 1988 Cal App LEXIS 423, superseded by statute as stated in *People v. Hoze* (1987, Cal App 3d Dist) 195 Cal App 3d 949, 241 Cal Rptr 14, 1987 Cal App LEXIS 2250, overruled *People v. Poole* (1985, Cal App 4th Dist) 168 Cal App 3d 516, 214 Cal Rptr 502, 1985 Cal App LEXIS 2113.

In sentencing a defendant who had been convicted of robbery, the trial court properly added a one-year enhancement for a prior prison term (*Pen C* § 667.5, subd. (b)) for receiving stolen property, as well as a five-year enhancement for a prior robbery conviction (*Pen C* § 667, subd. (a)), for which defendant had been on probation when he was convicted of receiving stolen property. Though the prior prison term, imposed after revocation of defendant's probation, had consisted of concurrent terms for both offenses, defendant would not have gone to prison if he had not committed the subsequent offense of receiving stolen property, and he thus served a "prior separate prison term" for that offense within the meaning of § 667.5. It was not a prior prison term based in part on the same conviction that supported

the § 667 enhancement, and there was no violation of the proscription on multiple punishment for one offense under *Pen C § 654*. *People v. Whigam* (1984, Cal App 4th Dist) 158 Cal App 3d 1161, 205 Cal Rptr 227, 1984 Cal App LEXIS 2393, superseded by statute as stated in *People v. Mason* (1988, Cal App 5th Dist) 200 Cal App 3d 1502, 247 Cal Rptr 217, 1988 Cal App LEXIS 423, superseded by statute as stated in *People v. Hoze* (1987, Cal App 3d Dist) 195 Cal App 3d 949, 241 Cal Rptr 14, 1987 Cal App LEXIS 2250, overruled *People v. Poole* (1985, Cal App 4th Dist) 168 Cal App 3d 516, 214 Cal Rptr 502, 1985 Cal App LEXIS 2113.

Pen C § 667 (Proposition 8), providing for a five-year enhancement of punishment for any person convicted of a serious felony who previously had been convicted of a serious felony, creates an exception to *Pen C § 1170*, subd. (g), which limits a term of imprisonment to twice the number of years imposed by the trial court as the base term. Thus, in a prosecution for a burglary (*Pen C § 459*) the trial court properly imposed a five-year enhancement for an admitted prior conviction of assault with intent to commit rape (*Pen C § 667*, subd. (a)) to run consecutively to a two-year base prison term imposed for the burglary. *People v. Rivera* (1984, Cal App 2d Dist) 162 Cal App 3d 141, 207 Cal Rptr 756, 1984 Cal App LEXIS 2796.

The five-year enhancement provisions of *Pen C § 667*, which provide a sentence enhancement for each prior conviction of a serious felony, are not subject to *Pen C § 1170.1*, subd. (g), which limits the term of imprisonment to twice the number of years imposed as the base term, subject to certain exceptions. Although § 1170.1 does not contain an exception for the "serious felonies" subject to the provisions of § 667, § 1170.1 will be read as if it contained such an exception, comparable to the explicit exception for enhancements for violent felonies (*Pen C § 667.5*), in order to carry out the intention of § 667, which was that serious felonies under that section not be subject to the double base term limitation. Therefore, in sentencing defendant convicted of burglary of a residence and who admitted a prior residential burglary conviction, the trial court did not err in imposing a sentence of two years for the current conviction with a five-year enhancement for the prior conviction. *People v. Jackson* (1985) 37 Cal 3d 826, 210 Cal Rptr 623, 694 P2d 736, 1985 Cal LEXIS 237.

In a prosecution for residential burglary and other offenses, in which defendant received the four-year midterm on the burglary count, an additional six months (concurrent) for exhibiting a knife, and a five-year consecutive sentence for a prior conviction pursuant to *Pen C § 667*, subd. (a) (enhancement for prior serious felony convictions), the trial court's application of § 667 did not violate *Pen C § 1170.1*, subd. (g), which generally restricts a term of imprisonment to no more than double the base term. *Pen C § 667*, enacted by the voters in 1982 as part of Proposition 8, was intended to impose an enhancement unlimited by the double base term rule of § 1170.1, subd. (g). Thus, there was no sentencing error. *People v. Cisneros* (1985, Cal App 2d Dist) 164 Cal App 3d 842, 211 Cal Rptr 20, 1985 Cal App LEXIS 1650.

A defendant convicted of robbery with a prior robbery conviction was properly sentenced with an enhancement of five years for the prior robbery conviction (*Pen C § 667*), as against his contention he should have been given the benefit of the more favorable one-year enhancement imposed by *Pen C § 667.5*, applicable to prior separate prison terms served for any felony. The law does not require that defendant be given the benefit of the more favorable of two applicable statutes, and moreover, the critical element of a prior prison term was neither specifically charged in the information nor necessarily included within the charge of a prior conviction. Defendant did not consent to be sentenced on the "lesser related" allegation of having served a prior prison term. Accordingly, there was no conflict between *Pen C § 667*, and *Pen C § 667.5*. *People v. Traina* (1985, Cal App 3d Dist) 168 Cal App 3d 305, 214 Cal Rptr 213, 1985 Cal App LEXIS 2095.

Enhancements for serious felonies (*Pen C § 667*) were not intended to be subject to *Pen C § 1170.1*, subd. (g), limiting the total term of imprisonment to twice the number of years imposed on the base term. Based on the language of *Cal. Const., art. I, § 28*, subd. (f) (Proposition 8), serious felony enhancements are to be imposed unlimited by the double the base term rule. A similar exception from the double base term limitation exists for enhancements for violent felonies (*Pen C § 667.5*, subd. (b)). *People v. Hall* (1985, Cal App 4th Dist) 168 Cal App 3d 624, 214 Cal Rptr 289, 1985 Cal App LEXIS 2122.

The Legislature's failure to amend *Pen C § 1170.1*, subd. (a) (consecutive sentencing), concurrently with the enactment of *Pen C § 667* (five-year enhancement for prior serious felony conviction), was a drafting oversight. Thus, the omission of any mention of § 667 in the consecutive sentencing provisions, at the time of defendant's sentencing for multiple burglary convictions, did not prevent the trial court from imposing a five-year enhancement authorized by § 667 for defendant's prior serious felony conviction, pursuant to the decision to sentence defendant to consecutive terms under *Pen C § 1170.1*. *People v. Hernandez* (1988, *Cal App 5th Dist*) 204 *Cal App 3d* 639, 251 *Cal Rptr* 393, 1988 *Cal App LEXIS* 857.

In a prosecution for robbery and kidnapping, the trial court did not err in imposing a prior serious felony enhancement under *Pen C § 667*, subd. (a), to defendant's sentence in computing the aggregate term under *Pen C § 1170.1*, subd. (a), even though § 667, subd. (a) was not included in § 1170.1, subd. (a), at the time of the commission of the crimes, where it was so included at the time of sentence. The Legislature's failure to amend § 1170.1, subd. (a), to refer to § 667 after § 667 was enacted by voter initiative was a draftsman's oversight; *Cal. Const.*, art. I, § 28, subd. (f) provides that any prior felony conviction shall subsequently be used without limitation for purposes of sentence enhancement. *People v. Jones* (1989, *Cal App 5th Dist*) 210 *Cal App 3d* 124, 258 *Cal Rptr* 294, 1989 *Cal App LEXIS* 435.

Under *Pen C § 667*, subd. (b), when multiple statutory enhancement provisions are available for the same prior offense, one of which is a *Pen C § 667*, enhancement, the greatest enhancement, but only that one, will apply. Accordingly, in a burglary prosecution in which the trial court imposed five-year enhancement for a prior serious felony conviction in a case pursuant to *Pen C § 667*, subd. (a), it was necessary to strike a one-year enhancement imposed for the prior prison term (*Pen C § 667.5*) of the same case. *People v. Gonzales* (1993, *Cal App 4th Dist*) 20 *Cal App 4th* 1607, 25 *Cal Rptr 2d* 305, 1993 *Cal App LEXIS* 1264.

Pen C § 667, subd. (b), providing that when multiple statutory enhancement provisions are available for the same prior offense, one of which is a *Pen C § 667*, enhancement, only the greatest enhancement applies, did not preclude the trial court from imposing a one-year enhancement under *Pen C § 667.5*, for a prior prison term which involved a concurrent prison sentence imposed for two separate crimes, one of which was a prior serious felony for which a five-year enhancement was imposed pursuant to *Pen C § 667*, subd. (a). Defendant served a prior prison term for spousal abuse in one case and for possession of a controlled substance in another case, with the terms ordered to run concurrently. Hence, only one prison sentence or term (*Pen C § 667.5*) resulted from the two separate crimes. Each of the cases provided an independent basis for a prior prison term allegation, and neither *Pen C § 667*, nor *Pen C § 654*, precluded the imposition of the one-year enhancement for the prior prison term. *People v. Gonzales* (1993, *Cal App 4th Dist*) 20 *Cal App 4th* 1607, 25 *Cal Rptr 2d* 305, 1993 *Cal App LEXIS* 1264.

In sentencing a defendant convicted of robbery, the trial court erred in imposing a one-year enhancement pursuant to *Pen C § 667.5*, subd. (b), for service of a prison term on a prior felony conviction for which defendant received a five-year enhancement pursuant to *Pen C § 667*, subd. (a). Under *Pen C § 667*, subd. (b) (section may not be applied when punishment imposed under other provisions of law would result in longer term of imprisonment), only the greater sentence enhancement of five years imposed under *Pen C § 667*, subd. (a), was proper. The lesser enhancement of one year imposed for that same conviction must be stricken. *People v. Harris* (1994, *Cal App 2d Dist*) 22 *Cal App 4th* 1575, 28 *Cal Rptr 2d* 317, 1994 *Cal App LEXIS* 179, review denied (1994, Cal) 1994 *Cal LEXIS* 2903.

Pen C § 667, subd. (a)(2), does not preclude use of a prior serious felony enhancement as a component in the calculation of the minimum period of imprisonment that a defendant must serve under a *Pen C § 667.7*, life term. Rather, the minimum period of imprisonment required under the second and third alternatives of that statute must include as a component the term of any imprisonment imposed under *Pen C § 667*, subd. (a), for a prior serious felony conviction. *People v. Jenkins* (1995) 10 *Cal 4th* 234, 40 *Cal Rptr 2d* 903, 893 *P2d* 1224, 1995 *Cal LEXIS* 2755.

In a prosecution for kidnapping and robbery, the trial court did not err in imposing sentence enhancements for both *Pen C § 667.5*, subd. (a) (three years for prior prison term for violent felony conviction), and *Pen C § 667*, subd. (a)

(five years for prior serious felony conviction), even though both were based on a single prior conviction for which defendant served time in prison. Imposition of both enhancements was not prohibited by a California Supreme Court holding that precluded imposition of both enhancements for a one-offense commitment, since both enhancements referred to multiple offenses. Although they each referred to the same armed kidnapping and armed robbery offenses, either one would have provided a sufficient basis in and of itself to support either enhancement. The Supreme Court holding does not preclude such allegation case-splitting when the prior prison term is based in part on the same case that also is the basis for imposition of another prior conviction enhancement, and in part on a separate, independent case. Moreover, the record evidenced the trial court's intention to impose the full possible punishment for defendant's crime and recidivist behavior without dual use of the enhancement, and it had to be presumed, in the absence of a showing otherwise, that the sentencing court did just that (*Evid. Code*, § 644). *People v. Brandon* (1995, Cal App 4th Dist) 32 Cal App 4th 1033, 38 Cal Rptr 2d 751, 1995 Cal App LEXIS 169, rehearing denied (1995, Cal App 4th Dist) 1995 Cal App LEXIS 177, review denied (1995, Cal) 1995 Cal LEXIS 3257.

In a prosecution in which defendant pleaded guilty to escape while charged with a felony (*Pen C* § 4532, subd. (b)), and in which he admitted a prior burglary conviction, the use of the same prior conviction to convict him of felony escape and to increase his sentence under *Pen C* § 667, subd. (e)(1) (three strikes law), was not a prohibited dual use of facts. Defendant asserted that a single prior conviction could not be used twice to enhance a sentence. However, his prior conviction did not enhance his sentence, but only defined his crime of escape and subjected him to an alternate sentencing scheme for recidivist offenders. Also, one of the California Supreme Court cases cited by defendant was inapplicable, in that it dealt with the specific problem of permitting enhancements under both *Pen C* § 667, and *Pen C* § 667.5 (enhancement for prior prison term), for the same prior conviction. There was no such problem in the present case. Not every escapee's sentence is increased under *Pen C* § 667, subd. (e). Nor does everyone convicted under *Pen C* § 4532, subd. (b), have a prior conviction, and even if the escapee does, it may not be for a serious or violent felony, so *Pen C* § 667, would not apply. Defendant's reliance on another Supreme Court case, on the basis that it prohibited dual use of a prior conviction to prove an element of the offense and to enhance the sentence, was unavailing. Since *Pen C* § 667, subd. (e), is not an enhancement, that rule was inapposite. Moreover, the rule was no longer valid after the adoption of determinate sentencing. *People v. Sipe* (1995, Cal App 3d Dist) 36 Cal App 4th 468, 42 Cal Rptr 2d 266, 1995 Cal App LEXIS 610, review denied (1995, Cal) 1995 Cal LEXIS 5979, cert den (1996) 516 US 1131, 133 L Ed 2d 875, 116 S Ct 951, 1996 US LEXIS 1223.

Pen C § 654, which prohibits double punishment for the same act or omission, does not preclude using the same prior conviction both as a strike under the three strikes law (*Pen C* § 667, subd. (b)) and as an enhancement for a prior felony conviction (*Pen C* § 667, subd. (a)). Since a prior conviction is not an act, *Pen C* § 654, does not apply; the prior conviction only establishes a defendant's status as a recidivist. Moreover, the Legislature may create exceptions to the statutory prohibition of *Pen C* § 654, and the Legislature clearly did so by enacting the three strikes law. *People v. Cartwright* (1995, Cal App 3d Dist) 39 Cal App 4th 1123, 46 Cal Rptr 2d 351, 1995 Cal App LEXIS 1054, review denied (1996, Cal) 1996 Cal LEXIS 1016.

The sentencing schemes of the legislative and initiative versions of the three strikes law (*Pen C* §§ 667, 1170.12) did not supersede the 1978 death penalty law (*Pen C* § 190 et seq.). Although the two versions of the three strikes law each establish a sentencing scheme for fixing the term of imprisonment for any person convicted of a felony who had previously been convicted of one or more specified felonies, neither supersedes the 1978 death penalty law. Neither is exclusive; each declares itself not to apply exclusively, but rather to apply "in addition to any other punishment provisions which may apply," including those of the 1978 death penalty law. *People v. Alvarez* (1996) 14 Cal 4th 155, 58 Cal Rptr 2d 385, 926 P2d 365, 1996 Cal LEXIS 6514, rehearing denied (1997) 1997 Cal. LEXIS 800, cert den (1997) 522 U.S. 829, 118 S. Ct. 94, 139 L. Ed. 2d 50, 1997 U.S. LEXIS 4883, 66 U.S.L.W. 3256.

The legislative version of the three strikes law (*Pen C* § 667) does not, to the extent it modifies the punishment for murder and limits the custody credits that can be earned by a convicted murderer, constitute an invalid legislative amendment to a law enacted by initiative (Prop. 7; the Briggs Initiative), which amended *Pen C* § 190. Although *Pen C* § 190, refers to persons convicted of murder, neither it nor any other provision of the Briggs Initiative indicates that the

electorate intended to preclude a murderer from receiving a total sentence that is greater than the term provided under *Pen C § 190*, when other factors, in addition to the fact of the conviction of murder, are present that increase the defendant's culpability or otherwise warrant greater punishment. The three strikes law is a separate sentencing scheme, and, if the prosecution pleads and proves that a defendant qualifies for sentencing under the three strikes scheme, the defendant must be sentenced under its provisions even if he or she otherwise would qualify for sentencing under some other sentencing statute. *People v. Ruiz (1996, Cal App 5th Dist) 44 Cal App 4th 1653, 52 Cal Rptr 2d 561, 1996 Cal App LEXIS 399*, review denied (1996, Cal) *1996 Cal LEXIS 4646*.

In sentencing a defendant convicted of a serious felony with one or more prior serious felony convictions under the three strikes law (*Pen C § 1170.12*), *Pen C § 667*, subd. (a), mandates, in addition to the indeterminate life terms imposed under *Pen C § 1170.12*, subd. (c)(2)(A)(i) and (ii), for the present offense, a five-year enhancement for each prior serious felony conviction brought and tried separately. *Pen C § 1170.12*, subd. (c), provides that the indeterminate life term must be imposed "in addition to any other enhancements or punishment provisions which may apply." This language clearly prescribes that terms of enhancement, including the five-year enhancement under *Pen C § 667*, subd. (a), be imposed in addition to the indeterminate term. *People v. Dotson (1997) 16 Cal 4th 547, 66 Cal Rptr 2d 423, 941 P2d 56, 1997 Cal LEXIS 4416*.

Pen C § 666, making petty theft with a prior theft conviction punishable as a felony, is not a "special statute" that controls over the punishment provisions of the three strikes law (*Pen C § 667*, subds. (b)-(i)), a "general statute." The special over the general rule does not apply unless each element of the "general" statute corresponds to an element on the face of the "special" statute. Thus, the three strikes law is applicable to defendants who have suffered any prior serious or violent felony convictions. It does not limit its application to theft-related crimes. In contrast, *Pen C § 666*, is applicable even to defendants who have no prior felony convictions, let alone serious or violent felony convictions, but its scope is limited to defendants who have suffered prior theft-related convictions. A violation of *Pen C § 666*, also will not necessarily or commonly result in a violation of the three strikes law. A recidivist petty thief, the target of *Pen C § 666*, will never violate the three strikes law, because petty theft is not a serious or violent felony even when it is a felony. *People v. Nguyen (1997, Cal App 6th Dist) 54 Cal App 4th 705, 63 Cal Rptr 2d 173, 1997 Cal App LEXIS 324*, review denied (1997, Cal) *1997 Cal LEXIS 5298*.

In sentencing defendant who had been convicted of attempted second degree burglary (*Pen C §§ 664, 459*), the trial court properly imposed a term of 25 years to life under the three strikes law (*Pen C § 667*, subds. (b)-(i)), rather than under the sentencing statute for an attempt crime (*Pen C § 664*). The "special over general" rule applies when each element of a general statute corresponds to an element of the special statute, or when a violation of the special statute will necessarily or commonly result in a violation of the general statute. The elements of *Pen C § 667*, subds. (b)-(i), do not correspond to the elements of *Pen C § 664*, nor does a violation of *Pen C § 664*, necessarily or commonly result in the application of the three strikes law. Punishment under that law occurs only when a defendant has suffered a previous serious or violent felony conviction. Punishment under *Pen C § 664*, occurs whenever a defendant is convicted of an attempt crime and no punishment is designated by any other provision. It follows that *Pen C § 664*, does not control over the three strikes law. A second or third strike defendant is not entitled to a shorter sentence under another sentencing statute; that is the meaning of the "notwithstanding" clause that introduces the three strikes law (*Pen C § 667*, subd. (c)). *People v. Espinoza (1997, Cal App 2d Dist) 58 Cal App 4th 248, 69 Cal Rptr 2d 626, 1997 Cal App LEXIS 816*, review denied (1998, Cal) *1998 Cal LEXIS 318*.

In a criminal prosecution, where the defendant was convicted and was also found to have served four prior prison terms (*Pen C § 667.5(b)*) and to have previously been convicted of four serious felonies (*Pen C §§ 667(b)-(i), 1170.12(a)-(d)*), and where the trial court failed to impose a one-year prior prison term enhancement pursuant to *Pen C § 667.5(b)*, with respect to one of the defendant's prior prison terms, the trial court, on remand, was required either to impose the prior prison term enhancement or strike it pursuant to *Pen C § 1385(a)*, and not take any action pursuant to former *Pen C § 1170.1(h)*, although the criminal conduct and sentencing occurred prior to the repeal of *Pen C § 1170.1(h)*. Former *Pen C § 1170.1(h)* was a remedial statute designed to allow a trial court to ameliorate the effects of a potentially excessive sentence by striking certain enhancements in the face of mitigating circumstances. Since the repeal

of a statute which provides a remedy to a party is fully prospective and applies to pending actions, *Pen C* § 3 does not require the trial judge to exercise discretion pursuant to the repealed statute. Further, denying defendant on remand the benefit of former *Pen C* § 1170.1(h) when his criminal conduct occurred prior to the repeal of that statutory provision, does not constitute an unconstitutional ex post facto application of the law. (*U.S. Const, art. I, § 9, cl. 3; Cal Const, art. I, § 9.*), in that the only potentially applicable aspect of ex post facto protection is that which relates to an increase in punishment. The repeal of former *Pen C* § 1170.1(h) did not increase the punishment for a prior prison term pursuant to *Pen C* § 667.5(b). Since there is virtually no difference between orders granting judicial leniency pursuant to *Pen C* § 1385(a) and former *Pen C* § 1170.1(h), there is no constitutionally relevant detriment to the defendant given the similarity in the application of the two provisions of law. *People v. Bradley* (1998, *Cal App 2d Dist*) 64 *Cal App 4th* 386, 75 *Cal Rptr 2d* 244, 1998 *Cal App LEXIS* 488, review denied (1998, Cal) 1998 *Cal LEXIS* 6071.

Pen C § 667, subd. (c)(6), which is identical to *Pen C* § 1170.12, subd. (c)(6), in this regard, clearly provides that consecutive sentencing is mandatory for any current felony convictions not committed on the same occasion, and not arising from the same operative facts. By implication, consecutive sentences are not mandatory under subdivision (c)(6) if the multiple current felony convictions are committed on the same occasion or arise from the same set of operative facts. In this situation, unless consecutive sentencing is required by some other statute, the trial court retains discretion to sentence defendant either concurrently or consecutively. *People v. Hall* (1998, *Cal App 2d Dist*) 67 *Cal App 4th* 128, 79 *Cal Rptr 2d* 690, 1998 *Cal App LEXIS* 848.

The proper method of calculating consecutive determinate terms under *Penal C* §§ 667(e)(1) and 1170.12 (c)(1) for two strike defendants convicted of multiple offenses is ordinarily to double one-third of the middle term. The two-strike sentencing provision incorporates the principal term/subordinate term methodology of *Penal C* § 1170.1, one of the central provisions of the *Determinate Sentencing Law* *People v. Nguyen* (1999) 21 *Cal 4th* 197, 87 *Cal Rptr 2d* 198, 980 *P2d* 905, 1999 *Cal LEXIS* 4995.

An allegation of a prior conviction within the meaning of the Three Strikes law (*Pen C* § 667(c)(4); *Pen C* § 1170.12(a)(4)) does not render a defendant ineligible for participation in the deferred entry of judgment program (*Pen C* § 1000 et seq.). Because the statutory provisions regarding the deferred entry of judgment program do not conflict with the Three Strikes law, and because the Three Strikes law does not preclude participation in deferred entry of judgment, the plain meaning of the words of the respective statutes indicates that an otherwise eligible strike defendant may participate, notwithstanding an allegation of a prior serious or violent felony. *People v. Davis* (2000, *Cal App 2d Dist*) 79 *Cal App 4th* 251, 93 *Cal Rptr 2d* 905, 2000 *Cal App LEXIS* 212.

The Three Strikes Law (*Pen C* §§ 667(c)(5), 1170.12(a)(5)) does not authorize or allow a defendant with three strikes to be awarded prison conduct credits (*Pen C* § 2930 et seq.) for use against his mandatory indeterminate term of life imprisonment. Credits of any sort are available only if, and to the extent that, they are authorized. In the absence of authorization for use against indeterminate terms, article 2.5 (§ 2930 et seq.) prison conduct credits are simply unavailable. *In re Cervera* (2001) 24 *Cal 4th* 1073, 103 *Cal Rptr 2d* 762, 16 *P3d* 176, 2001 *Cal LEXIS* 532, rehearing denied (2001, Cal) 2001 *Cal LEXIS* 1942.

The trial court could properly apply both the Three Strikes Law (*Pen C* § 667) and the habitual sexual offender statute (*Pen C* § 667.71) without violating *Pen C* § 654, since imposition of the increased penalties prescribed by those statutes depended on the fact of defendant's status as a repeat offender, not on an act or omission within the meaning of § 654. In addition, the Legislature had expressly indicated that where a defendant had a qualifying prior felony conviction, the sentencing provisions of the Three Strikes Law not only must be applied, they must be applied in addition to any other punishment provisions. *People v. Murphy* (2001) 25 *Cal 4th* 136, 105 *Cal Rptr 2d* 387, 19 *P3d* 1129, 2001 *Cal LEXIS* 1562, rehearing denied (2001, Cal) 2001 *Cal LEXIS* 4100.

Where a defendant with at least two strikes is sentenced for multiple offenses, the minimum term for each indeterminate life term is calculated separately for each new offense, without regard to the other new offenses. The consecutive sentencing provisions of *Pen C* § 1170.1 have no relevance in this context. Therefore, in computing the

minimum term for each determinate term on numerous counts of robbery, the trial court correctly included, on each term, a total of 15 years for defendant's three prior serious felony convictions incurred pursuant to *Pen C § 667(a)*. *People v. Byrd* (2001, Cal App 3d Dist) 89 Cal App 4th 1373, 108 Cal Rptr 2d 243, 2001 Cal App LEXIS 468, review denied (2001, Cal) 2001 Cal LEXIS 6422.

In sentencing a defendant who pleaded guilty to drug charges, the trial court erred in doubling the two-year term based on a prior conviction for mayhem. The mayhem conviction could not serve as a basis for a strike (*Pen C §§ 667, 1170.12*), since dismissal under *Pen C § 1385* of the underlying mayhem charge operated, as a matter of law, to erase the prior conviction as if defendant had never suffered the conviction in the initial instance. A contrary conclusion was not compelled by virtue of an agreement between defendant and the People, even if approved by the court, that the prior conviction could be used for sentencing purposes in subsequent cases. On its face, § 1385, in contrast to *Pen C § 1203.4*, did not address the effect of the dismissal of a prior conviction on the sentence of the defendant in a different case. If the Legislature had intended a dismissal under § 1385 to have the same prospective adverse consequences as § 1203.4, it would have amended § 1385 by adding language to that effect. *People v. Barro* (2001, Cal App 2d Dist) 93 Cal App 4th 62, 112 Cal Rptr 2d 797, 2001 Cal App LEXIS 827.

The sentencing court's use of a sex offender's prior conviction first as a strike, then under option 1 of the Three Strike law to set the minimum term of his indeterminate life sentence as a third strike offender, and under *Pen C § 667(a)* to impose a five-year enhancement, conformed to the language of the Three Strikes law and did not contravene *Pen C § 667.61(f)* of the One Strike law. *People v. Acosta* (2002) 29 Cal 4th 105, 124 Cal Rptr 2d 435, 52 P3d 624, 2002 Cal LEXIS 5245.

Although the Three Strikes law (*Pen C § 667*) provided that it was to be applied in addition to any other enhancement or punishment provisions which might apply and that, notwithstanding any other law, its provisions were to be applied in every case in which a defendant had a prior serious or violent felony conviction, *Pen C § 667.61(f)* of the One Strike law, enacted about six months after the Three Strikes law, expressly provided a limitation on the application of any law, including the Three Strikes law, for any particular qualifying present conviction. Such clear pronouncement indicated the Legislature intended to exclude application of such other law when it provided a lesser sentence for the qualifying current conviction and no other circumstances were applicable to impose increased punishment for such conviction. Nothing in § 667.61, however, compelled the conclusion that once a prior serious felony conviction was used as a basis for a one strike sentence that it simply vanished for all other sentencing purposes. This was especially true of a qualifying strike prior. By its language, the Three Strikes law necessarily applied in addition to any other punishment provisions for current convictions in a multiple count case unless such use was expressly limited. Thus, although § 667.61(f) explicitly limited the effect of the Three Strikes law when a defendant's prior serious felony conviction was the only circumstance qualifying a specific count or current conviction for punishment under the One Strike law, the Three Strikes law would still apply to the remaining present convictions of a multiple count case not sentenced under the One Strike law. In such manner, the provisions of the two statutes were given effect in any particular case. *People v. Johnson* (2002, Cal App 4th Dist) 96 Cal App 4th 188, 116 Cal Rptr 2d 742, 2002 Cal App LEXIS 1599, superseded by statute as stated in *People v. Lopez* (2004, Cal App 4th Dist) 119 Cal App 4th 355, 14 Cal Rptr 3d 202, 2004 Cal App LEXIS 885.

Insofar as the Legislature had continually expressed its manifest intent that a defendant who qualified for a *Pen C § 667(a)(1)* enhancement would have five years added to his total sentence, *Pen C § 667.61(f)* would not be read to preclude the imposition of a five-year serious felony enhancement under § 667(a)(1) when the same prior conviction which triggered such enhancement was also used as a circumstance to sentence a defendant under the One Strike law. To hold otherwise would thwart the Legislature's repeatedly expressed intent to punish more severely career criminals who stood convicted of a serious felony and had previously been convicted of a serious felony and would also benefit rather than punish more severely the criminal who qualified for a one strike sentence due to his repeated heinous sexual crimes. *People v. Johnson* (2002, Cal App 4th Dist) 96 Cal App 4th 188, 116 Cal Rptr 2d 742, 2002 Cal App LEXIS 1599, superseded by statute as stated in *People v. Lopez* (2004, Cal App 4th Dist) 119 Cal App 4th 355, 14 Cal Rptr 3d 202, 2004 Cal App LEXIS 885.

Trial court was correct in cumulatively applying the one strike and three strikes laws against defendant, where the conditions for cumulative application existed. *People v. Snow* (2003, Cal App 4th Dist) 105 Cal App 4th 271, 129 Cal Rptr 2d 314, 2003 Cal App LEXIS 45, rehearing denied (2003, Cal App 4th Dist) 2003 Cal App LEXIS 170, review denied (2003, Cal) 2003 Cal LEXIS 2571.

Pen C § 666 by its terms does not require the statute to be specifically pleaded in the information or indictment; nor do constitutional principles of due process require that the statute be specifically alleged as long as the pleading apprises the defendant of the potential for the enhanced penalty and alleges every fact and circumstance necessary to establish its applicability. Thus, an accusatory pleading charging the greater offense of robbery and alleging several prior prison terms for theft offenses was sufficient because it necessarily put defendant on notice of the lesser included offense of petty theft and prior theft convictions and prison terms to support a felony sentence. *People v. Tardy* (2003, Cal App 2d Dist) 112 Cal App 4th 783, 6 Cal Rptr 3d 24, 2003 Cal App LEXIS 1552, review denied (2004, Cal) 2004 Cal LEXIS 225.

Where an inmate performed his selfless, heroic act of saving a prison guard's life with the Heimlich maneuver, the department of corrections improperly denied the inmate's request for a reduction in sentence under *Pen C* § 2935 because "reduction of the sentence" as contemplated in that statute was not the same as a credit under the Three Strikes law, *Pen C* § 667(c)(5) and 1170.12(a)(5); hence, the inmate was not subject to the 20 percent limitation in the *Three Strikes Law*. *In re Young* (2004) 32 Cal 4th 900, 12 Cal Rptr 3d 48, 87 P3d 797, 2004 Cal LEXIS 3041.

Although the language of the provision set forth in *Pen C* § 12022.53(j) is not identical to the language of the provisions of *Pen C* § 667(a)(2) and former *Pen C* § 667(b), it is substantially similar, and should be similarly construed; the court concludes that the "other provision of law" language in *Pen C* § 12022.53(j), must be construed, in light of case law, to refer to other sentencing enhancement statutes, of which neither *Pen C* §§ 667(e)(2)(A), 1170.12(c)(2)(A) is one. *People v. Coker* (2004, Cal App 3d Dist) 120 Cal App 4th 581, 15 Cal Rptr 3d 553, 2004 Cal App LEXIS 1093, review denied (2004, Cal) 2004 Cal LEXIS 9697.

Presentence custody credits pursuant to *Pen C* § 4019 are available to a defendant given an indeterminate life term under the three strikes law. *People v. Philpot* (2004, Cal App 4th Dist) 122 Cal App 4th 893, 19 Cal Rptr 3d 280, 2004 Cal App LEXIS 1607, modified, rehearing denied (2004, Cal App 4th Dist) 2004 Cal App LEXIS 1815, review denied (2004, Cal) 2004 Cal LEXIS 11422.

Multiple-murder special circumstance was properly applied to three 1992 homicides. The three strikes law, *Pen C* §§ 667, 1170.12, adopted in 1994, did not provide the exclusive means of punishing a person who was convicted of a felony and who had previously been convicted of certain specified felonies. *People v. Cook* (2006) 39 Cal 4th 566, 47 Cal Rptr 3d 22, 2006 Cal LEXIS 9519, rehearing denied (2006) 2006 Cal. LEXIS 13101, 2006 D.A.R. 14244, cert den (2007, US) 127 S Ct 2438, 167 L Ed 2d 1139, 2007 US LEXIS 5993.

State court's sentence of a habeas petitioner to term of imprisonment of 25 years to life under California's three strikes law, *Pen C* § 667(d), for felony possession of 0.036 grams of cocaine base was not an objectively unreasonable application of clearly established federal law, specifically *U.S. Const. amend. VIII*, as determined by the *U.S. Supreme Court*. *Taylor v. Lewis* (2006, 9th Cir Cal) 460 F3d 1093, 2006 US App LEXIS 20831, rehearing denied, amended (2006, 9th Cir Cal) 208 Fed Appx 510, 2006 US App LEXIS 28074.

For purposes of *Pen C* §§ 1009 and 995, aggravating facts need not be pleaded and proved at the preliminary examination. Neither the legislature nor the courts have ever deemed aggravating facts used to impose the upper term as being equivalent to statutory sentencing "enhancements"--many of which were contained in statutory definitions of particular offenses prior to enactment of the determinate sentencing law--which must be alleged in the accusatory pleading and proved at the preliminary hearing, e.g., *Pen C* § 667(f)(1). *Barragan v. Superior Court* (2007, Cal App 3d Dist) 148 Cal App 4th 1478, 56 Cal Rptr 3d 660, 2007 Cal App LEXIS 451, review denied (2007, Cal) 2007 Cal LEXIS 6324.

5. Striking of Priors

Upon defendant's conviction of robbery (*Pen C § 211*) pursuant to his plea of nolo contendere and his admission of two prior robbery convictions, imposition of sentence on the prior offenses was not mandatory. Although *Pen C § 1170.1*, subd. (h), which authorizes a trial court to strike certain enhancements, does not refer to *Pen C § 667*, which mandates the imposition of enhancements for prior serious felonies, *Cal. Const., art. I, § 28*, subd. (f), uses ambiguous language in stating that any prior felony conviction shall be used "without limitation" for purposes of impeachment or sentence enhancement in any criminal proceeding. In light of the ambiguity, *Pen C § 667*, lacks sufficiently express language to prevent a trial court from striking, or otherwise rendering unenforceable, the enhancements provided for therein. In addition, since the trial court could have stricken the enhancements under *Pen C § 1385*, its lesser order staying imposition of sentence on the priors was within its discretion. *People v. Lopez (1983, Cal App 2d Dist) 147 Cal App 3d 162, 195 Cal Rptr 27, 1983 Cal App LEXIS 2178*.

The trial court, in sentencing a defendant who had previously been convicted of a "serious felony" within the meaning of *Pen C § 667*, providing for a five-year consecutive enhancement for prior serious felony convictions, erred in concluding that it had no discretion to strike the prior serious felony for purposes of sentencing. A trial court's general statutory authority to "dismiss" an action "in furtherance of justice" under *Pen C § 1385*, includes the power to "strike" a prior conviction for purposes of sentencing. Absent a clear expression of legislative intent eliminating a trial court's § 1385 authority whenever such elimination is intended, a sentencing statute will not construed to abrogate a trial court's general § 1385, power to strike. Thus, neither § 667, nor *Cal. Const., art. I, § 28*, subd. (f), providing that any prior felony conviction shall be used without limitation for purposes of enhancement, could be construed to abrogate the trial court's statutory authority to strike a prior conviction, since neither section contained any express language indicating that it was intended to eliminate a trial court's § 1385, power with respect to the serious felony enhancements adopted in § 667, and where nothing in the ballot analysis or arguments which were before the voters suggested such a purpose. *People v. Fritz (1985) 40 Cal 3d 227, 219 Cal Rptr 460, 707 P2d 833, 1985 Cal LEXIS 404*, sup'd by statute as stated in questionable precedent *In re Varnell (2002, Cal App 2d Dist) 95 Cal App 4th 205, 115 Cal Rptr 2d 464, 2002 Cal App LEXIS 350*, superseded by statute as stated in *People v. Aubrey (1998, Cal App 4th Dist) 65 Cal App 4th 279, 76 Cal Rptr 2d 378, 1998 Cal App LEXIS 590*, superseded by statute as stated in *People v. Rivera (1995, Cal App 6th Dist) 41 Cal App 4th 352, 48 Cal Rptr 2d 646, 1995 Cal App LEXIS 1253*, superseded by statute as stated in *People v. Casillas (1995, Cal App 1st Dist) 40 Cal App 4th 1506, 47 Cal Rptr 2d 734, 1995 Cal App LEXIS 1206*, superseded by statute as stated in *People v. Bailey (1995, Cal App 2d Dist) 37 Cal App 4th 871, 44 Cal Rptr 2d 205, 1995 Cal App LEXIS 789*, superseded by statute as stated in *People v. Webb (1995, Cal App 4th Dist) 35 Cal App 4th 1828, 42 Cal Rptr 2d 215, 1995 Cal App LEXIS 591*, superseded by statute as stated in *Parker v. Ingle (1995, 9th Cir Cal) 1995 US App LEXIS 20738*.

Following defendant's no contest plea to residential burglary, the trial court erroneously relied on *Cal. Rules of Court, rule 441(b)*, to order defendant's prior serious felony conviction for residential burglary stricken for enhancement purposes after the court considered the prior conviction as a circumstance in aggravation and imposed the upper term as a sentence. In enacting *Pen C § 667* (which imposes a five-year enhancement for each prior conviction of a serious felony), the electorate made clear its intent that a trial court does not have discretion under rule 441 to avoid the five-year enhancement by using the prior conviction to impose a more lenient upper term as sentence without an additional sentence in enhancement. *People v. Keys (1985, Cal App 2d Dist) 175 Cal App 3d 431, 220 Cal Rptr 760, 1985 Cal App LEXIS 2845*.

In a prosecution for robbery in which defendant admitted a prior conviction for robbery, the trial court properly imposed a five-year mandatory enhancement, in spite of defendant's contention that *Pen C § 667*, subd. (a), enhancement is discretionary, where the prior conviction was proved before the court, and no mitigating circumstances were found. Although the trial court had the power to strike the prior conviction in the furtherance of justice (*Pen C § 1385*), it would have been an abuse of discretion to do so. The striking of a prior serious felony conviction is not a routine matter, but is an extraordinary exercise of discretion very much like setting aside judgment of conviction after

trial, and requires consideration both of the constitutional rights of the defendant, and the interests of society represented by the *People v. Jackson* (1986, Cal App 2d Dist) 178 Cal App 3d 694, 224 Cal Rptr 37, 1986 Cal App LEXIS 2690.

While *Pen C § 1385*, discretion may appropriately be exercised in dismissing serious felony priors, the trial court is not required to state reasons for declining to exercise its discretion to strike a *Pen C § 667*, enhancement. The enhancement provision of § 667 is mandatory absent a valid exercise of § 1385 discretion. It is only where the trial court chooses to exercise its discretion that it is required to state reasons on the record. Thus, in a prosecution in which defendant was convicted of burglary and was sentenced to the median base term of two years plus a consecutive term of five years for a prior serious felony conviction, the trial court did not err in failing to state reasons for not exercising its § 1385 discretion. Further, even if the trial court erroneously believed it had no such discretion, it was not reasonably probable that the court would or could have properly exercised its discretion to impose any sentence that did not involve a five-year enhancement, where the trial court noted defendant's "long history of sometimes violent and aggressive behavior," and stated that there were no circumstances in mitigation, and where the probation report before the trial court fully supported the court's comments. *People v. Mack* (1986, Cal App 5th Dist) 178 Cal App 3d 1026, 224 Cal Rptr 208, 1986 Cal App LEXIS 2721.

In a prosecution for attempted murder, the trial court did not err in striking allegations that defendant committed two prior serious felonies within the meaning of *Pen C § 667* (permitting enhancement of his sentence), pursuant to former *Pen C § 1385* (dismissal of action in furtherance of justice). Although §§ 667 and 1385 had been amended to nullify a trial court's discretionary power to strike prior convictions charged as serious felonies, defendant committed the charged crime before the amendments became effective. Hence, application of the amended versions would have been retrospective; also, it would have added two consecutive five-year terms to his sentence. Thus, applying the amended laws to defendant would have run afoul of the ex post facto clause of the federal and California Constitutions, and the trial court properly applied the former law. *People v. Williams* (1987, Cal App 1st Dist) 196 Cal App 3d 1157, 242 Cal Rptr 421, 1987 Cal App LEXIS 2408.

Following conviction on a plea of guilty to robbery and attempted robbery (*Pen C §§ 211, 664*), the trial court properly denied defendant's motion to strike a prior-serious-felony enhancement of five years (*Pen C §§ 667, 1192.7*, subd. (c)) for a robbery conviction more than twenty years previous to the instant offenses. Even though *Pen C § 667*, lacks a washout provision for remote convictions as do other enhancement statutes, defendant failed to show the legislative scheme of § 667 affects similarly situated persons in an unequal manner. *People v. Smith* (1988, Cal App 1st Dist) 206 Cal App 3d 599, 253 Cal Rptr 673, 1988 Cal App LEXIS 1171.

To be subject to the five-year enhancement of prison term pursuant to *Pen C § 667*, subd. (a), a defendant's prior serious felony conviction must have occurred before the commission of the present offense. Thus, a five-year § 667 enhancement, imposed on sentencing for a conviction of residential burglary (*Pen C § 459*), had to be stricken, where defendant's conviction for the prior rape occurred after the charged burglary. *People v. Rojas* (1988, Cal App 2d Dist) 206 Cal App 3d 795, 253 Cal Rptr 786, 1988 Cal App LEXIS 1168.

There was no abuse of discretion in the trial court's refusal to refer a man convicted of robbery with one prior (*Pen C §§ 211; 667*, subd. (a)) to the California Rehabilitation Center for treatment of narcotics addiction pursuant to *Welf. & Inst. Code, § 3051*. Defendant's aggregate sentence exceeded six years imprisonment and he therefore was ineligible for such commitment (*Welf. & Inst. Code, § 3052*, subd. (a)(2)). Under *Pen C § 1385*, the trial court was not authorized to strike defendant's prior conviction enhancement under *Pen C § 667*, and the language discrepancy defendant perceived between those two statutes was insignificant, even though the goal of rehabilitation commitment is nonpunitive (*Welf. & Inst. Code, § 3000*). *People v. Quillar* (1989, Cal App 4th Dist) 214 Cal App 3d 1458, 263 Cal Rptr 337, 1989 Cal App LEXIS 1063.

A defendant who, in an earlier proceeding, pled guilty to assault with a deadly weapon and admitted inflicting great bodily injury in its commission (*Pen C § 12022.7*) was properly sentenced under the serious felony statute (*Pen C § 667*

, subd. (a)) in a subsequent prosecution, even though the infliction of great bodily injury enhancement had been stricken when defendant was sentenced for violation of probation arising out of the earlier prosecution. Convicted by his plea of guilty and his admission to the enhancement in the earlier proceedings, defendant could not be exonerated by sentencing considerations arising when he violated probation. The determination of guilt by a jury verdict or by plea of guilty suffices to convict for purposes of the serious felony statute. Thus, the striking of the enhancement for sentencing purposes in the earlier case did not negate the conviction or enhancement or change the nature of the original offense and its accompanying enhancement. Though a court may strike an enhancement allegation in the interest of justice at sentencing when authorized to do so, the enhancement is not nullified by lenient acts of the sentencing court. Even when the court imposes no sentence, the validity of a prior conviction stands for purposes of enhancement statutes. *People v. Shirley* (1993, Cal App 3d Dist) 18 Cal App 4th 40, 22 Cal Rptr 2d 340, 1993 Cal App LEXIS 872.

In sentencing defendant convicted of forcible rape, the trial court erred in imposing both a five-year enhancement pursuant to *Pen C* § 667, subd. (a), for a prior rape conviction (serious felony) and a five-year enhancement under *Pen C* § 667.6, subd. (a), for a prior enumerated sex offense. Because the case was one in which multiple statutory enhancement provisions were available for the same prior offense, one of which was a *Pen C* § 667, enhancement, only one could be imposed. Because *Pen C* § 1385, subd. (b), prohibits the striking of any prior conviction of a serious felony for purposes of enhancement on a sentence under *Pen C* § 667, it was necessary to strike the *Pen C* § 667.6, subd. (a), enhancement. In enacting *Pen C* § 667, when *Pen C* § 667.6, was already law, the voters undoubtedly did not intend the two enhancements to be cumulative. Nothing in the language of either statute carries a contrary suggestion. Most, if not all, of the offenses listed in *Pen C* § 667.6, subd. (a), qualify as "serious" felonies under *Pen C* § 667. Imposition of terms under both statutes would transform a five-year enhancement into a ten-year enhancement in many cases. *People v. Flournoy* (1994, Cal App 5th Dist) 26 Cal App 4th 1695, 32 Cal Rptr 2d 188, 1994 Cal App LEXIS 766.

An interpretation of the three strikes law (*Pen C* § 667, subs. (b)-(i)) that would deprive a trial judge of the power to dismiss a prior felony conviction allegation pursuant to *Pen C* § 1385 (dismissal in furtherance of justice), absent the prosecutor's consent, would violate the doctrine of the separation of powers. Dismissal is a judicial rather than an executive function. Interference with the traditional prerogatives of the executive cannot justify interference with the independence of the judiciary. Laws purporting to subject to prosecutorial approval the court's discretion to dispose of a criminal charge are unconstitutional. *People v. Superior Court (Romero)* (1996) 13 Cal 4th 497, 53 Cal Rptr 2d 789, 917 P2d 628, 1996 Cal LEXIS 3025, modified, rehearing denied (1996) 13 Cal 4th 1016, 1996 Cal LEXIS 4445.

Language in the three strikes law (*Pen C* § 667, subs. (b)-(i)) that provides that a trial court can strike an allegation of a prior felony conviction for insufficient evidence (*Pen C* § 667, subd. (f)(2)) does not imply an exclusion of a court's power to strike those allegations sua sponte in the furtherance of justice under *Pen C* § 1385. The evident purpose of *Pen C* § 667, subd. (f)(2), is to subject the prosecutor's motion to strike for insufficient evidence to judicial oversight. Furthermore, the first sentence of *Pen C* § 667, subd. (f)(1), providing for application of the entire three strikes law "[n]otwithstanding any other law" is consistent with a court's power to strike under *Pen C* § 1385, given the Legislature's express reference to action "pursuant to" *Pen C* § 1385 (*Pen C* § 667, subd. (f)(2)). Additional language that prohibits suspension of execution or imposition of sentence for "any prior offense" (*Pen C* § 667, subd. (c)(2)) does not refer to a prior felony conviction, but rather ensures that a three strikes defendant will be sentenced on all pending charges. *People v. Superior Court (Romero)* (1996) 13 Cal 4th 497, 53 Cal Rptr 2d 789, 917 P2d 628, 1996 Cal LEXIS 3025, modified, rehearing denied (1996) 13 Cal 4th 1016, 1996 Cal LEXIS 4445.

Pen C § 1385, subd. (b), which prohibits a court from striking a prior serious felony conviction allegation for purposes of a sentence enhancement under *Pen C* § 667, does not prohibit a court from striking prior felony conviction allegations pursuant to *Pen C* § 1385, subd. (a) (dismissal in furtherance of justice), in cases brought under the three strikes law (*Pen C* § 667, subs. (b)-(i)). The three strikes law articulates an alternative sentencing scheme for a current offense rather than an enhancement. Even though the Legislature placed the three strikes law within *Pen C* § 667, the Legislature also expressly authorized a prosecutor's motion to dismiss a prior felony allegation pursuant to *Pen C* § 1385 (*Pen C* § 667, subd. (f)(2)). Furthermore, although *Pen C* § 1385, subd. (b), restricts the discretion of a court to dismiss a prior felony allegation supporting a five-year enhancement pursuant to *Pen C* § 667, subd. (a), where the

current offense is a "serious felony" (*Pen C § 1192.7*), the drafters of the three strikes law could rationally have chosen to give a court more discretion under *Pen C § 667*, subds. (b)-(i), since the three strikes law applies whether or not the current felony offense is "serious" and provides for a possible life sentence. *People v. Superior Court (Romero)* (1996) 13 Cal 4th 497, 53 Cal Rptr 2d 789, 917 P2d 628, 1996 Cal LEXIS 3025, modified, rehearing denied (1996) 13 Cal 4th 1016, 1996 Cal LEXIS 4445.

A court's discretion to strike allegations of prior felony convictions under the three strikes law (*Pen C § 667*, subds. (b)-(i)) in furtherance of justice is limited, both when the court is acting on its own motion pursuant to *Pen C § 1385*, subd. (a), and when it acts on motion of the prosecuting attorney pursuant to *Pen C § 667*, subd. (f)(2). *Pen C § 1385*, requires consideration both of the constitutional rights of the defendant and the interests of society represented by the People. At the very least, the reason for dismissal must be that which would motivate a reasonable judge. Society, represented by the People, has a legitimate interest in the fair prosecution of crimes that have been properly alleged. A dismissal that arbitrarily cuts those rights without a showing of detriment to the defendant is an abuse of discretion. A court also abuses its discretion if it strikes a sentencing allegation solely to accommodate judicial convenience or because of court congestion, or simply because a defendant pleads guilty. Nor would a court act properly if guided solely by a personal antipathy for the effect that the three strikes law would have on a defendant, while ignoring the defendant's background, the nature of his or her present offenses, and other individualized considerations. *Pen C § 1385*, anticipates, and facilitates, appellate review with the mandatory requirement that the minutes reflect the reason for the dismissal. *People v. Superior Court (Romero)* (1996) 13 Cal 4th 497, 53 Cal Rptr 2d 789, 917 P2d 628, 1996 Cal LEXIS 3025, modified, rehearing denied (1996) 13 Cal 4th 1016, 1996 Cal LEXIS 4445.

An interpretation of the three strikes law (*Pen C § 667*, subds. (b)-(i)) that would deprive a trial judge of the power to dismiss a prior felony conviction allegation pursuant to *Pen C § 1385* (dismissal in furtherance of justice), absent the prosecutor's consent, would violate the doctrine of separation of powers (*Cal. Const., art. III, § 3*). *People v. Metcalf* (1996, Cal App 4th Dist) 47 Cal App 4th 248, 55 Cal Rptr 2d 164, 1996 Cal App LEXIS 634.

In cases charged under the three strikes law (*Pen C § 667*, subds. (b)-(i)), a court may exercise the power to dismiss a prior felony conviction allegation pursuant to *Pen C § 1385* (dismissal in furtherance of justice), either on the court's own motion or on that of the prosecuting attorney, subject, however, to strict compliance with the provisions of *Pen C § 1385*, and to review for abuse of discretion. *People v. Metcalf* (1996, Cal App 4th Dist) 47 Cal App 4th 248, 55 Cal Rptr 2d 164, 1996 Cal App LEXIS 634.

The Supreme Court's holding that a trial court sentencing a defendant under the three strikes law (*Pen C § 667*, subds. (b)-(i)) has discretion to dismiss an allegation of a prior felony conviction in the furtherance of justice pursuant to *Pen C § 1385*, subd. (a), is fully retroactive. A defendant serving a sentence under the three strikes law imposed by a court that misunderstood the scope of its discretion in this regard may file a petition for a writ of habeas corpus in the sentencing court to secure reconsideration of the sentence. Such a petition may be summarily denied if the record shows that the sentencing court was aware that it possessed the discretion to strike prior felony conviction allegations without the concurrence of the prosecuting attorney and did not strike the allegations, or if the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations. *People v. Metcalf* (1996, Cal App 4th Dist) 47 Cal App 4th 248, 55 Cal Rptr 2d 164, 1996 Cal App LEXIS 634.

In cases charged under *Pen C § 667*, subds. (b)-(i) (three strikes law), a court may exercise the power to dismiss prior felony conviction allegations in furtherance of justice, under *Pen C § 1385* (striking of priors for purposes of sentence enhancement), either on the court's own motion or on that of the prosecuting attorney. A defendant serving a sentence under the three strikes law, imposed by a court that misunderstood the scope of its discretion to strike prior felony conviction allegations in furtherance of justice, may file a petition for habeas corpus to secure reconsideration of the sentence. However, such a petition may be summarily denied if the record shows that the sentencing court was aware it possessed the discretion to strike prior felony conviction allegations without the concurrence of the prosecuting attorney and did not strike the allegations, or if the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations. *People v. Sotomayor* (1996, Cal App 2d Dist) 47

Cal App 4th 382, 54 Cal Rptr 2d 871, 1996 Cal App LEXIS 678, review denied (1996, Cal) 1996 Cal LEXIS 5865.

In a narcotics prosecution involving prior felony convictions for purposes of the three strike law (*Pen C § 667, subds. (b)-(i)*), the trial court did not meet the requirements of *Pen C § 1385*, when it struck two prior convictions in the interest of justice. A court's discretion to strike prior felony conviction allegations in furtherance of justice is limited. The court's exercise of discretion must proceed in strict compliance with *Pen C § 1385, subd. (a)*, which requires a statement of the reasons for the dismissal in an order entered in the minutes, and the court's determination is subject to review for abuse of discretion. In this case, the minutes indicated that defendant had admitted one prior conviction, and that the court struck the two other prior conviction allegations. This was insufficient to meet the dictates of *Pen C § 1385*. Furthermore, in opining that defendant's possession of a \$5 rock of cocaine did not justify a sentence of 25 years to life, the trial court's dismissal may have constituted an abuse of discretion. This indicated that the court may have improperly been concerned with the effect of the three strikes law on this defendant based upon what the court perceived as a relatively minor offense, and it suggested that the court improperly exercised its discretion in order to facilitate defendant's plea. *People v. Carter (1996, Cal App 2d Dist) 49 Cal App 4th 567, 56 Cal Rptr 2d 689, 1996 Cal App LEXIS 884.*

In a prosecution for felonious possession of cocaine base and misdemeanor possession of drug paraphernalia, where it was alleged that defendant had suffered three prior strikes in violation of the three strikes law (*Pen C § 667, subds. (b)-(i)*), the record failed to support defendant's contention that the court determined it was without power to strike any of the prior convictions under *Pen C § 1385*. Although the trial court did hold, in response to defendant's posttrial motion, that the three strikes law did not violate the separation of powers doctrine, and that it did not constitute cruel and unusual punishment, the specific issue of whether the court retained discretion to strike a prior under *Pen C § 1385*, was never addressed by the parties or the court. To presume from this record that the trial court erroneously believed it lacked *Pen C § 1385*, discretion to strike defendant's priors would be to engage in pure speculation. *People v. Alvarez (1996, Cal App 5th Dist) 49 Cal App 4th 679, 56 Cal Rptr 2d 814, 1996 Cal App LEXIS 893, review denied (1996, Cal) 1996 Cal LEXIS 7010.*

Pen C § 1385, subd. (a), permits a court acting on its own motion to strike prior felony conviction allegations in cases brought under the three strikes law (*Pen C § 667, subds. (b)-(i)*). The three strikes law is constitutional and does not violate the separation of powers doctrine. A defendant serving a sentence under the three strikes imposed by a court that misunderstood the scope of its discretion to strike prior felony conviction allegations in furtherance of justice pursuant to *Pen C § 1385, subd. (a)*, may raise the issue on appeal, or, if relief on appeal is no longer available, may file a petition for a writ of habeas corpus to secure reconsideration of the sentence. Such a petition should be filed in the sentencing court. Such a petition may be summarily denied if the record shows that the sentencing court was aware that it possessed the discretion to strike prior felony conviction allegations without the concurrence of the prosecuting attorney and did not strike the allegations, or if the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations. *People v. Alvarez (1996, Cal App 5th Dist) 49 Cal App 4th 679, 56 Cal Rptr 2d 814, 1996 Cal App LEXIS 893, review denied (1996, Cal) 1996 Cal LEXIS 7010.*

In a criminal prosecution in which defendant was convicted of cocaine possession with a prior prison conviction, the trial court abused its discretion in striking two serious/violent felony prior convictions in order to avoid the consequences of the three strikes law (*Pen C § 667, subds. (b)-(i)*), since it failed to state its reasons in the minutes, and based its decision on impermissible grounds. *Pen C § 1385*, requires a court to enter its reasons for the exercise of the power to strike or dismiss. Further, it was apparent from the court's comments when the plea was taken that the court had already decided to strike the priors in advance of the first recorded proceeding. The court's comments at sentencing also expressed a clear antipathy for the three strikes law and a sense of frustration as to the manner in which the prosecutor was exercising its discretion. Although the court expressed its belief that a life sentence was disproportionate for defendant's offense, the court gave no weight to defendant's record. Yet, at sentencing, the court imposed both an upper term and an enhancement based on a record demonstrating 29 years of criminal history. Thus, the court's reasons were based more heavily on judicial disagreement with the law than on any reasoned analysis of defendant's criminal history and the facts of the offense. *People v. Smith (1996, Cal App 4th Dist) 50 Cal App 4th 1194, 58 Cal Rptr 2d 9,*

1996 Cal App LEXIS 1056.

The language of *Pen C § 1385*, which permits a dismissal by the trial court "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 that arbitrarily cuts those rights without a showing of detriment to the defendant is an abuse of discretion. From these general principles it follows that a court abuses its discretion if it dismisses a case, or strikes a sentencing allegation, solely to accommodate judicial convenience or because of court congestion. A court also abuses its discretion by dismissing a case, or a sentencing allegation, simply because a defendant pleads guilty. Nor would a court act properly if guided solely by a personal antipathy for the effect that the three strikes law (*Pen C § 667*, subds. (b)-(i)), would have on a defendant, while ignoring defendant's background, the nature of the current offenses, and other individualized considerations. *People v. Bishop* (1997, Cal App 2d Dist) 56 Cal App 4th 1245, 66 Cal Rptr 2d 347, 1997 Cal App LEXIS 624.

In a prosecution for petty theft with a prior theft-related conviction that resulted in incarceration (*Pen C § 666*), the trial court properly exercised its discretion, pursuant to *Pen C § 1385*, subd. (a), to dismiss allegations of defendant's two prior convictions under the three strikes law (*Pen C § 667*, subds. (b)-(i)). The trial court properly weighed aggravating and mitigating factors under *Pen C § 1170*, subd. (b), when it sentenced defendant to the upper term of three years for the current offense, based on the aggravating factor of his prior record. Nonetheless, although defendant's prior convictions were an aggravating factor, the court properly based its decision to dismiss the priors on mitigating factors, those being the nature and time of defendant's crimes, since the current offense was nonviolent (theft of 6 videocassettes from a drug store) and defendant's prior violent offenses were remote (17 to 20 years old). *People v. Bishop* (1997, Cal App 2d Dist) 56 Cal App 4th 1245, 66 Cal Rptr 2d 347, 1997 Cal App LEXIS 624.

The trial court abused its discretion in dismissing a defendant's three strikes law prior serious felony conviction (*Pen C § 1385*, subd. (a)), on the sole ground that it happened 20 years before the current crime, where defendant had led a continuous life of crime after the prior. In determining whether a prior conviction is remote, the trial court should not simply consult the calendar. A prior conviction may be stricken if it is remote in time-sometimes referred to as "washing out" -because it carries the connotation of a crime-free cleansing period of rehabilitation after a defendant has had the opportunity to reflect upon the error of his or her ways. If there has been no "washing out," the prior should not be stricken on account of remoteness. *People v. Humphrey* (1997, Cal App 2d Dist) 58 Cal App 4th 809, 68 Cal Rptr 2d 269, 1997 Cal App LEXIS 853.

It is an abuse of discretion for a trial court to strike a prior conviction under the three strikes law solely to accommodate judicial convenience or because of court congestion. A court also abuses its discretion by dismissing a case, or a sentencing allegation, simply because a defendant pleads guilty. Nor would a court act properly if guided solely by a personal antipathy for the effect that the three strikes law would have on a defendant, while ignoring defendant's background, the nature of his or her present offenses, and other individualized considerations. *People v. Humphrey* (1997, Cal App 2d Dist) 58 Cal App 4th 809, 68 Cal Rptr 2d 269, 1997 Cal App LEXIS 853.

Trial courts have limited discretionary power under *Pen C § 1385*, acting on their own motion or the motion of the district attorney, to strike prior felony convictions in cases subject to the sentencing provisions of the three strikes law (*Pen C § 667*, subds. (b)-(i)). Orders striking such prior convictions are appealable, and, to assist in appellate review, *Pen C § 1385*, requires the trial court to set forth its reasons for striking the sentencing allegations in an order entered upon the minutes. However, a defendant has no right to move to strike a prior felony conviction, but may only ask the trial court to exercise its discretion. The trial court is not required to state reasons for declining to exercise its discretion under *Pen C § 1385*. *People v. Gillispie* (1997, Cal App 1st Dist) 60 Cal App 4th 429, 70 Cal Rptr 2d 462, 1997 Cal App LEXIS 1088, review denied (1998, Cal) 1998 Cal LEXIS 2105.

A trial court's discretion to strike or vacate an allegation or finding of a defendant's previous conviction of a serious

and/or violent felony under the three strikes law (*Pen C* § 667, subs. (b)-(i)), on its own motion, "in furtherance of justice" pursuant to *Pen C* § 1385, subd. (a), is limited, and is subject to review for abuse. The language of *Pen C* § 1385, subd. (a), "furtherance of justice," requires consideration of both the constitutional rights of the defendant and the interests of society represented by the People; at the very least, the reason for vacating the finding must be that which would motivate a reasonable judge. A dismissal which arbitrarily cuts the legitimate interest of society in the fair prosecution of crimes properly alleged without a showing of detriment to the defendant is an abuse of discretion. A court also abuses its discretion if it vacates a three strikes finding solely on the ground of judicial convenience or court congestion, simply because a defendant pleads guilty, or solely as a result of a personal antipathy for the three strikes law, while ignoring the defendant's background, the nature of the present offenses, and other individualized considerations. *People v. Williams* (1998) 17 Cal 4th 148, 69 Cal Rptr 2d 917, 948 P2d 429, 1998 Cal LEXIS 3, modified, rehearing denied (1998) 17 Cal 4th 643b, 1998 Cal LEXIS 1151.

In a prosecution for felony driving under the influence of a drug (*Veh C* §§ 23152, subd. (a), and former *Pen C* § 23175, see now *Pen C* § 23550), the trial court's ruling striking one of defendant's two prior serious felony convictions under the three strikes law (*Pen C* § 667, subs. (b)-(i)), pursuant to *Pen C* § 1385, was ineffective, since the trial court did not accompany its ruling with reasons set forth in an order entered on the minutes. The trial court's ruling was further unsound, since the record disclosed no mitigating factors with respect to defendant's present offense or his prior serious and/or violent felony convictions. Furthermore, defendant was unemployed and had not followed through with efforts to bring his substance abuse problem under control. Although his prior serious and/or violent felonies were 12 years old, defendant had not refrained from criminal activity during that span of time, was often in prison or jail, had violated parole and probation, and, three months before he committed the charged offense, had committed the misdemeanor of spousal battery, a crime involving actual violence. Furthermore, since defendant pled guilty in response to the trial court's indication of its willingness to strike one of defendant's priors and sentence him as a second strike offender rather than as a third strike offender, vacation of judgment was appropriate to allow defendant to withdraw his plea. *People v. Williams* (1998) 17 Cal 4th 148, 69 Cal Rptr 2d 917, 948 P2d 429, 1998 Cal LEXIS 3, modified, rehearing denied (1998) 17 Cal 4th 643b, 1998 Cal LEXIS 1151.

Where, following defendant's conviction on various felony charges, the trial court (1) considered whether he should receive a five-year sentence enhancement under *Penal C* § 667(a) because he had a prior serious felony conviction, (2) agreed with the prosecution that defendant had a prior serious felony conviction, but found that § 667(a) did not apply because, in the court's opinion, none of defendant's present convictions constituted a serious felony, and (3) later reconsidered and reversed that initial decision, the trial court's reconsideration of its initial decision did not constitute double jeopardy and was therefore not unconstitutional. The state and federal prohibitions against double jeopardy do not apply to noncapital sentencing determinations, and imposition of the sentence enhancement here constituted a noncapital sentencing determination, not a conviction of a new crime. *People v. Hernandez* (1998) 19 Cal 4th 835, 80 Cal Rptr 2d 754, 968 P2d 465, 1998 Cal LEXIS 8038, cert den (1999) 526 US 1136, 143 L Ed 2d 1017, 119 S Ct 1814, 1999 US LEXIS 3538, review denied (2000, Cal) 2000 Cal LEXIS 746, overruled in part *People v. Seel* (2004) 34 Cal 4th 535, 21 Cal Rptr 3d 179, 100 P3d 870, 2004 Cal LEXIS 11331.

In a prosecution for theft and burglary, in which the prosecution alleged multiple prior convictions (*Pen C* § 667, subs. (b)-(i)), the trial court did not abuse its discretion in granting the People's motion to bifurcate the jury trial of the current offenses from that of the allegations of the priors. In ruling on a bifurcation motion, a trial court should be guided by the specific circumstances of the case before it. The court in this case noted that it had presided over two trials in which the jury apparently had refused to follow the law and had found the defendants not guilty of offenses falling under the three strikes law. Although these circumstances were not specific to the current case, the court was also entitled to consider the prejudice to defendant from having the jury learn of his 12 prior convictions in a unitary trial. Also, defendant had no constitutional right to a unitary trial or to have the jury, rather than the court, adjudicate the matter; indeed, a bifurcated trial is often more fair to the defendant. Further, defendant had no right to jury nullification, which may have occurred had the jury known of the 12 priors when trying the current charges. Finally, even if the court abused its discretion, defendant suffered no prejudice, since it was not reasonably likely that the jury would have

acquitted defendant had it known of the priors. *People v. Cline* (1998, Cal App 4th Dist) 60 Cal App 4th 1327, 71 Cal Rptr 2d 41, 1998 Cal App LEXIS 46, review denied (1998, Cal) 1998 Cal LEXIS 2395.

If a defendant makes a prima facie showing that the sentencing court declined, under a mistaken understanding as to its discretion, to exercise its discretion to dismiss prior convictions under the three strikes law (*Pen C* § 667, subds. (b)-(i)), the defendant is entitled to be present with counsel at a hearing at which the court will be asked to exercise its discretion to strike prior convictions alleged under the three strikes law. In this situation, a prima facie showing for relief requires, at minimum, a verified allegation that the trial court indicated its belief that it lacked discretion to strike the prior convictions. However, the better practice would be to establish that allegation by attaching, as an exhibit to the petition for relief, a copy of a transcript establishing that fact. *In re Barfoot* (1998, Cal App 2d Dist) 61 Cal App 4th 923, 71 Cal Rptr 2d 870, 1998 Cal App LEXIS 147.

Pen C §§ 667(e)(2) and 1170.12(c)(2) may not be construed to abrogate the *Pen C* § 1385(a) discretion to strike a prior prison term enhancement in the absence of clear language indicating such was intended by the Legislature or the voters. There is no evidence the Legislature intended to abrogate the power to strike a *Pen C* § 667.5 enhancement pursuant to *Pen C* § 1385(a). This is demonstrated in material part by the *Romero* decision (*People v. Superior Court (Romero)* (1996) 13 Cal 4th 497, 53 Cal Rptr 2d 789, 917 P2d 628, 1996 Cal LEXIS 3025, modified, rehearing denied (1996) 13 Cal 4th 1016, 1996 Cal LEXIS 4445), which held that the Legislature did not intend to abrogate the power to dismiss *Pen C* § 667 prior serious felony convictions. There is likewise no evidence the Legislature intended to abrogate the power to strike pursuant to *Pen C* § 1385(a), a *Pen C* § 667.5(b) prior prison term enhancement. Nothing in the statutory language indicates such nor does the legislative history of *Pen C* § 667(b) through (i). Accordingly, a trial judge retains the *Pen C* § 1385(a) power to strike a *Pen C* § 667.5(b) prior prison term enhancement. *People v. Bradley* (1998, Cal App 2d Dist) 64 Cal App 4th 386, 75 Cal Rptr 2d 244, 1998 Cal App LEXIS 488, review denied (1998, Cal) 1998 Cal LEXIS 6071.

In a prosecution for burglary, where the defendant admitted a prior conviction for attempted robbery, making it his second strike under the "Three Strikes" law (*Pen C* §§ 667, subds. (b)-(i), 1170.12), which was also a prior serious felony conviction for the purposes of *Pen C* § 667, subd. (a)(1), the trial court properly exercised its discretion pursuant to *Pen C* § 1385, subd. (a) and struck the prior serious felony conviction for the purposes of the Three Strikes law. Had the Legislature intended to automatically preclude probation to all defendants who are subject to the *Pen C* § 667, subd. (a) enhancement, it certainly could have said so when it enacted *Pen C* § 1385, subd. (b), and it did not. Further, to interpret *Pen C* § 1385, subd. (b) as requiring that all defendants subject to a *Pen C* § 667, subd. (a) enhancement are ineligible for probation would render useless *Pen C* § 1203.08 which expressly prohibits probation to defendants who already stand convicted of two or more of the designated serious felonies in a ten-year period. *People v. Aubrey* (1998, Cal App 4th Dist) 65 Cal App 4th 279, 76 Cal Rptr 2d 378, 1998 Cal App LEXIS 590.

A trial court, when applying the three strikes law, may exercise its discretion under *Penal C* § 1385(a) so as to dismiss a prior conviction allegation with respect to one count but not another. Here, the trial court did not abuse its discretion in doing so; the sentence of 31 years, four months to life for two counts of burglary was not lenient and was consistent with the purpose of the three strikes law. *People v. Garcia* (1999) 20 Cal 4th 490, 85 Cal Rptr 2d 280, 976 P2d 831, 1999 Cal LEXIS 2975, rehearing denied (1999) 21 Cal 4th 85a, 1999 Cal LEXIS 4862.

Defendant received a prison term of nine years for his convictions after jury trial of assault with a deadly weapon, including a three-year enhancement for personal use of a deadly weapon to inflict great bodily harm (*Penal C* §§ 245(a)(1), 12022.7). In a court trial, it was also found true that defendant had suffered a prior serious felony conviction (guilty plea to federal bank robbery) for purposes of both a strike prior under the three strikes law and a serious felony five-year enhancement (*Penal C* §§ 667(a)(1), 667(b)-(i), 1192.7(c)(19), and he was sentenced to nine years imprisonment. Following a Supreme Court decision that courts have discretion to strike priors, defendant petitioned for habeas corpus, and was then sentenced to 12 years, which included the five-year serious felony enhancement, not included in his previous sentence. On appeal, the court held that defendant received ineffective assistance of appellate counsel for not raising the sufficiency of the evidence to prove that the federal bank robbery constituted a prior serious

felony, since the federal statute described two classes of offenses, only one of which qualified as a prior serious felony. The matter was returned to the trial court for retrial of the prior conviction allegation, with any resulting aggregate sentence limited to nine years. *People v. Mitchell* (1999, Cal App 4th Dist) 68 Cal App 4th 1489, 81 Cal Rptr 2d 339, 1999 Cal App LEXIS 15.

Following defendant's conviction of first degree robbery and petty theft, the trial court abused its discretion in dismissing two burglary prior strikes, although it did not dismiss a prior robbery. In reviewing a ruling whether to strike a prior serious or violent felony conviction allegation or finding under the three strikes law, the court must consider whether, in light of the nature and circumstances of his present felonies and priors, 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 or violent felonies. Here, in light of defendant's background and crimes, the trial court's decision was an abuse of discretion because it was not based on appropriate legal principles, and because it substituted its conclusions for those of the electorate. *People v. Thornton* (1999, Cal App 4th Dist) 73 Cal App 4th 42, 86 Cal Rptr 2d 84, 1999 Cal App LEXIS 612, review denied (1999, Cal) 1999 Cal LEXIS 7370.

A defendant who fell squarely within the Three Strikes law (*Pen C* § 667) did not take himself outside its spirit by the additional commission of a virtually uninterrupted series of nonviolent felonies and misdemeanors over a lengthy period of time. Although the defendant was not an offender with multiple violent felony offenses in his past, the Three Strikes law did not require multiple violent felony offenses to come within its terms, and here the defendant had a 22-year criminal record. In addition, middle age, considered alone, could not take defendant outside the spirit of the law. Accordingly, the trial court abused its discretion in dismissing defendant's sole strike for a prior conviction of assault with a deadly weapon. *People v. Strong* (2001, Cal App 3d Dist) 87 Cal App 4th 328, 104 Cal Rptr 2d 490, 2001 Cal App LEXIS 126, review denied (2001, Cal) 2001 Cal LEXIS 3966.

In sentencing a defendant who committed a technical violation of the sexual offender registration scheme by failing to annually "update" his registration within five days of his birthday (*Pen C* § 290), the trial court abused its discretion in denying defendant's motion to strike one or more of his Three Strikes priors (*Pen C* § 667), where none of the facts before the court supported the inference that defendant failed to update his registration in order to obfuscate his residence or escape the reach of law enforcement. *People v. Cluff* (2001, Cal App 1st Dist) 87 Cal App 4th 991, 105 Cal Rptr 2d 80, 2001 Cal App LEXIS 200.

The Three Strikes law (*Pen C* §§ 667, 1170.12) expressly made a defendant subject to its sentencing provisions ineligible for commitment to the California Rehabilitation Center (CRC) (*W & I C* § 3050 et seq.); once he pleaded guilty to the charges, he became subject to the law unless the trial court dismissed the "strike" allegations outright. The trial court did not have discretion to conditionally dismiss the strike allegations under *Pen C* § 1385. *People v. Carrillo* (2001, Cal App 6th Dist) 87 Cal App 4th 1416, 105 Cal Rptr 2d 360, 2001 Cal App LEXIS 232, review denied (2001, Cal) 2001 Cal LEXIS 4561.

Because defendant received the benefit of his plea bargain, defendant was estopped from complaining about the trial court striking two serious felony enhancements under *Pen C* § 667(a). *People v. Vera* (2004, Cal App 6th Dist) 122 Cal App 4th 970, 18 Cal Rptr 3d 896, 2004 Cal App LEXIS 1616, review denied (2004) 2004 Cal. LEXIS 12003.

There was nothing ambiguous about a written plea agreement, which permitted on any ground a motion to strike a prior conviction under *Pen C* §§ 667(a), (b)-(i), 667.5(b). The prosecutor's shorthand comment at the time the plea was taken, that the matter was to be sent for sentencing and a Romero motion, did not and could not change the terms of the written agreement; the remedy was to hear defendant's constitutional challenge, not to force him to choose between the deal the parties had struck and renewed exposure to greater charges. *People v. Toscano* (2004, Cal App 2d Dist) 124 Cal App 4th 340, 20 Cal Rptr 3d 923, 2004 Cal App LEXIS 1963.

Habeas relief was denied where, inter alia, the state trial court did not have the discretion to strike the sentence

enhancements for a prior serious felony, and where counsel was not ineffective for failing to raise the inmate's frivolous claims. *Rosenberg v. Lewis* (2003, ND Cal) 2003 US Dist LEXIS 9034.

Defense counsel's failure to ask the court to dismiss a prior strike in the interest of justice so as to make defendant eligible for traditional probation did not constitute ineffective assistance of counsel where: (1) defendant's performance on probation was found "unsatisfactory" by the trial court, (2) the prior strike indicated that defendant posed a "serious danger to society," and (3) defendant stipulated to the increased prison term. *People v. Johnson* (2003, Cal App 4th Dist) 114 Cal App 4th 284, 7 Cal Rptr 3d 492, 2003 Cal App LEXIS 1852, rehearing denied (2004, Cal App 4th Dist) 2004 Cal App LEXIS 28, review denied (2004, Cal) 2004 Cal LEXIS 2291.

Defendant failed to register as required by *Pen C* § 290; defendant had been convicted on four previous occasions of offenses that constituted strikes, but for sentencing purposes, the trial court struck two of the prior offenses as they related to his failure to register within five days of his birthday. *People v. Meeks* (2004, Cal App 3d Dist) 117 Cal App 4th 891, 12 Cal Rptr 3d 174, 2004 Cal App LEXIS 498.

Under the Three Strikes law, a trial court improperly based its dismissal of a prior-conviction allegation on a magistrate's preliminary finding that there was insufficient evidence as to willful discharge of a firearm; defendant had subsequently entered a negotiated no-contest plea on that charge; the finding of insufficiency had no bearing on either the nature of defendant's prior offenses or his background and character as they related to the Three Strikes law; the trial court misapprehended the limited function of a magistrate and failed to give due consideration to the nature of the plea negotiation process. *People v. Wallace* (2004) 33 Cal 4th 738, 16 Cal Rptr 3d 96, 93 P3d 1037, 2004 Cal LEXIS 6770.

Habeas petitioner under 28 U.S.C.S. § 2254, failed to demonstrate his counsel had been ineffective under the Sixth Amendment standard at sentencing, where he had clearly been advised that he faced a maximum sentence of 79 years to life under the Three Strikes law, *Pen C* §§667, 1170.12. Petitioner had never been promised that a prior conviction would be stricken to allow for a lighter sentence. *Smith v. Carey* (2005, ND Cal) 2005 US Dist LEXIS 14330.

6. Offenses Committed by Juvenile

A defendant's sentence was improperly enhanced for two prior serious felony convictions pursuant to *Pen C* § 667, subd. (a), where they were based on prior juvenile adjudications of criminal misconduct. Although *Cal. Const., art. I, § 28*, subd. (f) (Victim's Bill of Rights), provides "any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used...for enhancement of sentence..." it did not change the prior law that juvenile adjudications are not "criminal convictions." The constitutional provision applies to a minor who has been certified as unfit for treatment under the juvenile court law and who has been certified to a court of criminal jurisdiction and thereafter convicted of a felony. *People v. West* (1984, Cal App 3d Dist) 154 Cal App 3d 100, 201 Cal Rptr 63, 1984 Cal App LEXIS 1866.

In a prosecution of an adult for robbery and attempted second-degree murder, the court properly enhanced defendant's sentence, pursuant to *Pen C* § 667, for a prior serious out-of-state felony conviction where, although defendant was 15 years old at the time of his prior conviction, it could still be considered a prior felony conviction, within the meaning of the Victims' Bill of Rights (*Cal. Const., art. I, § 28*, subd. (f)), since that amendment expressly includes prior convictions "whether adult or juvenile" for enhancement purposes; this provision includes all prior felony convictions in which a juvenile is tried as an adult, even for crimes committed before the juvenile had attained California's statutory minimum age of 16. *People v. Blankenship* (1985, Cal App 4th Dist) 167 Cal App 3d 840, 213 Cal Rptr 666, 1985 Cal App LEXIS 2031.

A sentence enhancement is not an added punishment for the prior serious felony conviction but instead is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one. Thus, in a prosecution for burglary, the trial court properly enhanced defendant's sentence under *Pen C* § 667, subd. (a), for a prior conviction of robbery, committed while defendant was a juvenile, even though the prior conviction had been

expunged after defendant received an honorable discharge from the California Youth Authority; even without Proposition 8, providing in part that prior felony convictions are to be used without limitation for sentence enhancement in any criminal proceeding, defendant's expunged conviction could be used to enhance his sentence, since the logic of case law allowing enhanced punishment even when the defendant has received a pardon for the prior offense was applicable in defendant's case as well. *People v. Jacob* (1985, Cal App 2d Dist) 174 Cal App 3d 1166, 220 Cal Rptr 520, 1985 Cal App LEXIS 2808.

In a robbery prosecution (*Pen C* §§ 211-212.5, subd. (b)), the trial court properly enhanced defendant's sentence under *Pen C* § 667, subd. (a), for a prior conviction of murder, committed while defendant was a juvenile, even though, after successful completion of his commitment and honorable discharge from the California Youth Authority, defendant's guilty verdict had been set aside and the information dismissed pursuant to *Welf. & Inst. Code*, § 1772 (release from "all penalties and disabilities" for persons honorably discharged from control of Youthful Offender Parole Board). The remedial purposes of the youthful offender legislation are not furthered when removal of possible five-year sentence enhancements is promised in return for successful completion of a Youth Authority commitment and, thus, the benefits received from an honorable discharge do not include a reduced penalty for subsequent crimes. *People v. Shields* (1991, Cal App 6th Dist) 228 Cal App 3d 1239, 279 Cal Rptr 403, 1991 Cal App LEXIS 290, review denied (1991, Cal) 1991 Cal LEXIS 2837.

In a robbery prosecution (*Pen C* §§ 211-212.5, subd. (b)), the trial court properly enhanced defendant's sentence under *Pen C* § 667, subd. (a), for a prior conviction of murder, committed while defendant was a juvenile, even though, after successful completion of his commitment and honorable discharge from the California Youth Authority, defendant's guilty verdict had been set aside and the information dismissed pursuant to *Welf. & Inst. Code*, § 1772 (release from "all penalties and disabilities" for persons honorably discharged from control of Youthful Offender Parole Board). The remedial purposes of the youthful offender legislation are not furthered when removal of possible five-year sentence enhancements is promised in return for successful completion of a Youth Authority commitment and, thus, the benefits received from an honorable discharge do not include a reduced penalty for subsequent crimes. *People v. Shields* (1991, Cal App 6th Dist) 228 Cal App 3d 1239, 279 Cal Rptr 403, 1991 Cal App LEXIS 290, review denied (1991, Cal) 1991 Cal LEXIS 2837.

In a homicide prosecution, the trial court erred in striking defendant's two prior juvenile court adjudications that had been alleged as prior convictions under the three strikes law (*Pen C* § 667, subds. (b)-(i)), on the ground that they failed to satisfy *Pen C* § 667, subd. (d)(3)(D) (for juvenile adjudication to constitute prior felony conviction, juvenile must have been found to be fit and proper subject to be dealt with under juvenile court law). *Pen C* § 667, subd. (d)(3)(D), does not require an express finding of fitness for juvenile court law treatment. Under juvenile court law, the prosecutor may petition for a determination that a minor is not fit for juvenile court law treatment (*Welf. & Inst. Code*, § 707). Thus, the only circumstance under which an express finding of fitness is made is when the prosecutor unsuccessfully files such a petition. However, where the prosecutor does not file a *Welf. & Inst. Code*, § 707, petition, a finding of fitness may be implied. Nothing in *Pen C* § 667, subd. (d)(3)(D), precludes an implied finding of fitness, and a construction requiring an express finding would so severely limit those juvenile adjudications that qualify as strikes as to be at odds with the intent of the three strikes law. Further, such a construction could lead to constitutional challenges to the three strikes law. Finally, even if this construction appears to render *Pen C* § 667, subd. (d)(3)(D), superfluous, the presence of some duplication in a multipronged statutory test does not automatically render it meaningless. *People v. Davis* (1997) 15 Cal 4th 1096, 64 Cal Rptr 2d 879, 938 P2d 938, 1997 Cal LEXIS 2973, rehearing denied (1997, Cal) 1997 Cal LEXIS 5333.

The trial court properly determined that defendant's qualifying prior felony conviction as a juvenile was a strike under the three strikes law (*Pen C* § 667, subds. (b)-(i)), even though the felony was later reduced to a misdemeanor pursuant to *Pen C* § 17, subd. (c) (when defendant convicted of "wobbler" is discharged from Youth Authority, offense shall thereafter be deemed a misdemeanor for all purposes). *Pen C* § 667, subd. (d)(1), a later-enacted statute, makes clear, "notwithstanding any other law," that the word "conviction" in the three strikes law has the narrow meaning of a verdict or guilty plea and is not affected by later events. The phrase "notwithstanding any other law," is a "term of art"

expressing a legislative intent to have the specific statute control despite the existence of other law that might otherwise govern. Moreover, where two statutes addressing the same subject are irreconcilable, the later in time will prevail over the earlier. Although the three strikes law did not override a trial court's *Pen C § 17*, subd. (b), discretion to sentence a "wobbler" as a misdemeanor or as a felony, the express language of *Pen C § 667*, subd. (d)(1), establishes the Legislature did intend that it prevail over *Pen C § 17*, subd. (c), in determining whether a prior conviction qualifies as a strike. *People v. Franklin* (1997, Cal App 5th Dist) 57 Cal App 4th 68, 66 Cal Rptr 2d 742, 1997 Cal App LEXIS 651, rehearing denied (1997, Cal App 5th Dist) 57 Cal App 4th 1138, 1997 Cal App LEXIS 727, review denied (1997, Cal) 1997 Cal LEXIS 8305.

Defendant's juvenile adjudication for residential burglary qualified as a strike under the three strikes law (*Pen C §§ 667*, subds. (b)-(i), 1170.12, subds. (a)-(e)); thus, in pleading guilty to receiving stolen property and admitting an allegation that it had been adjudicated in juvenile court that he committed residential burglary, defendant did not enter his plea under a mistake of fact or law, and his trial counsel did not render ineffective assistance by advising him that the prior adjudication subjected him to punishment under the three strikes law. *Pen C § 667*, subd. (d)(3), sets forth the requirements for counting a juvenile adjudication as a strike, and *Pen C § 667*, subd. (d)(3)(D), provides that a juvenile court adjudication may constitute a strike if the committed offense is listed in *Welf. & Inst. Code*, § 707, subd. (b). Residential burglary, which is a serious felony when committed by an adult, is not included in *Welf. & Inst. Code*, § 707, subd. (b). The only logical explanation is that the Legislature made a drafting error; it makes no sense for residential burglary to count as a strike only when committed by an adult. Since interpreting the statute literally would frustrate the intent behind the statute, the juvenile adjudication constituted a strike. *People v. Griggs* (1997, Cal App 5th Dist) 59 Cal App 4th 557, 69 Cal Rptr 2d 174, 1997 Cal App LEXIS 961, review denied (1998, Cal) 1998 Cal LEXIS 1097, overruled *People v. Garcia* (1999) 21 Cal 4th 1, 87 Cal Rptr 2d 114, 980 P2d 829, 1999 Cal LEXIS 4846.

The juvenile court did not err in denying a jury trial to a minor who was charged with committing second degree robbery. A minor has no right to a jury trial in juvenile court proceedings even though some juvenile court adjudications may constitute prior convictions that could subject the minor to increased punishment for future convictions under the three strikes law (*Pen C §§ 667*, subds. (b)(i), 1170.12). Traditionally, minors have not been entitled to a jury trial in light of the rehabilitative, rather than punitive, nature of juvenile court proceedings. The three strikes law did not alter this. First, the offenses that would qualify for treatment as strikes constitute a relatively small portion of juvenile court cases. Second, prior to the enactment of the three strikes law, there was already authority for adult courts to consider juvenile proceedings in determining punishment. Third, the juvenile court system remains unique from adult criminal proceedings. The three strikes law's use of a juvenile adjudication in sentencing does not alter the treatment purpose of the previous juvenile adjudication. Even considering the three strikes law's potential, the result of a declaration of delinquency remains different from a finding of criminal guilt in adult proceedings. Hence, a juvenile adjudication without a jury trial does not violate a juvenile's due process rights. *In re Myresheia W.* (1998, Cal App 2d Dist) 61 Cal App 4th 734, 72 Cal Rptr 2d 65, 1998 Cal App LEXIS 137, review denied (1998, Cal) 1998 Cal LEXIS 3761.

Defendant was charged with and convicted in a jury trial of one count each of residential burglary and possession of burglar's tools. Four prior juvenile adjudications for residential burglary were tried to the court, pursuant to the three strikes law, and found true. The court dismissed three of the four priors, sentencing defendant to the middle term of four years for the current burglary, doubled to eight under the three strikes law's second strike provision. The Court of Appeal affirmed, rejecting, as had the trial court, defendant's contention his prior juvenile adjudication did not qualify under *Penal C § 667(d)(3)(D)* because residential burglary is not an offense listed in *W & I C § 707(b)*. The Supreme Court held that although a juvenile offense would qualify as a prior felony conviction if it were the subject of an adult conviction, it does not qualify as a strike, unless in the prior juvenile proceeding, the juvenile was adjudged a ward of the juvenile court because the person committed an offense listed in § 707(b), or the offense was classified as serious or violent. *People v. Garcia* (1999) 21 Cal 4th 1, 87 Cal Rptr 2d 114, 980 P2d 829, 1999 Cal LEXIS 4846.

A prior juvenile adjudication of a *Penal C § 667(d)(3)(B)* offense demonstrates beyond a reasonable doubt (*CRC Rules 1488(e)*) that a defendant has engaged in serious criminal behavior in the past. By reoffending, a defendant shows that he has failed to draw the proper lesson from the prior judicial determination that he violated the law, which failure

warrants harsher punishment in the adult proceeding. Here, the fact that defendant was neither afforded nor waived a jury trial at the prior juvenile adjudication did not prevent the use of that adjudication as a strike for purposes of sentencing in his current adult proceeding (sex offense). *People v. Fowler* (1999, Cal App 5th Dist) 72 Cal App 4th 581, 84 Cal Rptr 2d 874, 1999 Cal App LEXIS 529.

A juvenile adjudication for an offense, such as first-degree burglary, which is a violent felony under *Penal C* § 667.5(b), or a serious felony under *Penal C* § 1192.7(c), but that is not an offense listed in *W & I C* § 707(b), does not qualify as a "strike prior" under the three strikes law, *Penal C* §§ 667 and 1170.12. *People v. Diller* (1999, Cal App 3d Dist) 72 Cal App 4th 1165, 85 Cal Rptr 2d 720, 1999 Cal App LEXIS 570, review den, opinion withdrawn by order of court (1999, Cal) 1999 Cal LEXIS 6360.

A prior juvenile adjudication for committing battery with serious bodily injury (*Pen C* § 243(d)) was improperly found to constitute a strike under *Pen C* § 667, since the Legislature did not include § 243(d) in § 667(d)(3)(D) and the § 243(d) offense did not come within the catch-all provision of *W & I C* § 707(b)(14) (assault by any means of force likely to produce great bodily injury). While defendant's admission of the § 243(d) offense established that he caused serious or great bodily injury to the victim, nothing in the evidence showed that the means employed was "likely" to have caused the injury. *People v. Fountain* (2000, Cal App 3d Dist) 82 Cal App 4th 61, 97 Cal Rptr 2d 824, 2000 Cal App LEXIS 545, review denied (2000, Cal) 2000 Cal LEXIS 8506.

A juvenile adjudication for voluntary manslaughter was erroneously treated as a "strike," since voluntary manslaughter was not an offense listed in *W & I C* § 707(b); the prior juvenile adjudication therefore did not meet the requirements of *Pen C* § 667(d)(3)(D). The claim that the juvenile record showed the minor's conduct, in addition to the adjudicated offense, amounted to an assault by any means of force likely to produce great bodily injury, which was an offense listed in § 707(b), was of no avail, since the juvenile petition did not alleged such an assault and no true finding was made on such an offense. *In re Jensen* (2001, Cal App 4th Dist) 92 Cal App 4th 262, 111 Cal Rptr 2d 751, 2001 Cal App LEXIS 723, review denied (2001, Cal) 2001 Cal LEXIS 8956.

Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, did not violate the single-subject rule (*Cal Const art II* § 8(d)), since the provisions that changed laws regarding gang-related crime and the juvenile justice system were reasonably germane to each other and to the initiative's common purpose of addressing violent crime committed by juveniles and gangs. Further, amendments to the Three Strikes law (*Pen C* §§ 667, 1192.7) to add crimes for which juveniles and gang members could receive increased penalties were reasonably germane to the initiative's general purpose. Although there were collateral effects on adults who were not gang members, and despite the circumstance that the new lock-in date had the incidental effect of adding strikes that the Legislature previously had included in the list of violent and serious felonies, the provisions remained relevant to the common purpose of Proposition 21. *Manduley v. Superior Court* (2002) 27 Cal 4th 537, 117 Cal Rptr 2d 168, 41 P3d 3, 2002 Cal LEXIS 622.

Defendant was precluded by waiver and estoppel from asserting her minority as a basis for challenging her prior adult robbery conviction where she never revealed her true age in the course of the prior action and accepted the benefits of a plea bargain; thus, the prior robbery action could be used as a strike for sentence enhancement in her subsequent grand theft conviction. *People v. Level* (2002, Cal App 2d Dist) 97 Cal App 4th 1208, 119 Cal Rptr 2d 551, 2002 Cal App LEXIS 4017, review denied (2002, Cal) 2002 Cal LEXIS 4641.

Although a criminal defendant's prior juvenile robbery adjudication did not bar him from participating in a *Pen C* § 1210 et seq. drug treatment program, if he were ultimately sentenced to prison, his robbery prior adjudication, unless it was stricken pursuant to *Pen C* § 1385(a), would subject him to the enhanced penalties in *Pen C* §§ 667(e)(1) and 1170.12(c)(1). *People v. Westbrook* (2002, Cal App 2d Dist) 100 Cal App 4th 378, 122 Cal Rptr 2d 514, 2002 Cal App LEXIS 4416.

To qualify as a strike under the Three Strikes law, *Cal. Pen. Code* § 667(b)-(i), an offense previously adjudicated in

juvenile court must be one listed in *Cal. Welf. & Inst. Code § 707(b)*. *People v. Bowden* (2002, Cal App 2d Dist) 102 Cal App 4th 387, 125 Cal Rptr 2d 513, 2002 Cal App LEXIS 4677, rehearing denied (2002) 2002 Cal. App. LEXIS 4845, review denied (2002) 2002 Cal. LEXIS 8320.

Prior juvenile adjudication of robbery qualified as a strike in cases where the current offense was committed after the passage of Cal. Proposition 21, and a prior juvenile adjudication of robbery constituted a strike offense and could constitutionally be used as a strike even though there was no right to jury trial in the juvenile proceedings. *People v. Superior Court (Andrades)* (2003, Cal App 6th Dist) 113 Cal App 4th 817, 7 Cal Rptr 3d 74, 2003 Cal App LEXIS 1743, review denied (2004, Cal) 2004 Cal LEXIS 2034, cert den (2004) 543 US 884, 125 S Ct 121, 160 L Ed 2d 142, 2004 US LEXIS 5112.

Defendant's sentence, upon conviction of residential burglary, as a third strike offender by use of his two prior juvenile adjudications based on robberies committed while he was at least 16 years of age, did not violate the principles of Apprendi or Tighe, nor the jury requirement of the U.S. Constitution, and accordingly, such sentencing under *Pen C* §§ 667(d)(3) and 1170.12(b)(3) was found to be constitutional; it was noted that although a jury did not determine the elements necessary to prove the juvenile adjudication, they did have to find beyond a reasonable doubt that defendant suffered the adjudication pursuant to *Pen C* § 1025(b). *People v. Smith* (2003, Cal App 2d Dist) 110 Cal App 4th 1072, 1 Cal Rptr 3d 901, 2003 Cal App LEXIS 1125, review denied (2003, Cal) 2003 Cal LEXIS 8087.

Trial court did not err in denying defendant's motion to dismiss a strike allegation based on defendant's prior juvenile adjudication; the court agreed with other case law and found that the Three Strikes law required that a prior conviction, including a prior juvenile adjudication, be proved beyond a reasonable doubt, it provided for the right of a jury trial on the question of whether defendant had suffered a prior conviction, and the procedural safeguards provided in juvenile adjudications were sufficient to satisfy the concerns voiced by other cases. *People v. Lee* (2003, Cal App 6th Dist) 111 Cal App 4th 1310, 4 Cal Rptr 3d 642, 2003 Cal App LEXIS 1419, review denied (2003, Cal) 2003 Cal LEXIS 9612, cert den (2004) 542 US 906, 159 L Ed 2d 271, 124 S Ct 2840, 2004 US LEXIS 4228.

Trial court's use of a defendant's prior juvenile adjudications as strikes against him under *Pen C* § 667 did not violate his rights to a jury trial, due process, and equal protection where it did not violate due process to deprive the defendant of his liberty in his juvenile adjudications without a jury trial, and the use of prior juvenile adjudications to enhance adult sentences did not violate equal protection by creating unequal treatment of two or more similarly situated groups. *Sanders v. Hamlet* (2004, ND Cal) 2004 US Dist LEXIS 7008, aff'd (2006, 9th Cir Cal) 167 Fed Appx 631, 2006 US App LEXIS 3916.

California inmate was not entitled to federal habeas relief under 28 USCS § 2254 following his conviction for unlawfully possessing a firearm after having previously suffered a juvenile felony adjudication and for unlawfully possessing a sawed-off shotgun in violation of *Pen C* §§ 12021(e), 12020(a)(1); in the face of conflicting legal authority as to whether a juvenile adjudication qualified as a "conviction" under the Apprendi exception, there was no error in the California courts' use of the nonjury juvenile adjudication as a sentencing enhancement under *Pen C* §§ 667(d)(3), 1170.12(b)(3). *Boyd v. Newland* (2004, 9th Cir Cal) 393 F3d 1008, 2004 US App LEXIS 27074, amended, rehearing denied (2006, 9th Cir Cal) 2006 US App LEXIS 16002, reprinted as amended (2006, 9th Cir Cal) 455 F3d 897, 2006 US App LEXIS 16032.

Juvenile adjudication is not a prior conviction within the meaning of Apprendi because the juvenile offender does not have the right to a jury trial under the Sixth Amendment, and, as a result, a juvenile adjudication cannot be used, pursuant to California's Three Strikes law, to impose on an adult a sentence in excess of the maximum sentence that could have been imposed on the basis of a trial or a defendant's admission. Accordingly, the use of a juvenile adjudication, which was based on defendant's admission of guilt in juvenile court, to enhance his sentence beyond the ordinary, statutorily-mandated maximum sentence pursuant to the Three Strikes law violated his Apprendi rights. *People v. Nguyen* (2007, Cal App 6th Dist) 152 Cal App 4th 1205, 62 Cal Rptr 3d 255, 2007 Cal App LEXIS 1101.

In accordance with the Apprendi rule that a jury must find facts that increase statutory maximums, a contested juvenile adjudication cannot be used under *Pen C* §§ 667(d)(3), 1170.12(b)(3) to impose on an adult a sentence in excess of the maximum sentence that could have been imposed on the basis of a trial or a defendant's admission; a juvenile adjudication is not a prior conviction, as indicated in *W & I C* § 203, and therefore does not fall within the prior conviction exception to the Apprendi rule. *People v. Nguyen* (2007, Cal App 6th Dist) 146 Cal App 4th 1332, 54 Cal Rptr 3d 535, 2007 Cal App LEXIS 74, review gr, depublished (2007, Cal App 6th Dist) 2007 Cal App LEXIS 262.

Because defendant admitted the commission of an offense resulting in a juvenile adjudication, the Apprendi rule that a jury must find facts that increase statutory maximums did not bar use of the adjudication under *Pen C* §§ 667(d)(3), 1170.12(b)(3) to enhance defendant's sentence for felony possession of a firearm by a felon. *People v. Nguyen* (2007, Cal App 6th Dist) 146 Cal App 4th 1332, 54 Cal Rptr 3d 535, 2007 Cal App LEXIS 74, review gr, depublished (2007, Cal App 6th Dist) 2007 Cal App LEXIS 262.

7. Circumstances of Prior Convictions, Generally

There is no constitutional bar preventing application of *Pen C* § 667, providing for a five-year enhancement for previous convictions of serious felonies, to later offenses solely because the prior conviction which serves as the basis for the enhancement was committed before the section was enacted into law. Statutory penalties for a habitual offender arise as an incident of the subsequent offense rather than as a penalty for the prior offense. *People v. McCutcheon* (1986, Cal App 2d Dist) 187 Cal App 3d 552, 232 Cal Rptr 159, 1986 Cal App LEXIS 2273.

In the case of a man convicted of murder whose judgment was not pronounced until two months later because of his intervening escape, "conviction" meant the verdict alone and not the judgment based thereon, for purposes of sentence enhancement for a prior serious felony under *Pen C* § 667, in a later prosecution for offenses committed prior to his recapture. *People v. Johnson* (1989, Cal App 1st Dist) 210 Cal App 3d 316, 258 Cal Rptr 347, 1989 Cal App LEXIS 465, review denied (1989, Cal) 1989 Cal LEXIS 4068.

In a prosecution in which defendant pleaded guilty to residential burglary (*Pen C* § 459), enhancement of defendant's sentence pursuant to *Pen C* § 667, based upon five prior serious felony convictions, did not violate the prohibition against ex post facto laws, although the prior convictions occurred before the effective date of *Pen C* § 667, where the instant offense occurred after that date. The provision punishes the repetitive nature of the instant offense. *People v. Rivadeneira* (1991, Cal App 2d Dist) 232 Cal App 3d 1416, 284 Cal Rptr 75, 1991 Cal App LEXIS 875, review denied (1991, Cal) 1991 Cal LEXIS 5462.

For purposes of applying *Pen C* § 667, which provides that a person convicted of a serious felony who previously has been convicted of a serious felony shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately, there is no distinction between an adjudication of guilt based on a plea of guilt and one predicated on a trial on the merits. *People v. Wagner* (1994, Cal App 3d Dist) 21 Cal App 4th 729, 26 Cal Rptr 2d 383, 1994 Cal App LEXIS 4, review denied (1994, Cal) 1994 Cal LEXIS 2015.

In a prosecution in which the trial court imposed enhancements (*Pen C* § 667) based on convictions for gross vehicular manslaughter while intoxicated (*Pen C* § 191.5) and related charges (*Veh C* § 23153, subs. (a), (b)), and a prior serious felony conviction for gross vehicular manslaughter (*Pen C* § 192, subd. (c)(1)), the fact that the serious felony elements of the prior conviction were not adjudicated during the prior proceeding did not result in a violation of due process in the present case. A prior felony conviction in which the defendant personally inflicted great bodily injury may be taken into account as a "serious felony," as defined by *Pen C* § 1192.7, in the enhancement of a sentence under *Pen C* § 667, even though infliction of the injury was neither explicitly charged nor explicitly found in the prior proceeding. There was no justiciable issue, in the prior proceedings, as to whether defendant inflicted great bodily injury on a person other than an accomplice; such an issue with respect to possible future enhancements would have been premature. He could not have asserted, and a fortiori he could not complain in the instant case that he was denied,

a right to litigate that issue in the prior proceeding. *People v. Gonzales* (1994, Cal App 6th Dist) 29 Cal App 4th 1684, 35 Cal Rptr 2d 450, 1994 Cal App LEXIS 1141.

In a prosecution alleging defendant escaped while charged with a felony, it was permissible to amend the complaint, under *Pen C* § 667, subd. (d), part of the three strikes law, to allege defendant's 1993 burglary conviction was a "strike," notwithstanding that the three strikes law did not become effective until March 7, 1994. Defendant tried to rely on *Pen C* § 667, subd. (d)(1), which states that the determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i) of that section shall be determined "upon the date of the prior conviction." However, that statute indicates no intent to limit its effect to only those committing multiple felonies in the future. Its basic purpose-deterrence of recidivism-would be frustrated by excluding prior criminal conduct. Also, the rest of the phrase defendant relied on states the sentence imposed shall not affect the determination, unless "the sentence automatically, upon initial sentencing, converts the felony to a misdemeanor." Read in context, the "determination" at issue is whether the prior conviction is a felony rather than a misdemeanor. This determination is made "upon the date" of the conviction so later events, like a reduction to a misdemeanor, will not affect its classification as a felony conviction. It is reasonable to provide a reference point (the conviction date) for determining if a conviction is for a felony or a misdemeanor, while there is no reason to require a court to determine if a conviction is a "strike" unless the defendant commits another felony. *People v. Sipe* (1995, Cal App 3d Dist) 36 Cal App 4th 468, 42 Cal Rptr 2d 266, 1995 Cal App LEXIS 610, review denied (1995, Cal) 1995 Cal LEXIS 5979, cert den (1996) 516 US 1131, 133 L Ed 2d 875, 116 S Ct 951, 1996 US LEXIS 1223.

In a prosecution in which defendant pleaded guilty to second degree burglary, the three strikes law was not triggered where the trial court sentenced him to county jail rather than state prison, thereby rendering the conviction a misdemeanor. The court acted within its jurisdiction in reducing the charge to a misdemeanor. Although the court relied on inapplicable case law, it acted under authority granted in *Pen C* § 17 ("wobbler" is misdemeanor when court imposes punishment other than state prison), and a correct ruling will not be reversed even if the court's reasoning is erroneous. Burglary of a commercial building is second degree burglary (*Pen C* § 461), and is a "wobbler." While *Pen C* § 667, subd. (c), provides that the "current conviction" must be a felony to trigger the three strikes law, *Pen C* § 17 is sui generis, and provides that once the court imposes a misdemeanor sentence, the offense is a misdemeanor "for all purposes." Moreover, *Pen C* § 667, subd. (d)(1), provides that the determination of whether a prior felony is a strike shall be made upon the date of the prior conviction and "is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor." Thus, the Legislature recognized the effect of sentencing under *Pen C* § 17, and did not override that effect in its scheme determining whether a prior conviction qualifies as a strike. Until the court pronounces sentence on the new offense, it cannot be determined if a predicate current "felony" exists to trigger the three strikes laws. *People v. Trausch* (1995, Cal App 2d Dist) 36 Cal App 4th 1239, 42 Cal Rptr 2d 836, 1995 Cal App LEXIS 670, review denied (1995, Cal) 1995 Cal LEXIS 6631.

In a prosecution for assault with intent to commit rape and assault with a deadly weapon with allegations of prior serious felony convictions, defendant was subject to the terms the three strikes statute (*Pen C* § 667, subd. (b)-(i)), even though the alleged prior felony convictions predated the effective date of the statute. Although the language of *Pen C* § 667, subd. (d)(1), provides that the determination of whether a prior conviction is a prior felony conviction for purposes of the three strikes law be made upon the date of that prior conviction, it is apparent that the Legislature did not intend by that language to provide for prospective-only application of the statute. In light of the retroactivity feature of past habitual criminal statutes, of which the Legislature is deemed to have been aware when it enacted the three strikes law, no plausible reason supports a prospective reading of the three strikes law. Moreover, to delay the practical operation of the law unnecessarily would defeat the purpose of the adoption of the statute as an urgency measure, and severely undercut the clear intent of the Legislature to ensure longer prison sentences and greater punishment for those felons who have been previously convicted of violent or serious felonies (*Pen C* § 667, subd. (b)). *Gonzales v. Superior Court* (1995, Cal App 5th Dist) 37 Cal App 4th 1302, 44 Cal Rptr 2d 144, 1995 Cal App LEXIS 823, modified, rehearing denied (Cal App 5th Dist) 39 Cal App 4th 583A, 1995 Cal App LEXIS 919.

In a prosecution for receiving stolen property (*Pen C* § 496, subd. (a)), a "wobbler" offense, in which a prior serious

felony conviction was alleged, because the trial court exercised its discretion under *Pen C § 17*, subd. (b)(3), to reduce the current offense from a felony to a misdemeanor when granting probation at the initial sentencing, its authority was not superseded by the three strikes law (*Pen C § 667*). *Pen C § 17*, is sui generis and specifically leaves the determination of the nature of the current wobbler conviction to the discretion of the judge to be determined at sentencing. The three strikes law does not nullify that statutory authority and procedure for wobblers by automatically creating a new straight felony when qualifying priors are found true. Although such an interpretation may be harmonious with the legislative intent in enacting the law, it ignores the plain language of the statute, which makes it clear that the current conviction must be a felony to trigger application of the three strikes law. Moreover, it must be presumed that the Legislature was clearly aware of the court's powers under *Pen C § 17*, subd. (b), when it enacted the three strikes law. Thus, the Legislature in enacting that law did not intend to abrogate the trial judge's long-standing powers under *Pen C § 17*, subd. (b)(1) (wobbler as misdemeanor based on punishment), and did not intend to supersede the court's authority under *Pen C § 17*, subd. (b)(3), to determine whether a wobbler should be reduced to a misdemeanor when such authority is exercised at the initial sentencing. *People v. Superior Court (Perez)* (1995, 4th Dist) 38 Cal App 4th 347, 45 Cal Rptr 2d 107, 1995 Cal App LEXIS 899.

In a felony drug prosecution in which defendant admitted a prior prison term (*Pen C § 667.5*, subd. (b)) and a prior conviction (*Pen C § 667*, subds. (d), (e)), the trial court properly treated the case as a second strike case under the three strikes law (*Pen C § 667*, subds. (b)-(i)), even though that law was signed by the Governor and transmitted to the Secretary of State only seven and one-half hours before defendant committed the offenses. The three strikes law was an urgency measure, and its effective date was controlled by *Gov. Code, § 9600*, which provides that urgency statutes shall go into effect upon their enactment. The statute was enacted when it was passed by the Legislature, signed by the Governor, and forwarded to the Secretary of State. Under the plain meaning of *Gov. Code, § 9600*, the law became effective "immediately" upon its enactment, and nothing in the clear language of the statute indicates that "immediately" should be construed as "the next day." *People v. Cargill* (1995, Cal App 4th Dist) 38 Cal App 4th 1551, 45 Cal Rptr 2d 480, 1995 Cal App LEXIS 980, review denied (1995, Cal) 1995 Cal LEXIS 7720.

Although the three strikes law (*Pen C § 667*, subds. (b)-(i)) does not abrogate the discretion of trial courts to declare "wobbler" offenses to be misdemeanors under *Pen C § 17*, subd. (b)(1), the trial court abused its discretion based on the manner in which it declared defendant's offenses of second degree commercial burglary and petty theft with a prior theft-related conviction to be misdemeanors rather than felonies. The choice between a felony and a misdemeanor under *Pen C § 17*, subd. (b)(1), is dependent on a determination by the official who, at the particular time, possesses knowledge of the special facts of the individual case and may, therefore, intelligently exercise the legislatively granted discretion. In this case, the trial court's discretion was guided solely by the trial judge's personal antipathy for the effect that the three strikes law would have on defendant, who had been caught shoplifting three bottles of liquor in the present case, and had three prior felony convictions. Although the court was aware of defendant's background and the nature of his present offenses, these considerations were shunted into the background in an effort to avoid the court's otherwise clear expression that a felony sentence was appropriate. Thus, in order to escape the consequences of the three strikes law at any price, the trial court impermissibly reasoned backwards from the sentence it wished to avoid to the only available alternative. A sentence based on such an approach constitutes a failure to exercise discretion as required by the law. *People v. Dent* (1995, Cal App 2d Dist) 38 Cal App 4th 1726, 45 Cal Rptr 2d 746, 1995 Cal App LEXIS 995.

In a burglary prosecution, the trial court properly found that defendant's prior burglary conviction qualified as a strike under the three strikes law (*Pen C § 667*, subds. (b)-(i)). *Pen C § 667*, subd. (d)(1), provides that the determination of whether a prior conviction is a strike "shall be made upon the date of that prior conviction," and defendant asserted that since he suffered his prior conviction before the three strikes law became effective, his prior conviction could not qualify as a strike. However, defendant's view of the statutory language was unreasonable because it failed to take into account the surrounding context, it rendered certain portions of the three strikes law meaningless, it led to absurd results, and it was wholly inconsistent with the purpose of the law, which is to ensure longer prison sentences and greater punishment for serious and violent recidivists (*Pen C § 667*, subd. (b)). Rules of statutory construction that require courts to apply the plain meaning of statutory language and resolve ambiguities in favor of

defendants did not compel adoption of defendant's interpretation, since that would have resulted in absurd consequences, rendered portions of the statute meaningless, and frustrated the evident purpose of the law. *People v. Murillo* (1995, Cal App 6th Dist) 39 Cal App 4th 1298, 46 Cal Rptr 2d 403, 1995 Cal App LEXIS 1069, review denied (1996, Cal) 1996 Cal LEXIS 1029.

In a prosecution for first degree residential robbery and false imprisonment by violence, the trial court did not err in sentencing defendant under the three strikes law (*Pen C* § 667, subs. (b)-(i)), regardless of whether one of the prior convictions (for robbery) on which the sentence was based was a "serious" or "violent" felony when committed. *Pen C* § 667, subd. (d) (court must determine whether prior conviction is prior felony conviction), only requires the ultimate sentencing court to determine whether, as of the date of a prior conviction, the conviction was a felony or a misdemeanor. It does not require a contemporaneous determination, when the prior conviction occurred, that the conviction constituted a "strike" or a "serious felony" or a "violent felony." Thus, *Pen C* § 667, subs. (b)-(i), apply to felony convictions predating the effective date of the three strikes law which fit the definition of a "serious felony" or a "violent felony" on the relevant date. Likewise, *Pen C* § 667, subs. (b)-(i), are not limited to convictions that qualified as "serious" or "violent" felonies at the time the convictions occurred. The pertinent issue is whether the prior crime was a "serious" or "violent" felony when the new offense for which the defendant is on trial was committed. *People v. Turner* (1995, Cal App 2d Dist) 40 Cal App 4th 733, 47 Cal Rptr 2d 42, 1995 Cal App LEXIS 1140, review denied (1996, Cal) 1996 Cal LEXIS 1308, overruled *People v. Deloza* (1998) 18 Cal 4th 585, 76 Cal Rptr 2d 255, 957 P2d 945, 1998 Cal LEXIS 4037.

Under the three strikes law (*Pen C* § 667, subs. (b)-(i)), a "strike" includes a conviction suffered before Mar. 7, 1994, the effective date of the law. *People v. Hamilton* (1995, Cal App 2d Dist) 40 Cal App 4th 1615, 47 Cal Rptr 2d 749, 1995 Cal App LEXIS 1225, review denied (1996, Cal) 1996 Cal LEXIS 1554.

Under the three strikes law (*Pen C* § 667, subs. (b)-(i)), a "strike" includes a conviction suffered before Mar. 7, 1994, the effective date of the law. *People v. Kinsey* (1995, Cal App 2d Dist) 40 Cal App 4th 1621, 47 Cal Rptr 2d 769, 1995 Cal App LEXIS 1218, review denied (1996, Cal) 1996 Cal LEXIS 1550.

In sentencing defendant, who had been convicted of child molestation, the trial court did not err in considering as strikes under the three strikes law (*Pen C* § 667, subs. (b)-(i)) defendant's two 1989 convictions for child molestation. Convictions that predate the three strikes law may be used as strikes. Also, even though defendant obtained expungement relief under *Pen C* § 1203.4, for the prior convictions, that relief did not preclude use of the convictions as strikes. Although a dismissal under *Pen C* § 1203.4, is not a disposition specified in *Pen C* § 667, subd. (d), *Pen C* § 1203.4, expressly states "in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." Therefore, it was not necessary to refer to *Pen C* § 1203.4, in *Pen C* § 667, subd. (d). Finally, applying the three strikes law to defendant did not constitute cruel and unusual punishment, since defendant's recidivist behavior consisted of unremitting sexual depredation of a child resulting in his conviction of 15 felonies. *People v. Diaz* (1996, Cal App 2d Dist) 41 Cal App 4th 1424, 49 Cal Rptr 2d 252, 1996 Cal App LEXIS 54, review denied (1996, Cal) 1996 Cal LEXIS 2115.

The trial court did not err in sentencing defendant to nineteen years in prison, consisting of the base term for residential burglary, plus six years pursuant to *Pen C* § 667, subd. (e)(1) (if defendant has prior serious or violent felony, "in addition to any other enhancement or punishment provisions which may apply," base term is doubled), plus five years for a prior residential burglary under *Pen C* § 667, subd. (a)(1) (five-year enhancement when current charge is serious felony and defendant previously convicted of serious felony), plus two 1-year terms under *Pen C* § 667.5, subd. (b) (one year for each prior prison term served for felony). Although defendant's previous serious felony conviction predated the enactment of *Pen C* § 667, subd. (e)(1), it was a strike under that statute, notwithstanding *Pen C* § 667, subd. (d)(1) (determination of whether prior conviction is prior felony conviction shall be made on date of prior conviction). *People v. Nelson* (1996, Cal App 2d Dist) 42 Cal App 4th 131, 49 Cal Rptr 2d 361, 1996 Cal App LEXIS 75, review denied (1996, Cal) 1996 Cal LEXIS 2157.

In a prosecution for burglary, defendant was properly sentenced under the three strikes law (*Pen C* § 667, subs. (b)-(i)), even though judgment in his prior strike conviction postdated the commission of his current offense. Given the recidivist purpose of the three strikes law, when guilt is established, either by plea or verdict, the defendant stands convicted and thereafter has a prior conviction. Although a prior conviction for a "wobbler" must include the pronouncement of sentence for a determination whether the three strikes law applies, when a prior offense is by definition a serious or violent felony, a prior pronouncement of judgment is not required. *People v. Williams* (1996, *Cal App 6th Dist*) 49 *Cal App 4th* 1632, 57 *Cal Rptr 2d* 448, 1996 *Cal App LEXIS* 972, review denied (1997, Cal) 1997 *Cal LEXIS* 615.

Pen C § 667, subd. (d)(1), does not require the determination whether a prior conviction is a "strike" to be made at the time of the prior conviction, but simply by reference to the date of the prior conviction, and thus the three strikes law (*Pen C* § 667, subs. (b)-(i)) applies to prior felony convictions predating its enactment. *People v. Green* (1996, *Cal App 2d Dist*) 50 *Cal App 4th* 1076, 58 *Cal Rptr 2d* 259, 1996 *Cal App LEXIS* 1053, review denied (1997, Cal) 1997 *Cal LEXIS* 1131.

In a criminal prosecution in which defendant was convicted for violating *Health & Saf. Code*, § 11377 (possession of a controlled substance), the trial court did not err in treating defendant's two prior felony convictions as strikes under *Pen C* § 667 (three strikes law), notwithstanding that the prior convictions had been expunged under *Welf. & Inst. Code*, § 1772 (upon honorable discharge from Youth Authority, offender may petition to be released from all penalties and disabilities resulting from the offense or crime for which he or she was committed). The three strikes law is not a rehabilitative statute designed to provide nonpunitive treatment. Rather, it was designed to ensure longer prison sentences and greater punishment. Moreover, the application to defendant of cases that were published after he received his honorable discharge did not violate his due process rights, since the instant offense was committed well after publication of the decisions. Thus, defendant had fair notice that the honorable discharge did not eradicate the underlying convictions for all purposes, and that commission of a subsequent offense would subject him to enhanced penalties. *People v. Daniels* (1996, *Cal App 5th Dist*) 51 *Cal App 4th* 520, 59 *Cal Rptr 2d* 395, 1996 *Cal App LEXIS* 1143.

In a prosecution for heroin possession, in which it was alleged that defendant suffered two prior serious felony convictions within the meaning of the three strikes law (*Pen C* § 667, subs. (b)-(i)), the trial court acted properly in refusing to entertain defendant's motion to strike one of the prior convictions, where defendant's motion was based on his claim of ineffective assistance of counsel in the prior proceeding. In a noncapital context, a defendant has no right under either the federal or state Constitution to collaterally challenge a prior conviction on ineffectiveness-of-counsel grounds by means of a pretrial motion to strike the prior at the trial of a subsequent offense. The efficient administration of criminal justice would face serious disruption and the numerous provisions that enhance punishment for recidivism would be jeopardized if a trial court were required, in the course of proceedings related to a current offense, to entertain and adjudicate an attack on the validity of a prior conviction based on these grounds; claims of incompetence of counsel should more appropriately be resolved on habeas corpus. *Garcia v. Superior Court* (1997) 14 *Cal 4th* 953, 59 *Cal Rptr 2d* 858, 928 *P2d* 572, 1997 *Cal LEXIS* 6, rehearing denied (1997, Cal) 1997 *Cal LEXIS* 1228.

Prior convictions that subject a defendant to the sentencing provisions of the three strikes law (*Pen C* § 667, subs. (b)-(i)) do not preclude a trial court from reducing a current wobbler offense originally charged as a felony either by imposing a misdemeanor sentence (*Pen C* § 17, subd. (b)(1)), or by declaring it a misdemeanor upon a grant of probation (*Pen C* § 17, subd. (b)(3)). Both versions of the three strikes law specifically acknowledge that wobblers classified as misdemeanors at the time of the initial sentencing do not trigger increased penalties (*Pen C* §§ 667, subd. (d)(1), 1170.12, subd. (b)(1)). Until the trial court pronounces sentence on the new offense, it cannot be determined if a predicate current felony exists for application of the three strikes law; where the trial court has exercised its discretion to impose a punishment other than imprisonment in state prison, which by operation of law renders the conviction a misdemeanor, the three strikes law is not triggered. The same rationale applies to a grant of probation pursuant to *Pen C* § 17, subd. (b)(3). Although presumptively aware of preexisting law, including *Pen C* § 17, subd. (b)(1) and (3), neither the Legislature nor the electorate specifically limited the court's power under these provisions in regard to determining

the nature of the current conviction in the three strikes law. While in many instances the three strikes law was intended to restrict courts' discretion in sentencing repeat offenders, it left *Pen C § 17*, subd. (b), undisturbed. *People v. Superior Court (Alvarez)* (1997) 14 Cal 4th 968, 60 Cal Rptr 2d 93, 928 P2d 1171, 1997 Cal LEXIS 7, rehearing denied (1997, Cal) 1997 Cal LEXIS 1229.

In a prosecution in which defendant was convicted of robbery and unlawfully driving or taking a vehicle, the trial court properly found that defendant had two prior strikes (*Pen C § 667*, subds. (c) and (e)), for robbery and assault, within the meaning of the three strikes law (*Pen C § 667*, subds. (b)-(i)), even though the two convictions resulted from a single prior proceeding. A prior qualifying conviction need not have been brought and tried separately from another qualifying conviction in order to be counted as a separate strike. The reference to "prior conviction" in *Pen C § 667*, subd. (d), which defines a prior felony conviction for purposes of the three strikes law, and which does not contain an explicit "brought and tried separately" limitation, is neither vague nor ambiguous. *People v. Fuhrman* (1997) 16 Cal 4th 930, 67 Cal Rptr 2d 1, 941 P2d 1189, 1997 Cal LEXIS 4982.

In a prosecution in which defendant was convicted of assault by means of force likely to produce great bodily injury (*Pen C § 245*, subd. (a)(1)), during which he inflicted serious bodily injury (*Pen C § 12022.7*), the trial court properly sentenced him to a five-year enhancement (*Pen C § 667*, subd. (a)) after he admitted suffering a prior conviction for assault with a deadly weapon with an enhancement for infliction of great bodily injury, notwithstanding that the enhancement term in the prior case had been stayed. Under *Pen C § 667*, subd. (a), which mandates, for any person convicted of a serious felony who previously has been convicted of a serious felony, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction, the term "convicted" must be given a meaning that comports with the purpose of *Pen C § 667*, i.e., deterring recidivism. The purpose of the section would be frustrated by a construction that did not take account of prior criminal conduct. The striking of the enhancement for sentencing purposes in the earlier case did not negate the conviction or enhancement. Even when a court imposes no sentence, the validity of the prior conviction stands for purposes of enhancement statutes. *People v. Milosavljevic* (1997, Cal App 4th Dist) 56 Cal App 4th 811, 65 Cal Rptr 2d 562, 1997 Cal App LEXIS 593.

Two defendants who were convicted of three robberies (*Pen C § 211*) and other offenses, and sentenced under the three strikes law to consecutive life terms with a minimum term of 25 years for each felony count (*Pen C § 667*, subd. (e)(2)(A)(ii)), were entitled to resentencing, since the trial court erroneously believed that consecutive sentences were mandatory under the three strikes law (*Pen C § 667*, subds. (b)-(i)). The language of the three strikes law requires consecutive sentencing for each conviction that is "not committed on the same occasion, and not arising from the same set of operative facts" (*Pen C § 667*, subd. (c)(6), (7)). These robberies were committed against different victims, on the same occasion. *Pen C § 667*, subd. (c)(7), does not mention separate victims. Under the ordinary meaning of the language, the three robberies were committed on the "same occasion" and arose from "the same set of operative facts." Accordingly, consecutive sentences were not required under *Pen C § 667*, subd. (c)(7), although they were permissible. *People v. Newsome* (1997, Cal App 3d Dist) 57 Cal App 4th 902, 67 Cal Rptr 2d 438, 1997 Cal App LEXIS 734, rehearing denied (1997, Cal App 3d Dist) 1997 Cal App LEXIS 788.

In a prosecution for grand theft and burglary, defendant was properly found to have 12 prior convictions under the three strikes law (*Pen C § 667*, subds. (b)-(i)), even though all 12 burglaries were charged in a single information. Under the three strikes law, prior strike felonies need not have been brought and tried separately. *People v. Cline* (1998, Cal App 4th Dist) 60 Cal App 4th 1327, 71 Cal Rptr 2d 41, 1998 Cal App LEXIS 46, review denied (1998, Cal) 1998 Cal LEXIS 2395.

Where defendant's prior juvenile adjudication was not proved to be either a serious or violent felony offense, the trial court erred in imposing a second-strike sentence under *Penal C § 667(d)(3)* even though the prior adjudication was an offense enumerated in *W & I C § 707(b)*. Use of a nonserious, nonviolent juvenile adjudication to impose a second-strike sentence was contrary to the intent of the three strikes law and violated defendant's right to equal protection of the laws. *People v. Leng* (1999, Cal App 5th Dist) 71 Cal App 4th 1, 83 Cal Rptr 2d 433, 1999 Cal App

LEXIS 301, rehearing denied (1999, Cal App 5th Dist) *71 Cal App 4th 1259*, 1999 Cal App LEXIS 426.

Where defendant in a murder prosecution had earlier been declared a ward of the juvenile court because he had committed an offense listed in *W & I C § 707(b)*, rather than because he had committed a felony listed in *W & I C § 707(b)*, and thus he did not satisfy the requirements of *Penal C § 667(d)(3)(D)*, the trial court erred in determining that defendant's juvenile adjudication for robbery constituted a strike. The plain language of subsection (d)(3) discloses a rational explanation for the apparent disparity between requirements set forth in subsections (d)(3)(B) and (d)(3)(D). *People v. Lewis* (1999, Cal App 2d Dist) *72 Cal App 4th 945*, *85 Cal Rptr 2d 454*, 1999 Cal App LEXIS 552, opinion withdrawn by order of the ct, review den (1999, Cal) 1999 Cal LEXIS 6905.

Under California's three-strikes law, a defendant may be considered to have two prior strikes even though he was convicted of both qualifying offenses in a single judicial proceeding. There is no "washout" period after which prior qualifying convictions will no longer be counted as strikes. *Andrade v. AG* (2001, 9th Cir Cal) *270 F3d 743*, 2001 US App LEXIS 23720, rev'd (2003) *538 US 63*, *155 L Ed 2d 144*, *123 S Ct 1166*, 2003 US LEXIS 1950 and rev'd on other grounds *Lockyer v. Andrade* (2003) *538 US 63*, *155 L Ed 2d 144*, *123 S Ct 1166*, 2003 US LEXIS 1950.

Judges have reviewable discretion to not consider, in the interest of justice, an otherwise qualifying conviction as a strike under California's three-strikes law. *Andrade v. AG* (2001, 9th Cir Cal) *270 F3d 743*, 2001 US App LEXIS 23720, rev'd (2003) *538 US 63*, *155 L Ed 2d 144*, *123 S Ct 1166*, 2003 US LEXIS 1950.

In a "Three Strikes" case, the prosecution was not required to prove a prior robbery was committed by defendant while armed with a dangerous or deadly weapon in order for the robbery to count as a "strike." *People v. Bowden* (2002, Cal App 2d Dist) *102 Cal App 4th 387*, *125 Cal Rptr 2d 513*, 2002 Cal App LEXIS 4677, rehearing denied (2002) 2002 Cal. App. LEXIS 4845, review denied (2002) 2002 Cal. LEXIS 8320.

Under *Apprendi*, a criminal defendant has a federal constitutional right to a jury trial on factual issues relating to the circumstances and conduct underlying a prior conviction used to enhance punishment. *People v. McGee* (2004, Cal App 1st Dist) *115 Cal App 4th 819*, *9 Cal Rptr 3d 586*, 2004 Cal App LEXIS 159, review gr, unpublished, review den (2004, Cal) *12 Cal Rptr 3d 592*, *88 P3d 498*, 2004 Cal LEXIS 3765, aff'd, superseded (2006) *38 Cal 4th 682*, *42 Cal Rptr 3d 899*, *133 P3d 1054*, 2006 Cal LEXIS 6173.

Petitioner's 1976 conviction for assault with a deadly weapon and assault by means of force could potentially count as a "strike" offense under *Pen Code § 667(d)* if the state could establish that petitioner had personally inflicted great bodily harm on a victim, personally used a firearm, or personally used a dangerous or deadly weapon. *Gill v. Ayers* (2003, 9th Cir Cal) *322 F3d 678*, 2003 US App LEXIS 3929, opinion withdrawn (2003, 9th Cir Cal) *342 F3d 911*, 2003 US App LEXIS 17979, substituted opinion (2003, 9th Cir Cal) *342 F3d 911*, 2003 US App LEXIS 17970.

Defendant's attorney properly advised him at the plea stage that he was subject to enhanced sentencing pursuant to *Pen C §§ 667(e)(2)(A)(ii)*, *1170.12(c)(2)(A)(ii)* for prior felony convictions arising out of a sexual assault case where defendant personally inflicted great bodily injury on the victim by breaking her jaw. *In re Cruse* (2003, Cal App 2d Dist) *110 Cal App 4th 1495*, *2 Cal Rptr 3d 548*, 2003 Cal App LEXIS 1176, rehearing denied *Cruse (Myron) on H.C.* (2003, Cal App 2d Dist) 2003 Cal App LEXIS 1296.

Where defendant had prior convictions for robbery and carjacking when he was sentenced for second degree robbery and assault, in applying the three strikes law one of the prior convictions should have been stayed because they arose from a single act. *People v. Burgos* (2004, Cal App 2d Dist) *117 Cal App 4th 1209*, *12 Cal Rptr 3d 566*, 2004 Cal App LEXIS 599.

Defendant was properly sentenced as a three-strike offender on charges arising from defendant's violent outburst after the verdict was read but before he was sentenced for the prior offenses; he was convicted of the prior offenses, within the meaning of *Pen C §§ 667(c)*, *1170.12(b)(1)*, after the guilty verdict was read in open court. *People v. Medina* (2005, Cal App 2d Dist) *132 Cal App 4th 149*, *33 Cal Rptr 3d 215*, 2005 Cal App LEXIS 1342, modified, rehearing

denied (2005, Cal App 2d Dist) 2005 Cal App LEXIS 1475, review gr, depublished (2005, Cal) 36 Cal Rptr 3d 494, 123 P3d 930, 2005 Cal LEXIS 13285.

Conviction for a prior offense occurs, within the meaning of *Pen C* §§ 667(c), 1170.12(b)(1), after a jury's guilty verdict is read in open court but before the jury is polled or the defendant sentenced. *People v. Medina* (2005, Cal App 2d Dist) 132 Cal App 4th 149, 33 Cal Rptr 3d 215, 2005 Cal App LEXIS 1342, modified, rehearing denied (2005, Cal App 2d Dist) 2005 Cal App LEXIS 1475, review gr, depublished (2005, Cal) 36 Cal Rptr 3d 494, 123 P3d 930, 2005 Cal LEXIS 13285.

Defendant's statement recounted in a probation officer's report admitting that defendant had a prior conviction for infliction of corporal injury could not be considered in determining whether the prior conviction was a serious felony within the meaning of *California's Three Strikes Law*. *People v. Trujillo* (2006) 40 Cal 4th 165, 51 Cal Rptr 3d 718, 146 P3d 1259, 2006 Cal LEXIS 14358.

8. Convictions from Other Jurisdictions

In sentencing defendant convicted of numerous offenses arising from a series of armed robberies and assaults, the trial court did not err in imposing three 5-year enhancements under *Pen C* § 667 (enhancement for habitual offenders), for prior foreign state convictions. Under § 667, enhancements for foreign state convictions are permitted where the foreign offense includes all the elements of a serious felony. There is no requirement of an equivalency between the foreign offense and the similarly named California crime. Although the foreign convictions were for offenses that included elements different from their California counterparts, they still contained sufficient elements to constitute a "serious felony" in the state of California. For example, a 1967 Missouri conviction for "assault with intent to kill with malice" included all of the elements of a serious felony in California, i.e., attempted murder. *People v. Reynolds* (1991, Cal App 1st Dist) 232 Cal App 3d 1528, 284 Cal Rptr 356, 1991 Cal App LEXIS 896.

Defendant's conviction in Nevada of attempted sexual assault was a serious felony under the enhancement provisions of *Pen C* § 667, subd. (a), even though attempted sexual assault is not a crime in California. "Serious felonies" listed in *Pen C* § 1192.7, describe criminal conduct, not specifically enumerated crimes, and include oral copulation by force, and any attempt to commit a listed crime. The rule that the trial court may examine the entire record of conviction to determine the substance of the prior conviction is applicable to out-of-state convictions, and the indictment in Nevada charged conduct which would unequivocally constitute attempted forcible oral copulation, the indictment was read to the jury, and the jury found defendant guilty as charged. Accordingly, the record supported a finding that the elements that were adjudicated in Nevada included an attempt to commit oral copulation by force. *People v. Johnson* (1991, Cal App 4th Dist) 233 Cal App 3d 1541, 285 Cal Rptr 394, 1991 Cal App LEXIS 1046, review denied (1991, Cal) 1991 Cal LEXIS 5554.

Under *Pen C* § 667, subd. (a), providing a five-year enhancement for a conviction of any offense committed in another jurisdiction which includes all of the elements of any serious felony committed in this state, the trial court could rely on a Texas information charging defendant with robbery to which he pled guilty, to establish the elements of a California robbery. In imposing a *Pen C* § 667, enhancement, a court may look to the entire record of the conviction to determine the nature of a defendant's prior conviction. Thus, in determining whether the elements underlying the Texas conviction would constitute a serious felony in California, the court could look to the information and guilty plea as well as the particular elements of the offense. *People v. Hayes* (1992, Cal App 4th Dist) 6 Cal App 4th 616, 7 Cal Rptr 2d 866, 1992 Cal App LEXIS 609, rehearing denied (1992, Cal App 4th Dist) 1992 Cal App LEXIS 731, review denied (1992, Cal) 1992 Cal LEXIS 4123.

In a prosecution for burglary (*Pen C* § 459), the trial court properly found defendant's prior Arizona burglary conviction was a serious felony under *Pen C* § 667, subd. (a) (enhancement for prior serious felony conviction). Under *Pen C* § 1192.7, subd. (c)(18), burglary of an inhabited dwelling is a "serious felony." Although the Arizona burglary statute did not specify that a dwelling had to be inhabited, and the indictment charging defendant did not so allege, it

was proper for the trial court to consider an Arizona probation report suggesting that the residence had been inhabited. *Pen C § 1192.7*, subd. (c)(18), and *Pen C § 1192.7*, subd. (c)(24) (sale of narcotics to minors is serious felony), describe conduct, not specific offenses, and there is no distinction between California and foreign offenses. Thus, a defendant with a prior foreign conviction is subject to the same punishment as a person with a prior California conviction involving the same conduct, and the trier of fact must be permitted to go beyond the least adjudicated elements of the offense and to examine the entire record of the prior conviction to determine if the defendant engaged in such conduct. *People v. Myers (1993) 5 Cal 4th 1193, 22 Cal Rptr 2d 911, 858 P2d 301, 1993 Cal LEXIS 4794.*

In a prosecution for first degree burglary, the trial court erred in finding that defendant's two prior burglary convictions in Oregon constituted prior serious felony convictions for purposes of sentence enhancement under *Pen C § 667*, subd. (a). Neither the Oregon burglary statute nor the records of the prior convictions established that the offenses were serious felonies within the meaning of *Pen C § 1192.7*, subd. (c)(18). The Oregon statute does not require a showing of intent to commit grand or petit larceny or a felony at the time of the offense. The Oregon indictments did charge that defendant entered the dwellings with the intent to commit theft. The mens rea of theft under California law (*Pen C § 484*) is the specific intent to permanently deprive the owner of his or her property. The mens rea under Oregon law, by contrast, is the intent to deprive another of property or to appropriate another's property, and that mens rea element is satisfied by either an intent to permanently deprive another of property, or an intent to deprive the owner of the property in such a way that the owner loses or the perpetrator acquires the major portion of the economic value or benefit of the property. Such an intent would not necessarily constitute the intent to commit theft under California law. *People v. Marquez (1993, Cal App 6th Dist) 16 Cal App 4th 115, 20 Cal Rptr 2d 365, 1993 Cal App LEXIS 573*, review denied (1993, Cal) *1993 Cal LEXIS 4442*, overruled in part *People v. Avery (2002) 27 Cal 4th 49, 115 Cal Rptr 2d 403, 38 P3d 1, 2002 Cal LEXIS 250*, overruled *People v. Cuevas (1995) 12 Cal 4th 252, 48 Cal Rptr 2d 135, 906 P2d 1290, 1995 Cal LEXIS 7347.*

In a prosecution for first degree burglary, the trial court did not err in finding, for sentence enhancement purposes, that defendant previously had been convicted of a serious felony, since there was sufficient evidence that his prior conviction in federal court for bank robbery in violation of federal law constituted a serious felony under California law. Under *Pen. Code, § 667*, subd. (a) (additional five-year enhancement for defendants convicted of serious felony, who also previously experienced such a conviction), *Pen C § 667*, subd. (d) ("serious" felonies are those listed in *Pen C § 1192.7*, subd. (c)), and *Pen C § 1192.7*, subds. (c)(19) and (d) (listing and defining bank robbery as serious felony), the obvious legislative intent was to make bank robbery a serious felony, even under the federal bank robbery statute, which does not have a specific intent requirement. *People v. Guerrero (1993, Cal App 2d Dist) 19 Cal App 4th 401, 23 Cal Rptr 2d 803, 1993 Cal App LEXIS 1022*, cert den (1994) *512 US 1210, 129 L Ed 2d 819, 114 S Ct 2686, 1994 US LEXIS 4537.*

In two separate felony prosecutions of the same defendant, a trial court erred when it ruled that under the initiative version of the three strikes law (*Pen C § 1170.12*) defendant's out-of-state prior conviction could be used as a second strike but not as a third strike. There is no question that the legislative version of the three strikes law (*Pen C § 667*, subds. (b)-(i)) includes out-of-state convictions for purposes of determining whether someone is eligible for the third strike penalty (*Pen C § 667*, subd. (d)(2)). The language in the initiative version of the three strikes law that defines a prior conviction for third strike purposes is ambiguous (*Pen C § 1170.12*, subd. (c)(2)(A)), in that it could be interpreted to refer to the forum in which the prior conviction was obtained, i.e., an adult criminal proceeding in California, or as highlighting the nature of the prior conviction, i.e., a violent or serious felony. However, the initiative's history demonstrates an unequivocal intent on the part of the voters to adopt a sentencing scheme identical to the legislative version of the three strikes law. Moreover, interpreting *Pen C § 1170.12*, to include foreign convictions when calculating the sentence in a three strikes case is consistent with the otherwise identical statutory schemes of the legislative and initiative versions. Therefore, the ambiguous language of *Pen C § 1170.12*, subd. (c)(2)(A) is most properly construed as referring to the nature of the prior felony conviction, i.e., violent or serious, not to the rendering forum. *People v. Hazelton (1996) 14 Cal 4th 101, 58 Cal Rptr 2d 443, 926 P2d 423, 1996 Cal LEXIS 6516*, rehearing denied (1997, Cal) *1997 Cal LEXIS 414.*

An enhancement allegation for a foreign prior serious felony conviction (*Pen C* § 667, subd. (a)(1)) must be pled and proven beyond a reasonable doubt before it may be imposed. The same rule obtains in the three strikes context (*Pen C* § 667, subd. (f)(1)). The "least adjudicated elements" test is the appropriate one for determining whether a foreign prior qualifies as a serious felony and a strike under California law. Under the current version of the "least adjudicated elements" test, the trier of fact may consider the entire record of the proceedings leading to the prior conviction to determine whether the prior offense involved conduct which satisfies all of the elements of the comparable California serious felony offense. If not precluded by the rules of evidence or other statutory limitations, the trier of fact may also go beyond the least adjudicated elements of the offense and consider evidence found within the entire record of the foreign conviction. *People v. Purata* (1996, Cal App 4th Dist) 42 Cal App 4th 489, 49 Cal Rptr 2d 664, 1996 Cal App LEXIS 88, review denied (1996, Cal) 1996 Cal LEXIS 2397.

Following defendant's conviction for four counts of forcible rape, several other related sex and false imprisonment offenses, and dissuading a witness, a Texas judgment provided the trial court with sufficient evidence to conclude that a 1982 Texas attempted murder conviction constituted a valid qualifying prior felony conviction to support an enhancement and to serve as a strike for purposes of the three strikes law (*Pen C* § 667, subds. (a)(1), (b)-(i)). Although the Texas murder statute defined murder as "knowingly" causing the death of an individual (interpreted in case law as denoting implied malice), the attempt statutes in both California and Texas required specific intent to kill. The intent requirements of the attempt statutes controlled over any possible generalities in the two murder statutes, and that statutory language controlled, not interpretive case law. Furthermore, defendant raised this issue for the first time on appeal, so that the trial court had no evidence of any challenge to any element of the Texas prior conviction. *People v. Purata* (1996, Cal App 4th Dist) 42 Cal App 4th 489, 49 Cal Rptr 2d 664, 1996 Cal App LEXIS 88, review denied (1996, Cal) 1996 Cal LEXIS 2397.

In a prosecution for five counts of committing a lewd and lascivious act on a child under the age of fourteen, defendant's prior conviction for first degree rape under Washington law qualified as a serious felony both for purposes of a prior felony enhancement and under the three strikes law (*Pen C* § 667, subds. (a)(4) and (d)(1), *Pen C* § 1192.7, subd. (c)(3)), even though, under Washington law, in contrast to California law, a good faith, reasonable belief in the victim's consent is not a defense. There is no requirement that the defenses to the out-of-state crime be the same as under California law. This is so even when it can be argued that the defense is one which negates an element of the crime. The focus of the enhancement statute is on the elements of the crime (*Pen C* § 667, subds. (a)(1), (d)(2)), and on whether the defendant could have been punished for the crime if it had been committed in California. Furthermore, defendant's written statement of the facts underlying his guilty plea to the prior offense evidenced the lack of a good faith, reasonable belief that the victim consented, as defendant admitted that he both entered the victim's apartment and had intercourse with her without her consent. *People v. Howard* (1996, Cal App 4th Dist) 47 Cal App 4th 1526, 55 Cal Rptr 2d 520, 1996 Cal App LEXIS 732, review denied (1996, Cal) 1996 Cal LEXIS 6600, overruled *People v. Fuhrman* (1997) 16 Cal 4th 930, 67 Cal Rptr 2d 1, 941 P2d 1189, 1997 Cal LEXIS 4982 .

In determining whether an out-of-state prior conviction is for a serious felony, the trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction to determine whether the offense of which the defendant was previously convicted involved conduct which satisfies all of the elements of the comparable California serious felony offense (*Pen C* § 667, subd. (a)(1), *Pen C* § 668). When the record does not disclose any of the facts of the offense actually committed, a presumption arises that the prior conviction was for the least offense punishable. However, the record need only contain additional evidence from which the court can reasonably presume that an element of the crime was adjudicated in the prior conviction. The same approach applies in determining whether an out-of-state prior is a "strike" for purposes of the three strikes law. *People v. Howard* (1996, Cal App 4th Dist) 47 Cal App 4th 1526, 55 Cal Rptr 2d 520, 1996 Cal App LEXIS 732, review denied (1996, Cal) 1996 Cal LEXIS 6600, overruled *People v. Fuhrman* (1997) 16 Cal 4th 930, 67 Cal Rptr 2d 1, 941 P2d 1189, 1997 Cal LEXIS 4982

In order for a prior conviction from another jurisdiction to qualify as a strike under the three strikes law (*Pen C* § 667, subds. (b)-(i)), it must involve the same conduct as would qualify as a strike in California. There is, however, no

guaranty that the statutory definition of the crime in the other jurisdiction will contain all of the necessary elements to qualify as a predicate felony in California. *People v. Woodell* (1998) 17 Cal 4th 448, 71 Cal Rptr 2d 241, 950 P2d 85, 1998 Cal LEXIS 481, modified (1998) 17 Cal 4th 969b, 1998 Cal LEXIS 2100.

In a burglary prosecution, the jury properly considered a foreign state appellate court opinion as evidence that defendant had been convicted in that state of an assault involving conduct qualifying as a strike under the three strikes law (*Pen C* § 667, subs. (b)-(i)), i.e., to prove that he had been convicted of a serious felony based on his personal use of a deadly weapon (*Pen C* § 1192.7, subd. (c)(23)). To determine if a prior conviction constitutes a qualifying strike for purposes of the three strikes law, the trier of fact may look to the entire record of conviction, but no further. The record of conviction is not limited to the trial court record but extends to the appellate court record, including the appellate court opinion. Including the appellate court opinion as part of the record of conviction promotes efficiency and does not relitigate stale factual questions. Whether and to what extent an appellate court opinion is probative in a specific case must be decided on the facts of that case. *People v. Woodell* (1998) 17 Cal 4th 448, 71 Cal Rptr 2d 241, 950 P2d 85, 1998 Cal LEXIS 481, modified (1998) 17 Cal 4th 969b, 1998 Cal LEXIS 2100.

In a burglary prosecution, for purposes of determining whether defendant's prior conviction in a foreign state was a qualifying strike under the three strikes law (*Pen C* § 667, subs. (b)-(i)), because it was based on his personal use of a deadly weapon (*Pen C* § 1192.7, subd. (c) (23)), the trial court properly admitted a foreign state appellate court opinion for the nonhearsay purpose of howing what the out-of-state trial court found on the issue of whether the prior conviction was based on defendant's personal use of the weapon rather than vicarious liability. Based on the appellate court opinion and the remaining documents presented to prove the prior conviction, a reasonable trier of fact could have found beyond a reasonable doubt that the out-of-state trial court impliedly found that defendant was convicted of the assault because of his personal use of a deadly weapon, and not because of vicarious liability for weapon use by some third party. *People v. Woodell* (1998) 17 Cal 4th 448, 71 Cal Rptr 2d 241, 950 P2d 85, 1998 Cal LEXIS 481, modified (1998) 17 Cal 4th 969b, 1998 Cal LEXIS 2100.

In a criminal prosecution, the trial court erred in concluding a Florida prior conviction was not a conviction under California law for the purposes of the three strikes law (*Pen C* §§ 667, subs. (b)-(j), 1170.12), where the defendant admitted he pleaded guilty to the Florida crime. The fact that the defendant was not formally adjudicated guilty under Florida law was immaterial. The three strikes law defines a prior felony conviction to include a foreign prior conviction "[n]otwithstanding any other provision of law and for the purposes of this section." (*Pen C* § 1170.12, subs. (b) and (d)(1)). It applies to foreign convictions equivalent to California's serious and violent felonies. The term "conviction" has no fixed definition and has been interpreted by the courts of this state to have various meanings, depending upon the context in which the word is used. Generally, however, where the existence of a prior conviction triggers increased punishments, courts interpret "conviction" to mean the factual ascertainment of guilt by verdict or plea. This is consistent with the focus of the recidivist sentencing statutes, that the defendant has not in the past obeyed the law. As such, the popular meaning of the term "conviction" controls. Further, *Pen C* § 1170.12, subd. (b)(1) evinces an intent to eschew technicalities of definition. *People v. Castello* (1998, Cal App 4th Dist) 65 Cal App 4th 1242, 77 Cal Rptr 2d 314, 1998 Cal App LEXIS 691, review denied (1998, Cal) 1998 Cal LEXIS 7374.

In a prosecution for transportation of marijuana (*H & S C* § 11360(a)) and possession of marijuana for sale (*H & S C* § 11359), the trial court found defendant had four prior serious or violent felony convictions within the meaning of *Penal C* §§ 667 and 1170.12. The Court of Appeal reversed as to the finding that defendant was convicted of three prior felony offenses in Florida. The trial court had instructed the jury that it was the jury's function to determine the truth of the allegations that defendant had been convicted of the Florida offenses. However, the court then instructed the jury in a manner that identified the Florida offenses as those for which defendant had been convicted. The jury therefore received confusing and inconsistent instructions. The instructions relieved the prosecution of the burden of proving beyond a reasonable doubt each element of the alleged prior convictions. Removing consideration from the jury of an element of an offense violated defendant's California and United States constitutional rights. *People v. Hale* (1999, Cal App 4th Dist) 70 Cal App 4th 992, 83 Cal Rptr 2d 125, 1999 Cal App LEXIS 212, modified, rehearing denied (1999, Cal App 4th Dist) 71 Cal App 4th 884a, 1999 Cal App LEXIS 328, review gr, depublished (1999, Cal) 87 Cal Rptr 2d 113,

980 P2d 828, 1999 Cal LEXIS 4639, dismissed (1999, Cal) 90 Cal Rptr 2d 30, 986 P2d 864, 1999 Cal LEXIS 7217.

Evidence was insufficient to prove defendant had engaged in conduct which constituted a serious felony strike in California for purposes of the three strikes law. The federal bank robbery statute at issue could be violated in different ways, some of which would not qualify as a strike. Thus, proof that a defendant has been convicted for a violation of 18 USCS § 2113(a), entitled Bank Robbery and Incidental Crimes, does not establish which type of offense was committed. Viewing the record in the light most favorable to the judgment, the proffered evidence was not substantial such that a reasonable trier of fact could have found that the prosecution had sustained its burden of proving the defendant guilty of a prior serious felony conviction beyond a reasonable doubt. *People v. Jones* (1999, Cal App 2d Dist) 75 Cal App 4th 616, 89 Cal Rptr 2d 485, 1999 Cal App LEXIS 901, review denied (2000, Cal) 2000 Cal LEXIS 82.

In the absence of the expectation that the advisements and waivers of constitutional rights will appear on the face of the record, determination of the voluntariness of an out-of-state plea would be an onerous task and place an unreasonable burden on the trial courts. Allowing a defendant to challenge a plea based on an out-of-state conviction not entered under Tahl-like (*In re Tahl* (1969) 1 Cal 3d 122, 81 Cal Rptr 577, 460 P2d 449, 1969 Cal LEXIS 196, cert den (1970) 398 US 911, 90 S Ct 1708, 26 L Ed 2d 72, 1970 US LEXIS 1864, overruled *Mills v. Municipal Court for San Diego Judicial Dist.* (1973) 10 Cal 3d 288, 110 Cal Rptr 329, 515 P2d 273, 1973 Cal LEXIS 155) protections is judicially inefficient and would saddle the California trial courts with obligations not required by either the federal or state constitutions. Consequently, a defendant may not challenge such a conviction unless there is evidence that Tahl-like requirements operated in the jurisdiction at the time of the plea. Here, in a prosecution under *Penal C* § 12022.7 and *Veh C* § 20001, there was nothing in the record to indicate that Texas required Tahl-like admonishments when defendant's plea was taken. Therefore, the trial court did not err in denying defendant's challenge to the constitutionality of his 1978 Texas conviction for murder. *People v. Green* (1999, Cal App 5th Dist) 75 Cal App 4th 1002, 89 Cal Rptr 2d 613, 1999 Cal App LEXIS 929, review gr, unpublished (2000, Cal) 93 Cal Rptr 2d 495, 994 P2d 340, 2000 Cal LEXIS 991.

Petitioner did not show he was entitled to habeas relief, as he did not show the sentence imposed on him for his drug sale offense conviction, where two serious prior felony convictions from Illinois were proven, was in excess of state law, as the California Three Strikes law, *Pen C* § 667(b)-(i), permitted the sentence imposed; as a result, he did not show that the sentence imposed was fundamentally unfair. *Hughes v. Galaza* (2004, ND Cal) 2004 US Dist LEXIS 2975, aff'd (2005, 9th Cir Cal) 129 Fed Appx 340, 2005 US App LEXIS 3990.

In a grand theft case, an Arizona guilty plea to aggravated assault with a handgun was a prior conviction under California's three strikes law, although the assault case was dismissed after defendant completed a domestic violence diversion program; under *Pen C* §§ 667.5(c)(8), 1192.7(c)(8), assault with a firearm was a prior conviction offense, and the suspension of imposition of sentence did not, under *Pen C* §§ 667(d)(1)(A), 1170.12(b)(1)(A), affect the determination that a prior conviction was a strike. *People v. Laino* (2004) 32 Cal 4th 878, 11 Cal Rptr 3d 723, 87 P3d 27, 2004 Cal LEXIS 2991, cert den (2004) 543 US 886, 160 L Ed 2d 145, 125 S Ct 146, 2004 US LEXIS 5142.

Where defendant was convicted under *Pen C* § 288(a), defendant's sentence enhancement under *Pen C* § 667 was not error because the record showed that defendant's foreign conviction under *Neb. Rev. Stat. § 28.320.01* was for sexual touching of a child under the age of 14, which conduct would have satisfied the elements of *Pen C* § 288(a). *People v. Warner* (2004, Cal App 3d Dist) 119 Cal App 4th 331, 14 Cal Rptr 3d 419, 2004 Cal App LEXIS 886, review gr, unpublished (2004) 18 Cal. Rptr. 3d 869, 97 P.3d 811, 2004 Cal. LEXIS 8541, 2004 Cal. Daily Op. Service 8524, 2004 D.A.R. 11668, aff'd in part and rev'd in part, superseded (2006) 39 Cal 4th 548, 47 Cal Rptr 3d 1, 139 P 3d 475, 2006 Cal LEXIS 9501.

Court reversed the trial court's sentence enhancements imposed as a result of its findings concerning defendant's prior Texas convictions for robbery, burglary, and attempted burglary. Because there was no evidence that defendant's robbery involved either asportation or taking property from the person or his or her immediate presence, the finding that defendant's Texas robbery conviction satisfied all of the elements of robbery under California law was not supported by

substantial evidence; additionally, because "habitation" under Texas law was different than "inhabited dwelling" under California law, the evidence that defendant was convicted of burglary of a "habitation," was insufficient to prove that his conduct qualified as a serious felony in *People v. Rodriguez* (2004, Cal App 2d Dist) 122 Cal App 4th 121, 18 Cal Rptr 3d 550, 2004 Cal App LEXIS 1487.

In a trial for first-degree murder, the trial court properly refused to strike prior burglary convictions from Oregon and Alaska, alleged as prior serious felonies within the meaning of *Pen C* §§ 667(a) and 1192.7(c)(18), even though the Alaska and Oregon statutes could have supported convictions for conduct that, if committed in California, would not have been the "serious felony" of residential burglary under *Pen C* § 459. The trial court properly examined the entire record of the prior convictions, and each one would have satisfied the necessary elements to convict defendant of first degree burglary in California. *People v. Carter* (2005) 36 Cal 4th 1114, 32 Cal Rptr 3d 759, 117 P3d 476, 2005 Cal LEXIS 8908, rehearing denied (2005) 2005 Cal. LEXIS 12017, cert den (2006) 126 S. Ct. 1881, 164 L. Ed. 2d 570, 2006 U.S. LEXIS 3308, 74 U.S.L.W. 3598.

Where the People presented no evidence to prove that defendant, who had been convicted of three counts of lewd or lascivious conduct with a child, committed a crime in another state that contained all of the elements of a felony in California that would qualify as a serious felony under *Pen C* § 1192.7, defendant was not properly subject to a serious-felony sentence enhancement under *Pen C* § 667(a). *People v. Warner* (2006) 39 Cal 4th 548, 47 Cal Rptr 3d 1, 139 P 3d 475, 2006 Cal LEXIS 9501, modified (2006) 2006 Cal. LEXIS 11430.

Defendant's Utah convictions for aggravated robbery could not be used to enhance his California sentence for felony murder because the elements of robbery are not the same in California and Utah; specifically, in Utah, unlike California, one may be convicted of robbery for employing force or fear against a person who lacks any possessory interest in the property taken. Thus, the priors were not serious or violent felonies within the meaning of *Pen C* §§ 667(d)(2), 1170.12(b)(2), 667.5(c)(9), and 1192.7(c)(19), absent evidence concerning the underlying facts; retrial as to the prior conviction was permitted to allow the prosecution to present such evidence. *People v. Jenkins* (2006, Cal App 2d Dist) 140 Cal App 4th 805, 44 Cal Rptr 3d 788, 2006 Cal App LEXIS 909, modified (2006, Cal App 2d Dist) 2006 Cal App LEXIS 1077, review denied (2006, Cal) 2006 Cal LEXIS 12826.

A state prisoner, who sought habeas corpus relief, claimed that applying two separate five-year sentence enhancements imposed because of his prior out-of-state convictions was unconstitutional because it was never proved that the prisoner actually spent more than one year in prison; that argument was unavailing because, under *Pen C* § 667(a), a court could impose five-year enhancements for prior serious felony convictions. The statute required only that the prior conviction have been "brought and tried separately"; there was no requirement that in order to impose that enhancement, it had to be proven that the prisoner spent more than one year in prison. *Spence v. Runnels* (2006, ED Cal) 2006 US Dist LEXIS 3092.

9. Separateness of Prior Proceedings

Sentence enhancement pursuant to *Pen C* § 667 (prior serious felony convictions) applies to situations in which the prior conviction has resulted from a guilty plea, as well as to those in which the case has been tried by jury, notwithstanding the statute's references to charges "brought and tried separately." The term "tried" refers only to proceedings leading to the ultimate adjudication of guilt, and there is no distinction between an adjudication of guilt based on a plea and one predicated on a trial on the merits. *People v. Martinez* (1985, Cal App 5th Dist) 175 Cal App 3d 881, 221 Cal Rptr 258, 1985 Cal App LEXIS 2885.

When faced with a statute reasonably susceptible of two or more interpretations, of which at least one raises constitutional questions, a court should construe the statute in a manner that avoids any doubt about its validity. Thus, on appeal of a conviction of first degree residential burglary in which defendant contended that the phrase "on charges brought and tried separately" in *Pen C* § 667 (enhancements for prior serious felony convictions), precluded application of the statute to a prior serious felony conviction based on a guilty plea, § 667 was properly construed not to preclude

application to such convictions; a construction in accordance with defendant's argument would raise equal protection concerns for a defendant whose conviction was based on a jury verdict, and thus call into question the validity of the statute. *People v. Flint* (1986, Cal App 1st Dist) 180 Cal App 3d 13, 225 Cal Rptr 323, 1986 Cal App LEXIS 1481.

The purpose of the language, "prior convictions on charges brought and tried separately," in *Pen C § 667* (enhancements for prior serious felony convictions), is to disallow imposition of the statutory five-year enhancement for each of several crimes committed in one criminal escapade. The words do not apply where several prior convictions are based on several counts of a single accusatory pleading. *People v. Flint* (1986, Cal App 1st Dist) 180 Cal App 3d 13, 225 Cal Rptr 323, 1986 Cal App LEXIS 1481.

In a prosecution for robbery, the trial court did not err in sentencing defendant to a consecutive term based on a prior serious felony conviction (*Pen C § 667*), even though defendant's prior felony conviction resulted from a guilty plea. Although § 667 states that an enhancement is to be imposed on each prior serious felony conviction "on charges brought and tried separately," a guilty plea is a conviction and is sufficient to support a judgment that a defendant is an habitual criminal. Further, it would pose equal protection problems if those with prior convictions resulting from guilty pleas were exempt from § 667, whereas those with priors resulting from trial were not. *People v. Lobaugh* (1987, Cal App 3d Dist) 188 Cal App 3d 780, 233 Cal Rptr 683, 1987 Cal App LEXIS 1278.

In a prosecution for rape and burglary, the trial court properly imposed three consecutive five-year enhancements for defendant's two prior convictions for forcible rape and one prior conviction for robbery, even though defendant had plead guilty to all three offenses simultaneously. Defendant's admission of the two prior forcible rape convictions sufficiently established all necessary elements for enhancement under *Pen C § 667.6* (enhancement for prior conviction of specified sex offenses). Further, the "separately brought and tried" limitation of *Pen C § 667*, subd. (a) (enhancement for prior serious felonies) under which the enhancement for the prior robbery conviction was imposed, does not bar multiple enhancements where the convictions are based on unrelated counts of different accusatory pleadings. *People v. Lewis* (1987, Cal App 2d Dist) 191 Cal App 3d 1288, 237 Cal Rptr 64, 1987 Cal App LEXIS 1721.

The trial court improperly imposed two consecutive enhancements to defendant's sentence under *Pen C § 667*, subd. (a) (enhancements for prior serious felony convictions), based on two convictions resulting from pleas of guilty to two counts of first degree burglary in the same, earlier proceeding. The two prior convictions were not on charges brought and tried separately as required by *Pen C § 667*. Charges brought and tried separately for purposes of § 667 means that prior formal proceedings leading to multiple adjudications of guilt must have been totally separate. *People v. Deay* (1987, Cal App 3d Dist) 194 Cal App 3d 280, 239 Cal Rptr 406, 1987 Cal App LEXIS 2039.

In a prosecution for assault with a firearm and possession of a deadly weapon by a convicted felon, the trial court did not err in imposing a two-year on-bail enhancement and a five-year prior serious felony enhancement based on the same prior act, notwithstanding the prohibition against multiple punishment contained in *Pen C § 654*. On-bail enhancements pursuant to *Pen C § 12022.1*, are not imposed as a result of a defendant's status as a prior convicted felon; rather, they relate more specifically to the defendant's commission of a new felony offense while released from custody on an earlier felony of which he or she is ultimately convicted. By contrast, a defendant is punished under *Pen C § 667*, subd. (a), because he or she was convicted of having committed a new serious felony offense after having suffered a prior serious felony conviction, thus becoming a recidivist offender. Thus, even where an element of each of the enhancements involved is established by the same underlying conviction, sentences on both may be imposed without violating *Pen C § 654*, because the other elements for each enhancement must be supported by different facts. *People v. Juarez* (1993, Cal App 4th Dist) 21 Cal App 4th 318, 26 Cal Rptr 2d 697, 1993 Cal App LEXIS 1292, review denied (1994, Cal) 1994 Cal LEXIS 1299.

In a prosecution for attempted first degree burglary, the trial court properly imposed five-year enhancements for each of defendant's three prior first degree burglary convictions (*Pen C § 667*), even though two of the convictions had arisen from complaints that had been adjudicated in a single plea agreement. The two prior convictions had involved unrelated separate criminal incidents and had originated in separate complaints. As part of the plea agreement, the

complaints had retained their separate character, defendant had entered a separate plea on each complaint, and he had been sentenced separately for each offense. The mere fact that, pursuant to a plea agreement, he had entered pleas to both offenses in one proceeding, and had been later sentenced for both offenses in another proceeding, did not overcome the conclusion that these offenses had been brought and tried separately for purposes of § 667. The underlying proceedings resulting in these convictions had been formally distinct, from filing to adjudication of guilt. *People v. Wagner (1994, Cal App 3d Dist) 21 Cal App 4th 729, 26 Cal Rptr 2d 383, 1994 Cal App LEXIS 4*, review denied (1994, Cal) 1994 Cal LEXIS 2015.

In order to support separate sentence enhancements under *Pen C* § 667, which provides that a person convicted of a serious felony who previously has been convicted of a serious felony shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately, the underlying proceedings must have been formally distinct, from filing to adjudication of guilt. *People v. Wagner (1994, Cal App 3d Dist) 21 Cal App 4th 729, 26 Cal Rptr 2d 383, 1994 Cal App LEXIS 4*, review denied (1994, Cal) 1994 Cal LEXIS 2015.

The trial court did not err in imposing both a prior prison enhancement (*Pen C* § 667.5) for a term served, and also a serious felony enhancement (*Pen C* § 667) for a conviction of a separate crime, notwithstanding that the two convictions resulted from a joint trial. *People v. Wiley (1994, Cal App 4th Dist) 25 Cal App 4th 159, 30 Cal Rptr 2d 701, 1994 Cal App LEXIS 527*, review denied (1994, Cal) 1994 Cal LEXIS 4374.

Although there is no constitutional right to have a jury determine factual issues relating to prior convictions alleged for purposes of sentence enhancement, California, by statute, has granted criminal defendants the right to have a jury determine the truth of such prior conviction allegations. However, the applicable statutes are limited in nature, and the specific issue of whether multiple prior convictions alleged under *Pen C* § 667, subd. (a)(1), were "brought and tried separately" is to be determined by the trial court rather than the jury. The question properly is a matter for the court because it is largely legal in nature, frequently depending upon the interpretation of complex and detailed provisions of California criminal procedure. Although there are some underlying "facts" that are relevant to the determination of whether charges have been "brought and tried separately," such as the filing of charges either in a single complaint or multiple complaints, such facts generally are readily ascertainable upon an examination of court documents. This is the type of inquiry traditionally performed by judges as part of the sentencing function. *People v. Wiley (1995) 9 Cal 4th 580, 38 Cal Rptr 2d 347, 889 P2d 541, 1995 Cal LEXIS 703*.

In a prosecution for forcible rape (*Pen C* § 261, subd. (a)(2)), forcible sodomy (*Pen C* § 286, subd. (c)), and forcible oral copulation (*Pen C* § 288a, subd. (c)), the trial court properly imposed two 5-year sentence enhancements for a prior serious felony (kidnapping) (*Pen C* § 667, former subd. (a)), and a prior violent sex felony (rape) (*Pen C* § 667.6, former subd. (a)), even though the charges for both prior crimes were brought and tried together. When an accusatory pleading charges multiple counts and the defendant is convicted of multiple counts, the defendant has not suffered a single conviction; he or she has suffered multiple convictions. The policies and requirements of *Pen C* § 667, subd. (a), and *Pen C* § 667.6, subd. (a), are different. The former applies to a large number of serious offenses, both violent sex offenses and nonviolent sex offenses. The latter applies only to a small number of violent sex offenses. The former applies only to "charges brought and tried separately," while the latter applies whether or not the charges were brought and tried separately. In enacting *Pen C* § 667.6, the Legislature had a purpose distinct from section *Pen C* § 667, subd. (a); it intended that violent sex offenders, the most incorrigible subset of "serious" felons, be subject to greater prison terms than mere "serious" offenders. It accomplished that purpose by omitting from *Pen C* § 667.6, the "on charges brought and tried separately" restriction included in *Pen C* § 667, subd. (a). *People v. Shea (1995, Cal App 2d Dist) 39 Cal App 4th 1257, 46 Cal Rptr 2d 388, 1995 Cal App LEXIS 1072*, review denied (1996, Cal) 1996 Cal LEXIS 861.

In a prosecution for cultivation of marijuana, the trial court did not err in relying upon defendant's previous convictions of four serious or violent felonies in sentencing defendant pursuant to the provisions of the three strikes law (*Pen C* § 667, subds. (b)-(i)), even though all four priors were charged in a single information and were disposed of in a

single proceeding on Feb. 11, 1986. Although *Pen C* § 667, subd. (a), an enhancement statute, applies only to prior serious felony convictions on charges "brought and tried separately," the three strikes law, in contrast, is the articulation of a parallel sentencing scheme for specifically described recidivists that contains no such requirement; the determination of whether a prior felony qualifies as a "strike" is made under *Pen C* § 667, subd. (d), which applies "[n]otwithstanding any other law." Moreover, the Legislature included an analogous requirement for current charges in *Pen C* § 667, subd. (c)(6), which provides for consecutive sentencing "[i]f 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." If the Legislature had intended to include a comparable "brought and tried separately" requirement with respect to prior serious or violent felonies, it would have said so. *People v. Allison* (1995, *Cal App 1st Dist*) 41 *Cal App 4th* 841, 48 *Cal Rptr 2d* 756, 1995 *Cal App LEXIS* 1280, review denied (1996, Cal) 1996 *Cal LEXIS* 1666.

The magistrate erred in striking a "second strike" allegation (*Pen C* § 667, subds. (b)-(i)) on the ground that it did not meet the "brought and tried separately" requirement of *Pen C* § 667, subd. (a). The "brought and tried separately" phrase in *Pen C* § 667, subd. (a), does not control the remaining subdivisions of the statute comprising the three strikes law. The fact that defendant's prior convictions were adjudicated in a single proceeding does not mean that they constitute one prior conviction; two strikes can arise from one case. This interpretation comports with the express legislative intent stated for the enactment of the three strikes law, since the inclusion of all qualifying prior convictions, whether brought and tried separately or not, will help ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious or violent felony offenses. Had the drafters of the three strikes law intended to include the "brought and tried separately" requirement, they would have made their intention plain. *People v. Superior Court (Arevalos)* (1996, *Cal App 4th Dist*) 41 *Cal App 4th* 908, 48 *Cal Rptr 2d* 833, 1996 *Cal App LEXIS* 16, review denied (1996, Cal) 1996 *Cal LEXIS* 1678.

In sentencing a defendant under the three strikes law, after defendant was convicted of robbery of one woman and attempted robbery of her companion, the trial court erred in finding consecutive sentences were mandatory under the three strikes law. Under the three strikes law, a sentencing court retains the power to impose concurrent terms for current serious or violent felonies committed on the same occasion (*Pen C* § 667, subd. (c)). The crimes for which defendant was convicted were committed on the same occasion even though the robbery and attempted robbery were simultaneously perpetrated by two attackers acting in concert, instead of just one perpetrator acting alone. *People v. Bell* (1998, *Cal App 4th Dist*) 61 *Cal App 4th* 282, 71 *Cal Rptr 2d* 415, 1998 *Cal App LEXIS* 85.

Because use of a previous manslaughter conviction as an enhancing allegation in a case of assault on a peace officer and drunk driving did not punish defendant for the earlier crime, this use did not violate an extradition order's stricture against punishing defendant for facts other than those facts for which extradition had been granted, and it did not violate the doctrine of specialty. *People v. Minor* (2005, *Cal App 4th Dist*) 125 *Cal App 4th* 1576, 23 *Cal Rptr 3d* 669, 2005 *Cal App LEXIS* 102.

10. Determination of Serious Felony, Generally

The imposition of a five-year enhancement to defendant's sentence, under *Pen C* § 667, for defendant's 1970 Michigan conviction for assault with intent to commit armed robbery was proper. Although the offense of assault with intent to commit rape or robbery was formerly prescribed by *Pen C* § 220, but was deleted from that statute in 1978, *Pen C* § 1192.7, subd. (c), prescribing the "serious" felonies for which the five-year enhancement is to be imposed, specifies "assault with intent to commit rape or robbery." *People v. Pinette* (1985, *Cal App 1st Dist*) 163 *Cal App 3d* 1122, 210 *Cal Rptr* 107, 1985 *Cal App LEXIS* 1565.

Following defendant's guilty plea to first degree burglary (*Pen C* §§ 459, 460) and robbery with the use of a firearm (*Pen C* §§ 211, 12022.5), the trial court erred in sentencing him, in addition to the sentences imposed for the other crimes, to a five-year consecutive enhancement for his prior "serious felony" conviction (*Pen C* § 667) for attempted exhibition of a firearm in the presence of a peace officer (*Pen C* §§ 417, subd. (b), 664). *Pen C* § 667, subd. (d), defines "serious felony" as those listed in *Pen C* § 1192.7, subd. (c), which include "[a]ny attempt to commit a crime listed in

this subdivision other than an assault" (§ 1192.7, subd. (c)(25)). Since the list does not include exhibition of a firearm in the presence of a peace officer, the attempted commission of the offense is not a "serious felony" under § 667. Furthermore, though the list includes "any felony in which the defendant uses a firearm" (§ 1192.7, subd. (c)(8)) and "[a]ny felony in which the defendant personally used a dangerous or deadly weapon" (§ 1192.7, subd. (c)(23)), "use of a firearm" and "use of a dangerous or deadly weapon" are not "crimes" under the "attempt" subdivision, but enhancements for which a separate sentence distinct from an underlying felony is imposed. *People v. Austin* (1985, Cal App 3d Dist) 165 Cal App 3d 547, 211 Cal Rptr 509, 1985 Cal App LEXIS 1743.

A prosecutor is bound by the face of the record of conviction when proving the nature of a prior conviction. Thus, in a prosecution for robbery, defendant's judgment of conviction of assault with a deadly weapon under *Pen C* § 245(a), which at the time of the conviction could be violated by committing an assault on another by any means of force likely to produce great bodily injury and did not necessarily include the element that defendant personally used a dangerous or deadly weapon as called for in *Pen C* § 1192.7(c)(23), did not prove that defendant was convicted of a serious felony within the meaning of *Pen C* § 667 (providing for enhancements for persons previously convicted of serious felonies and referring to *Pen C* § 1192.7, for a list of those crimes considered to be serious felonies). *People v. Armendariz* (1985, Cal App 5th Dist) 174 Cal App 3d 674, 220 Cal Rptr 229, 1985 Cal App LEXIS 2773.

Under *Pen C* § 667 (providing an enhancement for conviction of a serious felony when defendant has suffered a prior serious felony conviction), involuntary manslaughter (*Pen C* § 192, subd. (b)) may be considered a serious felony if the defendant personally inflicted great bodily injury in the commission of the crime, despite the non-enumeration of involuntary manslaughter in the statute. Thus, where defendant was charged with, and convicted of, killing the victim by means of immersion in scalding water, causing massive second and third degree burns and pain at the time of infliction as well as during the month preceding her death, the trial court properly enhanced defendant's punishment by five years. *People v. Brown* (1988, Cal App 2d Dist) 201 Cal App 3d 1296, 247 Cal Rptr 683, 1988 Cal App LEXIS 519.

The trial court did not err in finding that defendant's conviction of *Pen C* § 12303.3 (explosion of destructive device), was a serious felony for purposes of the five-year sentence enhancement provided in *Pen C* § 667, subd. (a). Under *Pen C* § 1192.7, subd. (c)(27), exploding a destructive device with intent to injure is defined as a serious felony. The term "intent to injure" as used in *Pen C* § 1192.7, subd. (c)(15), includes either the intent to injure any property or any person. A conviction under *Pen C* § 12303.3, based on either the intent to injure property or the intent to injure a person is sufficient to establish a serious felony, and it was immaterial that the jury may have found that defendant attempted to explode the destructive device with the intent to injure property only. The omission of the object of the intent to injure in *Pen. Code*, § 1192.7, evidences the drafters' intention to encompass both the intent to injure property and the intent to intent to injure persons. This interpretation is consistent with the purpose of Proposition 8 and the recidivist statute (*Pen C* § 667). *People v. Armstrong* (1992, Cal App 2d Dist) 8 Cal App 4th 1060, 10 Cal Rptr 2d 839, 1992 Cal App LEXIS 1002, review denied (1992, Cal) 1992 Cal LEXIS 5566.

In a prosecution for attempted murder and robbery, the trial court did not err in imposing a five-year enhancement for a prior serious felony conviction (*Pen C* § 667, subd. (a)) on one of the defendants, based on that defendant's prior battery conviction (*Pen C* § 243, subd. (d) (battery committed against any person and inflicting serious bodily injury)). The element of "serious bodily injury," as required for felony battery, is essentially equivalent to "great bodily injury" for the purpose of a "serious felony" sentence enhancement pursuant to *Pen C* §§ 667, subds. (a) & (d), and 1192.7, subd. (c)(8). The trial court properly went behind the minimum elements of the prior offense and considered the entire record to determine the validity of the prior serious felony conviction allegation. In determining that defendant was the only defendant charged in the prior battery offense, the court necessarily determined that defendant "personally" inflicted the great bodily injury and that he did so on a person "other than an accomplice," as required by the defining language in *Pen C* § 1192.7, subd. (c)(8). *People v. Moore* (1992, Cal App 2d Dist) 10 Cal App 4th 1868, 13 Cal Rptr 2d 713, 1992 Cal App LEXIS 1361.

In a prosecution in which defendant pled guilty to driving under the influence (DUI) and with a .08 percent blood-alcohol level and with injury (*Veh C* § 23153, subds. (a)-(b)), hit and run with injury (*Veh C* § 20001, subd. (a)),

and driving with a license suspended for a prior DUI conviction (*Veh C § 14601.2*, subd. (a)), the trial court properly enhanced defendant's sentence under *Pen C § 667*, subd. (a) (serious felony conviction with prior serious felony conviction). Both the prior and the present offenses were required to be serious felonies under *Pen C § 1192.7*, subd. (c). Drunk driving offenses may be serious felonies if the defendant's conduct supports such a finding. While the complaint did not allege that defendant's present offenses were serious felonies, the facts supported allegations that he inflicted great bodily injury and used his vehicle as a deadly weapon (*Pen C § 1192.7*, subd. (c)(8), (23)), and the complaint did allege a prior serious felony conviction, which defendant admitted. Thus, he was on notice that the prosecutor intended to prove the current offenses were serious felonies. To challenge the sufficiency of the allegations, defendant should have demurred before pleading guilty. *People v. Bow* (1993, Cal App 2d Dist) 13 Cal App 4th 1551, 17 Cal Rptr 2d 94, 1993 Cal App LEXIS 206, review denied (1993, Cal) 1993 Cal LEXIS 2948.

Assault with a deadly weapon constitutes a serious felony for purposes of the five-year enhancement statute (*Pen C § 667*, subd. (a)) within the meaning of *Pen C § 1192.7*, subd. (c)(23), where the prosecution properly pleads and proves that the defendant personally used a deadly or dangerous weapon in the commission of the offense. However, without an enhancement or more specific pleading, assault with a deadly weapon under *Pen C § 245*, subd. (a)(1), may not be considered a serious felony since the defendant would not have "personally used a dangerous or deadly weapon" as *Pen C § 1192.7*, subd. (c)(23), requires. *People v. Shirley* (1993, Cal App 3d Dist) 18 Cal App 4th 40, 22 Cal Rptr 2d 340, 1993 Cal App LEXIS 872.

A defendant found guilty of assault with a deadly weapon (a knife) was guilty of a serious felony for purposes of the sentence enhancement under *Pen C § 667*, subd. (a) (conviction of serious felony with prior serious felony conviction), even though the amended information alleged defendant personally inflicted great bodily injury within the meaning of *Pen C § 12022.7*, causing the charged offense to be a serious felony (*Pen C § 1192.7*, subd. (c)(8)), and the jury found that allegation to be not true. The charged offense could still be a serious felony if the prosecution proved the existence of any of the other categories in *Pen C § 1192.7*, subd. (c), and the trial court found the offense to be a serious felony under *Pen C § 1192.7*, subd. (c)(23) (any felony in which defendant personally used a dangerous or deadly weapon). Ample evidence presented at trial supported the finding. The trial court was entitled to base its finding on the evidence presented at trial and was not bound by the jury's not true finding on the great bodily injury allegation, since the issue of whether defendant suffered the prior serious felony conviction was bifurcated from the trial on the charged offense and the great bodily injury allegation. *People v. Flynn* (1995, Cal App 1st Dist) 31 Cal App 4th 1387, 37 Cal Rptr 2d 765, 1995 Cal App LEXIS 71, review denied (1995, Cal) 1995 Cal LEXIS 3185.

In a prosecution for commercial robbery, the trial court did not err in sentencing defendant under the three strikes law (*Pen C § 667*, subds. (b)-(i)), since his prior conviction for the grossly negligent discharge of a firearm (*Pen C § 246.3*) qualified as a prior strike. Even though *Pen C § 246.3*, is not expressly included in the list of serious felonies enumerated in *Pen C § 1192.7*, subd. (c), that list does include "any felony in which the defendant personally uses a firearm" (*Pen C § 1192.7*, subd. (c)(8)). Since the Legislature has expressed its will that the commission of a felony involving the personal use of a firearm should be classified as serious, it would be anomalous to exempt an offender simply because use of the firearm is an element of the underlying offense. *People v. Leslie* (1996, Cal App 2d Dist) 47 Cal App 4th 198, 54 Cal Rptr 2d 545, 1996 Cal App LEXIS 635.

In a prosecution for commercial robbery, the trial court, in sentencing defendant under the three strikes law (*Pen C § 667*, subds. (b)-(i)) based on a prior conviction for the grossly negligent discharge of a firearm (*Pen C § 246.3*), did not err in finding that the prior offense was a serious felony under *Pen C § 1192.7*, even though defendant did not admit at the time he pleaded guilty to the prior offense that it was a serious felony. Although the serious felony allegation that accompanied defendant's prior charge was in essence dismissed when no admission was taken and the court made no finding, the prosecution was not thereby precluded from proving the prior serious felony conviction upon defendant's subsequent felony conviction. There is no indication within *Pen C § 969f*, or its legislative history that would indicate any expression of intent by the Legislature that the failure to secure an admission to the serious felony allegation would preclude the People from forever raising the issue. *People v. Leslie* (1996, Cal App 2d Dist) 47 Cal App 4th 198, 54 Cal Rptr 2d 545, 1996 Cal App LEXIS 635.

A defendant convicted of petty theft with a prior (*Pen C* §§ 484, 486, 666) with two prior serious felony convictions was properly sentenced under the three strikes law (*Pen C* § 667, subds. (b)-(i)), since defendant was sentenced to prison on the petty theft charge, which made the offense a felony. Petty theft is ordinarily a misdemeanor, but it can be punished more harshly under certain circumstances involving prior felony convictions. *People v. Terry* (1996, *Cal App 1st Dist*) 47 *Cal App 4th* 329, 54 *Cal Rptr 2d* 769, 1996 *Cal App LEXIS* 676, review denied (1996, *Cal*) 1996 *Cal LEXIS* 5694.

In a criminal prosecution, the trial court did not err in finding that defendant's prior conviction for carjacking (*Pen C* § 215, subd. (a)) was a strike for purposes of the three strikes law. Section 1 of Prop. 184, the three strikes initiative, codified as *Pen C* § 1170.12, subd. (b)(1), defines a strike as any offense defined in *Pen C* § 667.5, subd. (c), as a violent felony or in *Pen C* § 1192.7, subd. (c), as a serious felony, and § 2 of the initiative, which is not codified, provides that all references to existing statutes are to statutes as they existed on June 30, 1993. Although carjacking was not made a felony offense until Oct. 1, 1993, the initiative cannot be read to limit qualifying priors to only those named felonies in existence on June 30, 1993. Rather, it simply means that whether a defendant has suffered a strike is to be determined by referring to the June 30, 1993, texts of *Pen C* § 667.5, subd. (c), and *Pen C* § 1192.7, subd. (c), and applying them as of the date the defendant is sentenced under *Pen C* § 1170.12. Defendant's carjacking offense was a felony, and the prosecutor introduced evidence that defendant was found to have personally used a firearm in committing the offense (*Pen C* § 12022.5, subd. (a)). Thus, the offense was both a violent felony and a serious felony under the June 30, 1993, versions of *Pen C* §§ 667.5, subd. (c)(8), and 1192.7, subd. (c)(8). *People v. Nava* (1996, *Cal App 5th Dist*) 47 *Cal App 4th* 1732, 55 *Cal Rptr 2d* 543, 1996 *Cal App LEXIS* 759, review denied (1996, *Cal*) 59 *Cal Rptr 2d* 155, 927 *P2d* 265, 1996 *Cal LEXIS* 6814.

In a narcotics prosecution, the trial court erred in finding true that defendant's prior conviction for assault on a peace officer (*Pen C* former § 245, subd. (b) (now *Pen C* § 245, subd. (c)), was a strike within the meaning of *Pen C* § 667, subds. (c)-(j) (three strikes law). Since the prosecution failed to prove beyond a reasonable doubt, with substantial evidence, that the assault involved a deadly weapon or instrument, the prior conviction was not a serious felony under *Pen C* § 1192.7, subd. (c)(11), for purposes of *Pen C* § 667, subd. (d). The only evidence in the record that could have supported a finding that a weapon was used in the assault—an abstract of judgment and a notation on defendant's fingerprint card—failed to support such a finding. First, the abstract of judgment merely reflected that defendant was convicted of violating *Pen C* former § 245, subd. (b), without any indication that a weapon was or was not involved. Second, although the trial court's inference that the fingerprint card notation "ADW" was a shorthand reference to assault with a deadly weapon appeared reasonable, the further inferences that whoever made the notation meant to differentiate between the two types of conduct that violate the statute—use of a deadly weapon or instrument extrinsic to the perpetrator's body or by means likely to produce great bodily injury—and had sufficiently reliable information upon which to make that differentiation were not of solid value. *People v. Williams* (1996, *Cal App 5th Dist*) 50 *Cal App 4th* 1405, 58 *Cal Rptr 2d* 517, 1996 *Cal App LEXIS* 1072.

In sentencing defendant, who had been convicted of petty theft with a prior theft conviction (*Pen C* § 666) and who had suffered multiple prior serious felony convictions, the trial court did not err in applying the three strikes law (*Pen C* §§ 667, subds. (c) and (e), 1170.12, subd. (c)). Under *Pen C* § 666, a court has the discretion to treat petty theft with a prior as either a misdemeanor or a felony. However, because defendant had been previously convicted of robbery, he was subject to the current theft being treated as a felony. Also, the court specifically denied a motion to reduce the crime to a misdemeanor, because of defendant's long and continuous history of recidivism. Further, none of the factors delineated in *Pen C* § 17, subd. (b), which defines a crime as a misdemeanor, applied. Therefore, defendant's crime was a felony, rather than a misdemeanor that carried the potential for a longer sentence. Because the three strikes law is applicable when a defendant is convicted of a felony and has one or more prior convictions for a serious or violent felony, defendant was properly sentenced according to the three strikes law. *People v. Bury* (1996, *Cal App 4th Dist*) 50 *Cal App 4th* 1873, 58 *Cal Rptr 2d* 682, 1996 *Cal App LEXIS* 1122, review denied (1997, *Cal*) 1997 *Cal LEXIS* 1374.

In a prosecution in which a jury convicted defendant of possessing cocaine base for sale (*Health & Saf. Code*, § 11351.5), the evidence was insufficient to support the trial court's finding that defendant's prior conviction for assault (

Pen C § 245, subd. (a)(1)) constituted a serious felony under *Pen C § 1192.7*, subd. (c), and thus a strike under *Pen C § 667*, subd. (d)(1), of the three strikes law (*Pen C § 667*, subds. (b)-(i)). To prove this strike, the People offered only the abstract of judgment, which proved nothing more than the least adjudicated elements of the prior conviction, even though they were entitled to go beyond the least adjudicated elements and use the entire record to prove that defendant had in fact personally inflicted great bodily injury or personally used a dangerous or deadly weapon. *People v. Rodriguez* (1998) 17 Cal 4th 253, 70 Cal Rptr 2d 334, 949 P2d 31, 1998 Cal LEXIS 10, superseded by statute as stated in *People v. Luna* (2003, Cal App 2d Dist) 113 Cal App 4th 395, 6 Cal Rptr 3d 539, 2003 Cal App LEXIS 1700.

Where, following defendant's conviction on various felony charges, the trial court (1) considered whether he should receive a five-year sentence enhancement under *Penal C § 667(a)* because he had a prior serious felony conviction, (2) agreed with the prosecution that defendant had a prior serious felony conviction, but found that § 667(a) did not apply because, in the court's opinion, none of defendant's present convictions constituted a serious felony, and (3) later reconsidered and reversed that initial decision, the trial court's reconsideration of its initial decision did not constitute double jeopardy and was therefore not unconstitutional. The state and federal prohibitions against double jeopardy do not apply to noncapital sentencing determinations, and imposition of the sentence enhancement here constituted a noncapital sentencing determination, not a conviction of a new crime. *People v. Hernandez* (1998) 19 Cal 4th 835, 80 Cal Rptr 2d 754, 968 P2d 465, 1998 Cal LEXIS 8038, cert den (1999) 526 US 1136, 143 L Ed 2d 1017, 119 S Ct 1814, 1999 US LEXIS 3538, review denied (2000, Cal) 2000 Cal LEXIS 746, overruled in part *People v. Seel* (2004) 34 Cal 4th 535, 21 Cal Rptr 3d 179, 100 P3d 870, 2004 Cal LEXIS 11331.

Where a defendant's prior conviction is for assault, the conviction will qualify as a serious felony strike only if the defendant used a deadly weapon in connection with the crime. (*Pen C §§ 1192.7*, subd. (c)(23), 667, subd. (d)(1).) It is the prosecution's burden to establish such use beyond a reasonable doubt. *People v. Houck* (1998, Cal App 4th Dist) 66 Cal App 4th 350, 77 Cal Rptr 2d 837, 1998 Cal App LEXIS 743.

In a criminal prosecution the defendant was improperly sentenced under the "Three Strikes" law in that the trial court improperly relied on a preliminary hearing transcript to establish that one of his prior convictions was for a "serious felony" for purposes of the "Three Strikes" law (*Pen C §§ 667*, subds. (b)-(i), 1170.12, subd. (c)(2)). In determining if a prior conviction constitutes a qualifying strike for purposes of the "Three Strikes" law, the trial court may look to the entire record of conviction but no further. *People v. Houck* (1998, Cal App 4th Dist) 66 Cal App 4th 350, 77 Cal Rptr 2d 837, 1998 Cal App LEXIS 743.

In a prosecution for first degree burglary, the trial court properly imposed a five-year term under *Pen C § 667*, subd. (a), for the defendant's prior conviction for grand theft of a firearm (former *Pen C § 487*, subd. 3). The defendant contended that grand theft of a firearm was not a serious prior felony under *Pen C § 1192.7*, subd. (c), in that theft of a firearm does not "involve" a firearm. Grand theft "involving" a firearm is reasonably construed as any grand theft where a firearm is part of the crime, whether as a weapon to effect the crime or as the object of the crime. In light of the clearly stated legislative intent that it be a serious felony and the fact that the plain meaning of "involve" does not prohibit the inclusion of defendant's offense, grand theft of a firearm constitutes a serious felony within the meaning of *Pen C § 1192.7*, subd. (c)(26). *People v. Rodola* (1998, Cal App 4th Dist) 66 Cal App 4th 1505, 78 Cal Rptr 2d 735, 1998 Cal App LEXIS 836, review denied (1999, Cal) 1999 Cal LEXIS 342.

The court, rather than the jury, determines if a prior felony conviction qualifies as a serious felony for purposes of the *Three Strikes* law. *People v. Kelii* (1999) 21 Cal 4th 452, 87 Cal Rptr 2d 674, 981 P2d 518, 1999 Cal LEXIS 5311, rehearing denied (1999, Cal) 1999 Cal LEXIS 6615.

Following conviction by a jury of possession of a firearm by a felon with findings that he suffered two prior felony convictions, defendant was sentenced to prison for 25 years to life. The Court of Appeal, however, found insufficient evidence that defendant's conviction for discharging a firearm from a motor vehicle was a prior felony conviction for purposes of the three strikes law, and remanded for a limited new trial on the prior felony conviction allegation. Although defendant conceded there was sufficient evidence he suffered a conviction for violating *Penal C § 12034(c)*,

and that it was a felony, upon analysis of the elements of the predicate offense, the prior conviction could have been based on acts not specified in *Penal C § 1192.7(c)(8)* or (23), and then, as a matter of the sufficiency of the evidence, the least offense punishable was not a serious felony, and such prior conviction may not be used to impose a sentence pursuant to the three strikes law. Something more than defendant's bare guilty plea to the prior charged offense was required, and it was the People's burden to produce such additional evidence. *People v. Cortez* (1999, Cal App 2d Dist) 73 Cal App 4th 276, 86 Cal Rptr 2d 234, 1999 Cal App LEXIS 635, review denied (1999, Cal) 1999 Cal LEXIS 7063.

An assault conviction which was a "wobbler" was automatically rendered a misdemeanor under *Pen C § 17(b)(1)*, and therefore could not constitute a prior serious felony conviction with the meaning of the Three Strikes law (*Pen C § 667(d)(1)*), when the trial court suspended proceedings, granted summary probation, ordered defendant to serve one year in the county jail and directed that probation be terminated upon completion of the jail term. *People v. Glee* (2000, Cal App 2d Dist) 82 Cal App 4th 99, 97 Cal Rptr 2d 847, 2000 Cal App LEXIS 549, review denied (2000, Cal) 2000 Cal LEXIS 8120.

A conviction for oral copulation with a child who was less than 14 years old and more than 10 years younger than the perpetrator (*Pen C § 288a*) was a strike under the Three Strikes Law (*Pen C § 667*). *Pen C § 1192.7(c)(6)*, under which a "lewd or lascivious act on a child under the age of 14 years" was a serious felony, was not limited to violations of *Pen C § 288*. The electorate and the Legislature had both shown that they knew how to use language expressly requiring a violation of § 288 when that was their intent. Although § 1192.7(c)(6) certainly included acts that, because of the perpetrator's intent, were lewd or lascivious under § 288, it was not limited to those acts. *People v. Murphy* (2001) 25 Cal 4th 136, 105 Cal Rptr 2d 387, 19 P3d 1129, 2001 Cal LEXIS 1562, rehearing denied (2001, Cal) 2001 Cal LEXIS 4100.

A prior *Pen C § 245(a)(1)* conviction for an assault not involving a deadly weapon or instrument other than a firearm did not qualify as a "serious felony" under *Pen C § 1192.7(c)(31)* and thus did not constitute a "strike" under the "Three Strikes" law (*Pen C §§ 667, 1170.12*). The language of § 1192.7(c)(31) clearly and unambiguously specified that an assault with a specified weapon or an assault on a peace officer or firefighter in violation of § 245 was a "serious felony" and omitted an assault by means of force likely to produce great bodily injury from the classification. A contrary result was not compelled by *Pen C § 7.5*, which, by its own terms, did not apply in interpreting § 1192.7(c)(31), since there was no ambiguity or internal conflict in its language. Further, § 7.5 could not be read to create a statutory ambiguity that did not otherwise exist; where a statute clearly and unambiguously circumscribed the application of a cited Penal Code provision, § 7.5 did not render the otherwise clear language uncertain. *People v. Winters* (2001, Cal App 4th Dist) 93 Cal App 4th 273, 113 Cal Rptr 2d 158, 2001 Cal App LEXIS 845, review denied (2002, Cal) 2002 Cal LEXIS 535.

Defendant's Oregon conviction for second degree rape, which was defined as sexual intercourse with a minor under the age of 14, constituted a strike under California law (*Pen C § 667*), even though the prior Oregon conviction did not contain a specific sexual intent, since it was a lewd and lascivious act on a child and thus satisfied the requirements of a serious felony under *Pen C § 1192.7(c)(6)*. *People v. Fox* (2001, Cal App 5th Dist) 93 Cal App 4th 394, 112 Cal Rptr 2d 907, 2001 Cal App LEXIS 859.

In a capital murder case where defendant was also charged with possession of a firearm by a felon and was found to be convicted of a serious felony in violation of *Pen C § 245(a)(2)*, within the meaning of *Pen C § 667(a)*, the imposition of the enhancement was improper because a violation of *Pen C § 12021(a)* was not a serious felony as defined in *Pen C § 1192.7(c)*, and was, therefore, not subject to *Pen C § 667(a)*; therefore, the felony enhancement was stricken. *People v. Prieto* (2003) 30 Cal 4th 226, 133 Cal Rptr 2d 18, 66 P3d 1123, 2003 Cal LEXIS 2425, rehearing denied (2003, Cal) 2003 Cal LEXIS 3968, cert den (2003) 540 US 1008, 157 L Ed 2, 124 S Ct 542, 2003 US LEXIS 8275.

There was nothing ambiguous about a written plea agreement, which permitted on any ground a motion to strike a prior conviction under *Pen C §§ 667(a), (b)-(i), 667.5(b)*. The prosecutor's shorthand comment at the time the plea was taken, that the matter was to be sent for sentencing and a Romero motion, did not and could not change the terms of the

written agreement; the remedy was to hear defendant's constitutional challenge, not to force him to choose between the deal the parties had struck and renewed exposure to greater charges. *People v. Toscano* (2004, Cal App 2d Dist) 124 Cal App 4th 340, 20 Cal Rptr 3d 923, 2004 Cal App LEXIS 1963.

Defendant was not denied his right to jury trial under state or federal constitutional law when the trial court found his violation of *Pen C* § 246.3 to be a serious felony for enhancement purposes under *Pen C* § 667(a); the jury's finding of a gang related felony under *Pen C* § 186.22(b)(1) was tantamount to a jury finding of a serious felony pursuant to *Pen C* § 1192.7(c)(28). *People v. Bautista* (2005, Cal App 5th Dist) 125 Cal App 4th 646, 22 Cal Rptr 3d 845, 2005 Cal App LEXIS 8, review denied (2005, Cal) 2005 Cal LEXIS 4067.

In a weapons case in which the trial court defined a gang related felony as a serious felony under *Pen C* § 1192.7(c)(28) for the purpose of imposing a *Pen C* § 667(a) five-year enhancement for a serious felony offense, the imposition of a second consecutive five-year enhancement term on the same count pursuant to *Pen C* § 186.22(b)(1)(B) was impermissible bootstrapping. *People v. Bautista* (2005, Cal App 5th Dist) 125 Cal App 4th 646, 22 Cal Rptr 3d 845, 2005 Cal App LEXIS 8, review denied (2005, Cal) 2005 Cal LEXIS 4067.

Defendant's sentence on his convictions for making a criminal threat and of resisting a peace officer, which was based on a finding that he had been convicted of a prior serious felony within the meaning of the Three Strikes law, *Pen C* § 1170.12, which also triggered the five-year enhancement provision of *Pen C* § 667(a), could not stand because the record was insufficient to demonstrate that his prior assault conviction under *Pen C* § 245(a)(1) qualified as a serious felony. The prosecution's only evidence regarding the nature of the prior assault conviction was a prison packet submitted under *Pen C* § 969b, which contained an abstract of judgment with an ambiguous description of the prior assault and a fingerprint card referencing the conviction, and both were completely silent on the question of whether defendant personally used a deadly weapon or personally inflicted great bodily injury, so the conviction did not qualify as a serious felony under *Pen C* § 1192.7(c)(8) or (c)(23). *People v. Banuelos* (2005, Cal App 2d Dist) 130 Cal App 4th 601, 30 Cal Rptr 3d 315, 2005 Cal App LEXIS 992, modified, rehearing denied (2005, Cal App 2d Dist) 2005 Cal App LEXIS 1104.

In denying a state prisoner's petition for a writ of habeas corpus, the court rejected the argument that the evidence was inadequate to establish under *Pen C* §§ 667(a), 1170.12(c) that one of the prisoner's prior convictions qualified as a serious felony for purposes of sentencing enhancement, because even if the state court erred in its interpretation of state law, absent a showing of fundamental unfairness, the alleged misapplication of state law provided no basis for habeas relief. *Sims v. Rowland* (2003, ND Cal) 2003 US Dist LEXIS 18547, aff'd (2005, 9th Cir Cal) 414 F3d 1148, 2005 US App LEXIS 14642.

Proposition 36 probationer suffered a prior strike conviction within the meaning of *Pen C* § 667(c)(2), (d) after she was prosecuted for striking a victim in the head with a bottle, causing a wound that required 14 stitches. However, she was not rendered ineligible for probation under *Cal Penal Code* § 1210.1(b)(1) because she was granted probation in the prior strike case and thus never served any time in prison. *People v. Johnson* (2003, Cal App 4th Dist) 114 Cal App 4th 284, 7 Cal Rptr 3d 492, 2003 Cal App LEXIS 1852, rehearing denied (2004, Cal App 4th Dist) 2004 Cal App LEXIS 28, review denied (2004, Cal) 2004 Cal LEXIS 2291.

Trial court erred in imposing a five-year sentence enhancement for defendant's serious felony priors pursuant to *Pen C* § 667(a)(1) because the jury specifically found that defendant did not inflict great bodily injury in the commission of the charged offenses. Additionally, the trial court violated defendant's statutory and constitutional rights to a jury trial by treating the jury's finding of "serious bodily injury" as legally equivalent to a finding of "great bodily injury" despite the jury's express finding that defendant did not inflict "great bodily injury"; under Apprendi, a criminal defendant has a right to jury trial as to any factual issue that must be resolved in order to determine whether the charged offense is a serious felony for the purpose of imposing a sentence enhancement under § 667(a)(1). *People v. Taylor* (2004, Cal App 4th Dist) 118 Cal App 4th 11, 12 Cal Rptr 3d 693, 2004 Cal App LEXIS 623.

Trial court properly found a prior conviction for possession of a firearm while on probation, with a gang enhancement, constituted a serious felony for purposes of the "One Strike" law. Felony offenses that had been subjected to the enhancement provision of *Pen C* § 186.22 qualified as serious felonies within the meaning of *Pen C* § 1192.7(c)(28). *People v. Martinez* (2004, Cal App 4th Dist) 120 Cal App 4th 64, 15 Cal Rptr 3d 210, 2004 Cal App LEXIS 1040, review gr, depublished *People v. Martinez* (2004) 18 Cal. Rptr. 3d 870, 97 P.3d 812, 2004 Cal. LEXIS 8544, 2004 Cal. Daily Op. Service 8525, 2004 D.A.R. 11665, review dismissed (2005) 24 Cal. Rptr. 3d 864, 106 P.3d 303, 2005 Cal. LEXIS 1697, 2005 Cal. Daily Op. Service 1436, 2005 D.A.R. 1924.

Based upon the plain language of *Pen C* § 667(a), the crucial date for determining if a prior conviction qualifies as a serious felony is the date of the charged offense. If the alleged prior conviction is included in the list of serious felonies in *Pen C* § 1192.7, on the date of the charged offense, the prior conviction qualifies for the five-year enhancement under *Pen C* § 667(a). *People v. Ringo* (2005, Cal App 2d Dist) 134 Cal App 4th 870, 36 Cal Rptr 3d 444, 2005 Cal App LEXIS 1874, review denied (2006, Cal) 2006 Cal LEXIS 3538, cert den (2006, US) 166 L Ed 2, 127 S Ct 117, 2006 US LEXIS 6663.

At the time defendant committed the charged offenses, his prior conviction of *Pen C* § 422, was a serious felony "listed" in *Pen C* § 1192.7(c)(38). Therefore, the five-year enhancement of *Pen C* § 667(a)(1) was properly applied to his sentence. *People v. Ringo* (2005, Cal App 2d Dist) 134 Cal App 4th 870, 36 Cal Rptr 3d 444, 2005 Cal App LEXIS 1874, review denied (2006, Cal) 2006 Cal LEXIS 3538, cert den (2006, US) 166 L Ed 2, 127 S Ct 117, 2006 US LEXIS 6663.

Trial court's imposition of an additional 10 years for two serious prior felony convictions under *Pen C* § 667(a), thus treating defendant's active participation in a criminal street gang conviction under *Pen C* § 186.22(a) as a serious felony, was not error because the language of *Pen C* § 1192.7 made clear that a conviction of *Pen C* § 186.22(a) was a serious felony. *People v. Thomas* (2005, Cal App 4th Dist) 130 Cal App 4th 1202, 30 Cal Rptr 3d 582, 2005 Cal App LEXIS 1046, review denied (2005) 2005 Cal. LEXIS 11349.

Evidence in a drug case was insufficient to establish that defendant had a prior strike conviction within the meaning of *Pen C* §§ 667(b)-(i), 1170.12 because the record of his prior conviction under *Veh C* § 23153(a) for driving under the influence causing bodily injury did not establish that he caused great bodily injury under *Pen C* § 1192.7(c)(8); an alleged *Ev C* § 1221 adoptive admission after the plea in the prior case could not be considered, and a police officer's testimony in the prior case that a nurse said the victim had multiple broken bones could not be admitted under the former testimony exception of *Ev C* § 1291(a) because the nurse's statement did not fall within any exception to the hearsay rule. *People v. Thoma* (2007, Cal App 2d Dist) 150 Cal App 4th 1096, 58 Cal Rptr 3d 855, 2007 Cal App LEXIS 755, rehearing denied (2007, Cal App 2d Dist) 2007 Cal App LEXIS 1079.

11. Effect of Prior Burglary Conviction

In applying *Pen C* § 667, subd. (a), which governs sentence enhancement for persons previously convicted of a "serious felony" as defined in *Pen C* § 1192.7, subd. (c), qualification of the use of a prior conviction for enhancement with a factor that is not a statutory element of the crime is permissible. Specifically, in imposing an enhancement for a prior burglary conviction under § 667, subd. (a) and § 1192.7, subd. (c)(18), "burglary of a residence", the use of the prior conviction may be qualified by requiring a showing that the object of the burglary was a residence. In enacting Proposition 8, which included both §§ 667 and 1192.7, the people were not concerned with what the elements of first or second degree burglary were, but rather with the serious nature of violation of one's living quarters; their purpose was to protect their homes by imposing harsher punishment on habitual residential burglars. *People v. Dean* (1984, Cal App 4th Dist) 161 Cal App 3d 493, 207 Cal Rptr 688, 1984 Cal App LEXIS 2677, overruled *People v. Alfaro* (1986) 42 Cal 3d 627, 230 Cal Rptr 129, 724 P2d 1154, 1986 Cal LEXIS 268

A defendant who pled nolo contendere to an information charging second degree burglary involving entry into a residence, who admitted a prior conviction of a "residential burglary" within the meaning of *Pen C* § 667, subd. (a), and

who signed a waiver acknowledging his plea exposed him to a five-year enhancement, was properly given a sentence enhancement of five years pursuant to *Pen C § 667*, applicable to a defendant previously convicted of a serious felony who is again convicted of such a felony, and *Pen C § 1192.7*, which defines "serious felony" to include "burglary of a residence." Defendant's plea, under the circumstances, constituted an admission that the current burglary was a residential burglary within the meaning of § 667, and the admission was sufficient to establish the residential character of the burglary. It was thus immaterial that entry into a residence may not have been an essential element of the second degree burglary. *People v. O'Bryan (1985) 37 Cal 3d 841, 210 Cal Rptr 450, 694 P2d 135, 1985 Cal LEXIS 238.*

In a prosecution for assault with a deadly weapon and other offenses, the trial court did not err in imposing upon defendant a five-year enhancement for a prior conviction of first degree burglary pursuant to *Pen C § 667*. Although the information did not charge prior burglary of a residence, defendant responded affirmatively when asked by the trial court whether he had suffered a prior conviction within the meaning of § 667 and *Pen C § 1192.7*. Therefore, this admission constituted an adjudication that the structure burglarized was a residence and that the prior conviction was therefore of a "serious felony" within the meaning of § 667, justifying imposition of the five-year enhancement. *People v. Kane (1985, Cal App 3d Dist) 165 Cal App 3d 480, 211 Cal Rptr 628, 1985 Cal App LEXIS 1737.*

Defendant's admission of a conviction for burglary as a serious felony within the meaning of *Pen C §§ 667 and 1192.7* without an express admission of its residential character was sufficient to permit imposition of a serious felony enhancement, even though the admission was not the result of a plea bargain. *People v. Thomas (1986) 41 Cal 3d 837, 226 Cal Rptr 107, 718 P2d 94, 1986 Cal LEXIS 178.*

In a prosecution in which defendant was convicted of attempted burglary, it was improper to impose a sentence of two years on the principal count, plus an enhancement of five years for each of two prior serious felony convictions, under *Pen C § 667*, and *Pen C § 1192.7*, subd. (c)(18), defining "serious felony" to include "burglary of a residence," where both prior convictions antedated the effective date of § 667 and where both involved crimes not requiring proof of entry into a residence as an element. With respect to the prior offenses, allegations in the information in both cases as to residential entry could not cure the defect, since such allegations were insufficient to prove an entry or attempted entry not made an element of the crime. *People v. Calio (1986) 42 Cal 3d 639, 230 Cal Rptr 137, 724 P2d 1162, 1986 Cal LEXIS 269.*

In a prosecution for burglary in which the court relied on a 1975 prior first degree burglary conviction to impose a five-year enhancement on defendant's sentence, the trial court erroneously went behind the record of the 1975 conviction to prove residential burglary, which was not previously a minimum element of the crime in order to impose the enhancement under *Pen C §§ 667, 1192.7*. Reliance on documents in the court file including the information, was improper, where the allegation charging entry into a residence did not add to the elements of the crime, posed no issue which was necessarily adjudicated by the judgment, and thus was not the subject of collateral estoppel, and where, in 1975, defendant had no incentive to challenge the residential allegation as it made no difference and did not serve to elevate the burglary from second to first degree at the time the offense was committed. Since the prosecution did not need to prove the burglary occurred in a residence as another allegation made the burglary one of the first degree, residential entry was not necessarily adjudicated, so that there was no competent proof that defendant's 1975 conviction was for the serious felony of burglary of a residence so as to justify the five-year enhancement. *People v. Dillingham (1986, Cal App 2d Dist) 186 Cal App 3d 688, 231 Cal Rptr 20, 1986 Cal App LEXIS 2143.*

In a prosecution for murder, in which defendant admitted that he had sustained three prior serious felony convictions within the meaning of *Pen C § 667* (permitting five-year sentence enhancements), the trial court properly sentenced him to a term of 15 years for the three priors. Although the priors were for second degree burglary, and defendant did not specially admit their residential nature, burglary does not have to include a residence to be a serious felony. *Pen C § 1192.7* ("serious felonies"), also includes burglaries involving the infliction of great bodily injury on persons other than accomplices, or the use of a deadly weapon. The issue posed by the information was whether burglary was committed pursuant to § 1192.7; the admissions conceded this issue and extended in scope to all allegations concerning the priors contained in the information. *People v. Richard (1987, Cal App 2d Dist) 189 Cal App*

3d 1159, 234 Cal Rptr 747, 1987 Cal App LEXIS 1434.

In determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction. Hence, in a prosecution for burglary of an inhabited dwelling (*Pen C § 459*), the trial court did not err in looking beyond the judgment to the entire record of defendant's two prior burglary convictions in determining whether they were convictions for residential burglary and were thus serious felonies constituting a basis for sentence enhancement under *Pen C §§ 667, 1192.7*, subd. (c). *People v. Guerrero (1988) 44 Cal 3d 343, 243 Cal Rptr 688, 748 P2d 1150, 1988 Cal LEXIS 25*.

In a nonjury trial for residential burglary (*Pen C § 459*) in which the court found true the allegation that defendant was previously convicted of a serious felony, residential burglary (*Pen C § 667*, subd. (a)), the prior burglary was a previous conviction within the meaning of *Pen C § 667*, subd. (a), even though defendant was on probation for the prior when he committed the new burglary. In the prior case, defendant pleaded guilty in municipal court, and the superior court suspended proceedings and placed defendant on probation. For purposes of *Pen C § 667*, subd. (a), the defendant had been convicted at the time of the adjudication of guilt, even if judgment had not yet been pronounced or become final. Although in certain contexts involving civil disabilities flowing from conviction, the disability is not effective until pronouncement or finality of judgment, defendant's case did not involve a civil disability. Further, the rule of construction of ambiguous penal statutes in favor of the defendant was inapplicable to the word "conviction," since that rule will not be applied to contravene a manifest legislative purpose, and the purpose of *Pen C § 667*, is to deter repetition of criminal conduct. *People v. Wilson (1991, Cal App 2d Dist) 227 Cal App 3d 1210, 278 Cal Rptr 319, 1991 Cal App LEXIS 183*, review denied (1991, Cal) 1991 Cal LEXIS 2214.

In a prosecution for robbery with personal use of a firearm (*Pen C §§ 211, 12022.5*, subd. (a)) and being a felon in possession of a firearm (*Pen C § 12021*, subd. (a)), the trial court did not err in imposing a five-year serious-felony enhancement under *Pen C § 667*, subd. (a), for defendant's 1983 conviction of attempted second degree burglary, even though, for purposes of the enhancement statute, a burglary must be of an inhabited dwelling, and after 1982, all residential burglaries were of the first degree. The trial court properly examined the conduct involved in the prior burglary charge, and found, based on the reporter's transcript of the preliminary hearing and the probation report, that the conviction resulted from a plea bargain reached after defendant was charged with attempted burglary of an inhabited dwelling. *People v. Gomez (1994, Cal App 4th Dist) 24 Cal App 4th 22, 29 Cal Rptr 2d 94, 1994 Cal App LEXIS 315*, review denied (1994, Cal) 1994 Cal LEXIS 3282.

In a prosecution in which defendant, who had a prior burglary conviction, pled guilty to 4 counts of forgery (*Pen C § 470*) arising from his cashing of 10 forged checks at various liquor stores during a 23-day period, the trial court did not err in imposing consecutive terms pursuant to *Pen C § 667*, subd. (c)(6), which requires the court to impose consecutive sentences on each count if the defendant has one or more prior felony convictions and the current conviction is for more than one felony count not committed on the same occasion and not arising from the same set of operative facts. The trial court's remarks at the time of sentencing demonstrated that it impliedly found that defendant's offenses did not come within an exception to the statute for convictions arising from the same set of operative facts, and that determination was supported by substantial evidence. Although the blank checks defendant had stolen were taken at the same time, he cashed them all within a three-week period, and his single motive was to obtain money to support his drug habit, the fact that some of the facts relating to defendant's offenses were the same did not bring him within an exception to the statute as a matter of law. *People v. McKee (1995, Cal App 2d Dist) 36 Cal App 4th 540, 42 Cal Rptr 2d 707, 1995 Cal App LEXIS 616*, review denied (1995, Cal) 1995 Cal LEXIS 6424, overruled *People v. Deloza (1998) 18 Cal 4th 585, 76 Cal Rptr 2d 255, 957 P2d 945, 1998 Cal LEXIS 4037*.

In sentencing a defendant convicted of five felonies, the trial court properly imposed a five-year sentence enhancement under *Pen C § 667*, subd. (a), on the basis of defendant's prior conviction of residential burglary following a 1989 amendment of *Pen C § 460*, subd. (a), to specifically include burglary of an inhabited vessel within the definition of first degree burglary. Proof of this prior conviction adequately proved the truth of the prior serious felony allegation, even though *Pen C § 1192.7*, subd. (c)(18), which contains the definition of "serious felony" for purposes of

Pen C § 667, does not include burglary of an inhabited vessel within its definition of burglary. Even if defendant's prior conviction was for burglary of an inhabited vessel, he sustained a conviction of a serious felony that supported the enhancement. In light of the prior California cases broadly interpreting the term "dwelling house" for purposes of *Pen C § 460*, the legislative objective underlying this statutory language (i.e., the recognition of the increased danger and gravity of a residential burglary), and the out-of-state cases construing similar language to include burglary of an inhabited vessel, the term "burglary of an inhabited dwelling house," when incorporated into *Pen C § 1192.7*, subd. (c)(18), implicitly encompasses burglary of an "inhabited vessel." Moreover, nothing in the amendment to *Pen C § 460*, was intended to limit the applicability of the *Pen C § 1192.7*, subd. (c)(18), enhancement, so as to exclude burglary of an inhabited vessel from the category of burglaries covered by that statute. The amendment was intended, rather, to ensure that vessels would receive the same protection as other habitations. *People v. Cruz* (1996) 13 Cal 4th 764, 55 Cal Rptr 2d 117, 919 P2d 731, 1996 Cal LEXIS 5168, rehearing denied (1996, Cal) 1996 Cal LEXIS 5350.

12. Effect of Prior Robbery Conviction

Robbery is a "serious felony" within the meaning of *Pen C § 667*, which mandates the imposition of enhancements for prior serious felonies. *People v. Lopez* (1983, Cal App 2d Dist) 147 Cal App 3d 162, 195 Cal Rptr 27, 1983 Cal App LEXIS 2178.

A defendant convicted of robbery with a prior conviction of robbery was properly sentenced with an enhancement of five years for the prior felony pursuant to *Pen C § 667*, even though the aggregate term exceeded twice his base term, a result prohibited by *Pen C § 1170.1*, subd. (g). In view of the adoption by the electorate of *Cal. Const., art. I, § 28*, subd. (f), providing for a five-year enhancement for each prior serious felony conviction, enhancements for serious felonies under *Pen C § 667*, were not intended to be subject to the double base term limitation of § 1170.1, subd. (g). Courts must interpret a constitutional amendment to give effect to the intent of the voters adopting it. *People v. Traina* (1985, Cal App 3d Dist) 168 Cal App 3d 305, 214 Cal Rptr 213, 1985 Cal App LEXIS 2095.

Pen C § 667, allows imposition of separate five-year and one-year sentence enhancements for prior felony convictions irrespective of the "double-the- base-term" rule of *Pen C § 1170.1*, subd. (g), and thus the trial court was free to add the enhancements to the sentence of a robbery convict despite the three-year base term for robbery provided by *Pen C § 213*. *People v. James* (1985, Cal App 1st Dist) 170 Cal App 3d 164, 216 Cal Rptr 24, 1985 Cal App LEXIS 2220.

Under *Pen C § 667*, subd. (a), permitting one consecutive five-year enhancement for each prior conviction "brought and tried separately," the trial court properly imposed on a convicted defendant two five-year enhancements for two prior robbery convictions, even though both prior charges were brought at the same time and both prior sentences ran concurrently, where the two prior robbery cases were brought separately and there was no showing that they were consolidated or otherwise tried together as one case. The mere fact that a sentence is served concurrently does not necessarily mean that it is part of a single course of conduct. When a defendant has multiple criminal objectives he can be prosecuted separately for each such incident without violating the prohibition against multiple punishment (*Pen C § 654*). *People v. Harris* (1987, Cal App 5th Dist) 192 Cal App 3d 1197, 238 Cal Rptr 31, 1987 Cal App LEXIS 1849.

Under *Pen C § 667*, which requires one consecutive five-year enhancement for each prior serious-felony conviction "on charges brought and tried separately," the trial court erred in imposing, after defendant's conviction for robbery and attempted robbery, a five-year enhancement for each of two prior robbery convictions, where the two prior convictions were upon charges initiated through the filing of a single complaint in municipal court, notwithstanding the two charges were thereafter prosecuted in superior court under two separate informations. A similar phrase in former *Pen C § 644*, the source of § 667, had been judicially construed to require that the prior felony proceedings be totally separate. Thus, for purposes of § 667, the charges underlying the prior convictions must have been made in proceedings that were formally distinct, from filing to adjudication of guilt. *In re Harris* (1989) 49 Cal 3d 131, 260 Cal Rptr 288, 775 P2d 1057, 1989 Cal LEXIS 1535.

In a prosecution in which defendant was convicted of first degree robbery and unauthorized entry and pleaded guilty to second degree burglary, and in which the court found he had a prior conviction for residential burglary alleged as an enhancement under the Three Strikes law subjecting a second strike defendant to twice the base term (*Pen C* § 667, subd. (e)), the trial court did not err in imposing the middle term of eight years for the robbery (twice middle term of four years) pursuant to the Three Strikes law, even though defendant's prior offense predated the law's enactment. In *Pen C* § 667, subd. (d)(1) (determination whether prior conviction is prior felony conviction for purposes of statute must be made "upon" date of prior conviction), the word "upon" means simply that the determination of whether an offense is a "strike" must be made with reference to the date of the prior conviction and not with reference to the sentence subsequently imposed for the prior. Since the "strike" determination need not have been made at the time of the prior conviction, the Three Strikes law may be applied to convictions predating its enactment. *People v. Reed* (1995, *Cal App 1st Dist*) 33 *Cal App 4th* 1608, 40 *Cal Rptr 2d* 47, 1995 *Cal App LEXIS* 350, review denied (1995, Cal) 1995 *Cal LEXIS* 4457.

In sentencing defendant, who pleaded no contest to possession of cocaine and petty theft with a prior theft-related conviction and who admitted a prior conviction for robbery, the trial court properly doubled defendant's base term both for the drug offense and for the subordinate term for the theft offense pursuant to the three strikes law (*Pen C* § 667, subd. (b)-(i)). *Pen C* § 667, subd. (e)(1), which requires that the "determinate term" of a defendant with a prior felony conviction be calculated by doubling the term otherwise provided as punishment for the "current felony conviction." Defendant's "determinate term" included the subordinate term for the theft offense, because the latter term was a fixed term under Judicial Council rules on sentencing. *Pen C* § 667, subd. (c)(6), which requires consecutive sentences for any current conviction for more than one felony not committed on the same occasion or arising from the same operative set of facts, indicated that the Legislature understood that a "current conviction" could encompass more than one felony offense for the purposes of applying *Pen C* § 667, subd. (e). *Pen C* § 667, subd. (e) did not constitute a sentence enhancement that could be applied only once to defendant's sentence. *People v. Hill* (1995, *Cal App 3d Dist*) 37 *Cal App 4th* 220, 44 *Cal Rptr 2d* 11, 1995 *Cal App LEXIS* 719, review denied (1995, Cal) 1995 *Cal LEXIS* 6982, cert den (1996) 517 *US* 1170, 134 *L Ed 2d* 672, 116 *S Ct* 1574, 1996 *US LEXIS* 2875.

A 29-year-to-life state prison term imposed under the three strikes law (*Pen C* § 667, subds. (b)-(i)) on a defendant found guilty of attempted injury upon a cohabitant (*Pen C* §§ 664, 273.5, subd. (a)), battery, and assault, and as to whom 3 serious felony allegations were found true: a 1986 attempted robbery conviction, a 1987 robbery conviction, and a 1989 attempted robbery conviction, was not cruel or unusual punishment (*Cal. Const., art. I, § 17*). Defendant was not subject to a life sentence merely on the basis of his current offense but on the basis of his recidivist behavior. Recidivism in the commission of multiple felonies poses a manifest danger to society justifying the imposition of longer sentences for subsequent offenses. Defendant failed to show that this case was that "exquisite rarity," an instance of punishment which offends fundamental notions of human dignity or which shocks the conscience. *People v. Kinsey* (1995, *Cal App 2d Dist*) 40 *Cal App 4th* 1621, 47 *Cal Rptr 2d* 769, 1995 *Cal App LEXIS* 1218, review denied (1996, Cal) 1996 *Cal LEXIS* 1550.

In a prosecution for felony access card fraud arising from defendant's use of a cloned cellular telephone, defendant was properly sentenced under the three strikes law (*Pen C* § 667, subds. (b)-(i)) upon proof of his 1978 conviction for robbery, even though no determination was made in 1978 that his conviction was a strike, and robbery was neither a serious nor a violent felony under statutes existing in 1978. The three strikes law does not require the determination whether a prior conviction is a strike to be made at the time of the prior conviction, but simply by reference to the date of the prior conviction, and thus the three strikes law applies to prior felony convictions predating its enactment. The three strikes law also applies to felony convictions that were neither serious nor violent felonies at the time of conviction, but fit that definition on June 30, 1993 (*Pen C* § 667, subd. (h)). Since robbery was a serious felony under *Pen C* § 1192.7, as it existed on June 30, 1993, defendant's 1978 robbery conviction qualified as a strike. *People v. Butler* (1996, *Cal App 2d Dist*) 43 *Cal App 4th* 1224, 51 *Cal Rptr 2d* 150, 1996 *Cal App LEXIS* 270, review denied (1996, Cal) 1996 *Cal LEXIS* 3724.

The trial court's use of defendant's prior robbery conviction to impose multiple punishment under *Pen C* § 667,

subd. (e)(1), of the three strikes law (*Pen C § 667*, subds. (b)-(i)), after he pleaded guilty to petty theft with a prior conviction for robbery (*Pen C § 666*) and admitted that he served a prison term for the prior offense, did not violate double jeopardy under *U. S. Const., 5th Amend.*, since defendant was not being cumulatively punished for the same act. In this case, defendant was not being punished for the prior robbery. Rather, he was being punished under the sentencing provisions of *Pen C § 667*, subd. (e), for the petty theft, which was made a felony under *Pen C § 666*, as a result of his having suffered the prior robbery conviction, and the petty theft and the robbery were two distinct offenses. Although his status as a repeat offender subjected him to harsher punishment under section 667, subd. (e), and service of the prison term resulted in an enhancement of that term, he was not being punished for the prior conviction. Recidivist statutes do not impose a second punishment for the first offense in violation of the double jeopardy clause. Moreover, the double jeopardy clause does not prohibit the imposition of multiple punishment for the same offense where the Legislature has authorized multiple punishment. *People v. White Eagle* (1996, Cal App 5th Dist) 48 Cal App 4th 1511, 56 Cal Rptr 2d 749, 1996 Cal App LEXIS 816, rehearing denied (1996, Cal App 5th Dist) 1996 Cal App LEXIS 895, review denied (1996, Cal) 1996 Cal LEXIS 7009.

In a prosecution in which defendant was sentenced to the middle term of two years' imprisonment for attempted second degree robbery, a serious felony, and in which the trial court doubled defendant's sentence to four years because he had a prior robbery that qualified as a "strike" (*Pen C § 667*, subd. (e)(1)), and also imposed a five-year enhancement (*Pen C § 667*, subd. (a)(1)), the Court of Appeal erred in ordering an additional three-year prison term, imposed following revocation of defendant's probation for the prior robbery, to be served consecutively with the term for the current offense, rather than concurrently as the trial court had ordered. The Court of Appeal erroneously characterized the conviction in the probation violation matter as a current conviction under *Pen C § 667*, subd. (c)(7), calling for consecutive sentences for a three strikes defendant with more than one current serious or violent conviction. Defendant was not convicted of his 1993 offense in the present proceeding. Neither was defendant subject to consecutive sentencing under *Pen C § 667*, subd. (c)(8), since he was not "already serving" "any other sentence" when "sentence [was] imposed pursuant to subdivision (e)" of *Pen C § 667*. The Legislature treats the concepts of sentence and probation differently. Defendant did not begin to serve his sentence before he was committed to the sheriff's custody, and likely not until the sheriff delivered him to prison. *People v. Rosbury* (1997) 15 Cal 4th 206, 61 Cal Rptr 2d 635, 932 P2d 207, 1997 Cal LEXIS 1006.

13. Admissibility and Sufficiency of Evidence

In a prosecution in which the trial court imposed enhancements (*Pen C § 667*) based on convictions for gross vehicular manslaughter while intoxicated (*Pen C § 191.5*) and related charges (*Veh C § 23153*, subds. (a), (b)), and a prior serious felony conviction for gross vehicular manslaughter (*Pen C § 192*, subd. (c)(1)), the relevant portions of the preliminary examination transcript in the prior proceeding were admissible, over hearsay, confrontation, and due process objections, to prove that, in the commission of the prior felony, defendant inflicted great bodily injury within the meaning of *Pen C § 1192.7*, subd. (c)(8) ("serious" felony, for enhancement purposes, includes felony in which defendant inflicts great bodily injury). Since the transcript was not offered to prove defendant was guilty of the earlier offense, but merely for the neutral inquiry as to the nature of the earlier offense, it was admissible as an exception to the hearsay rule. Such limited admissibility comports with the goal of promoting efficient administration of justice. Also, since statements made during a preliminary hearing are under oath and subject to cross-examination, defendant was adequately protected from the dangers of out-of-court statements. *People v. Gonzales* (1994, Cal App 6th Dist) 29 Cal App 4th 1684, 35 Cal Rptr 2d 450, 1994 Cal App LEXIS 1141.

In a prosecution for attempted murder, assault with a deadly weapon, and burglary, in which the trial court imposed sentence enhancements based on two prior serious felonies pursuant to *Pen C § 667*, subd. (a)(1), the evidence was sufficient to support the trial court's implied finding that the alleged prior convictions arose from charges "brought and tried separately" within the meaning of that statute. The evidence showed the charges were prosecuted in separate informations in the superior court, but did not disclose whether one or two complaints were filed in municipal court.

However, notwithstanding that defendant's informations were filed in the same county, that he was convicted in court trials one day apart, and that he was sentenced in both cases during the same court session, the trial court reasonably could infer that the charges had been initiated in separate complaints, since the separate informations bore case numbers that differed significantly. In any event, in view of the fact that the matter could be revisited on habeas corpus, it was appropriate for the Supreme Court to take judicial notice of the records of the municipal court proceedings concerning the prior convictions, and those records confirmed that the prior convictions arose from charges separately brought. *People v. Wiley* (1995) 9 Cal 4th 580, 38 Cal Rptr 2d 347, 889 P2d 541, 1995 Cal LEXIS 703.

Where multiple statutory enhancement provisions are available for the same prior offense, one of which is an enhancement under *Pen C* § 667 (prior serious felony conviction), the greatest enhancement, but only that one, will apply. Thus, in a prosecution in which defendant was convicted of two counts of forcible rape, one count of forcible oral copulation, and one count of residential robbery, and in which the trial court found defendant had two prior convictions for serious felonies for which separate prison terms had been imposed within the meaning of *Pen C* § 667, subd. (a), and *Pen C* § 667.5, subd. (b), the trial court erred in imposing, for each prior, two 5-year sentence enhancements pursuant to *Pen C* § 667, subd. (a), and two 1-year enhancements pursuant to *Pen C* § 667.5, subd. (b), to be served concurrently with the time imposed for the *Pen. Code*, § 667, subd. (a), enhancements. Accordingly, the enhancements imposed pursuant to *Pen C* § 667.5, subd. (b), had to be stricken. *People v. Smith* (1995, Cal App 2d Dist) 33 Cal App 4th 1586, 40 Cal Rptr 2d 31, 1995 Cal App LEXIS 347, review denied (1995, Cal) 1995 Cal LEXIS 4464.

In a prosecution for assault with a deadly weapon, there was insufficient evidence to support the jury's finding that two prior felony conviction allegations were true, where the proof of those convictions was based only on documentary evidence of the informations filed and waiver forms, signed by defendant, that indicated his desire to plead not guilty and no contest to those two charges. In considering whether there is sufficient evidence to support findings of prior convictions, courts look to evidence that the defendant unequivocally expressed his or her intent to plead guilty in open court, as required by *Pen C* §§ 1017 and 1018. Because there was no direct evidence in the record that defendant went on to enter a plea in open court in either case, the prosecution did not meet its burden of proving that the defendant actually pleaded no contest or guilty to the charges; the waiver forms themselves were insufficient. Further, even though the forms indicated that they would be destroyed if the plea was not entered in open court, no evidence was presented to the jury of the practice of the courts in handling guilty pleas or the procedure followed with respect to destroying waiver forms. Likewise, the jury received no instruction on the presumption of the performance of an official duty, and thus the jury could not logically reach the conclusion that the waiver forms proved the alleged prior convictions. *People v. Jones* (1995, Cal App 1st Dist) 37 Cal App 4th 1312, 44 Cal Rptr 2d 552, 1995 Cal App LEXIS 827, rehearing denied (1995, Cal App 1st Dist) 1995 Cal App LEXIS 920, review denied (1995, Cal) 1995 Cal LEXIS 7233.

The trial court did not err in denying defendant's *Pen C* § 995, motion to dismiss an allegation of three strikes prior felony convictions (*Pen C* § 667, subds. (a)-(i)), made on the ground that no evidence to support the strike priors was adduced at the preliminary hearing. Although a *Pen C* § 995, motion may be used in certain instances to challenge enhancement allegations, an allegation made pursuant to *Pen C* § 667, subds. (a)-(i), may not be the subject of a motion to dismiss. Although *Pen C* § 667, subds. (f) and (g), specifically require the People to plead and prove known strike priors, nothing contained within these subdivisions specifies when the prosecution is required to present this proof. Had the drafters of *Pen C* § 667, intended that evidence of a defendant's prior convictions be presented at the preliminary examination they would have crafted subdivisions (f) and (g) differently (such as, "shall plead and prove all known prior convictions at the preliminary hearing.") Since no uncertainty or doubt about the meaning of the statute is apparent, the provision must be applied according to its terms without further judicial construction. No public policy considerations require that strike priors be alleged and proved at the preliminary hearing. *Miranda v. Superior Court* (1995, Cal App 2d Dist) 38 Cal App 4th 902, 45 Cal Rptr 2d 498, 1995 Cal App LEXIS 935, review denied (1996, Cal) 1996 Cal LEXIS 163.

In a prosecution for selling cocaine base, proof of defendant's 1967 Louisiana conviction for aggravated attempted escape was insufficient to establish the statutory elements of the serious felony of assault by an inmate (*Pen C* § 1192.7, subd. (c)(12), (13)), under California law, and hence was inadequate to support a prior serious felony conviction

allegation under the three strikes law (*Pen C* § 667, subs. (b)-(i)). Although one exhibit, a district attorney's arraignment or bail form, was a part of the record of the prior conviction, the other exhibit, a prison information form dated almost two months after sentencing, was outside the record leading to judgment, and thus was inadmissible. Moreover, both documents were inadmissible hearsay, and there was no applicable exception. The district attorney's form reflected only the district attorney's preliminary understanding of what occurred during the attempted escape, with no information establishing that the facts asserted were trustworthy or reliable. Furthermore, there was no information in the record as to who prepared the prison form, or its basis, purpose, or role. The documents offered to prove the prior strike that were admissible (the charging document and the clerk's minutes) reflected only defendant's guilty plea to the charge, and did not establish that the prior offense constituted an assault within the meaning of *Pen C* §§ 1192.7, subd. (c)(12), (13). *People v. Lewis* (1996, *Cal App 4th Dist*) 44 *Cal App 4th* 845, 52 *Cal Rptr 2d* 338, 1996 *Cal App LEXIS* 337.

Preliminary hearing transcript excerpts are within the record of a prior conviction as required for their admission under *Ev C* § 1291(a) as an exception to the hearsay rule for former testimony of an unavailable witness in a subsequent proceeding to determine whether the prior conviction qualifies as a serious felony for purposes of sentence enhancement under *Pen C* §§ 667, 1192.7(c)(8). The court could look to the entire record of conviction and no further; therefore, witnesses at the preliminary hearing are considered legally unavailable because the prosecution and the defense are precluded from presenting any evidence outside the record of conviction to prove the circumstances of the prior crime. *People v. Bartow* (1996, *Cal App 1st Dist*) 46 *Cal App 4th* 1573, 54 *Cal Rptr 2d* 482, 1996 *Cal App LEXIS* 612.

In a prosecution for felonious possession of cocaine base and misdemeanor possession of drug paraphernalia, where it was alleged that defendant had suffered three prior strikes in violation of the three strikes law (*Pen C* § 667, subs. (b)-(i)), the trial court did not err by not allowing any reference to the three strikes law or the twenty-five-year-to-life sentence faced by defendant. Defendant initially confessed to the police officer who searched him, his wife, and their vehicle that all the cocaine found in the car was his, and that his wife had nothing to do with it, but he recanted his confession at trial, testifying that he had been attempting to protect his wife, who had been arrested anyway, and that he faced substantial prison time due to his record of prior felony convictions and jail time. Why defendant chose to recant his confession was irrelevant. For purposes of evaluating the reliability of defendant's confession, the only relevant question was: if defendant was innocent, why did he previously admit his guilt? Because defendant was able to fully explain that was Mexican-American and protective of his wife, and that he had confessed because he did not want his wife to go to jail, there was no error. Furthermore, any minimal probative value of evidence of defendant's motive to recant was substantially outweighed by the possibility that its admission would create a substantial danger of undue prejudice. *People v. Alvarez* (1996, *Cal App 5th Dist*) 49 *Cal App 4th* 679, 56 *Cal Rptr 2d* 814, 1996 *Cal App LEXIS* 893, review denied (1996, *Cal*) 1996 *Cal LEXIS* 7010.

In a prosecution for felonious possession of cocaine base and misdemeanor possession of drug paraphernalia, where it was alleged that defendant had suffered three prior strikes in violation of the three strikes law (*Pen C* § 667, subs. (b)-(i)), defendant failed to meet his burden of establishing that one of his prior convictions had been dismissed pursuant to *Pen C* § 1385. The only evidence submitted on this issue was an ambiguous handwritten notation in the prior trial court's docket entries. No reporter's transcript of the earlier was available. More importantly, defendant failed to present as evidence the prior court's minute order reflecting the reasons for dismissal as required under *Pen C* § 1385. The docket entries preceding the ambiguous notation indicated that the dismissal was only with regard to a petition for revocation of probation based on a violation of probation. Therefore, the trial court properly denied defendant's motion to strike the prior conviction allegation. In any event, even if the prior conviction was invalid for purposes of the three strikes law, defendant had two other strikes which required his twenty-five-year-to-life sentence; hence, any purported error was harmless. *People v. Alvarez* (1996, *Cal App 5th Dist*) 49 *Cal App 4th* 679, 56 *Cal Rptr 2d* 814, 1996 *Cal App LEXIS* 893, review denied (1996, *Cal*) 1996 *Cal LEXIS* 7010.

A trier of fact is entitled to draw reasonable inferences from certified records offered to prove that a defendant suffered a prior conviction and served a prison term, for purposes of the three strikes law (*Pen C* § 667, subs. (b)-(i)). *People v. Williams* (1996, *Cal App 5th Dist*) 50 *Cal App 4th* 1405, 58 *Cal Rptr 2d* 517, 1996 *Cal App LEXIS* 1072.

In a court trial on whether defendant's prior conviction for assault with a deadly weapon (*Pen C* § 245, subd. (a)(1)) was a serious felony within the meaning of the three strikes law (*Pen C* § 667, subds. (b)-(i)), the trial court properly considered the transcript of defendant's plea to the assault offense in determining that it was a strike. The transcript was not inadmissible hearsay. The trial court relied on the factual basis for the plea, as stated by the prosecutor, with which defense counsel agreed. The factual basis included the fact that defendant personally used a metal pipe in committing the assault. Defendant entered a plea to assault with a deadly weapon, which is a serious felony, not assault by means of force likely to produce great bodily injury or simply assault as defined in *Pen C* § 245, subd. (a)(1). Thus, defendant made an adoptive admission of the truth of the facts underlying the plea on the prior conviction. *People v. Sohal* (1997, *Cal App 3d Dist*) 53 *Cal App 4th* 911, 62 *Cal Rptr 2d* 110, 1997 *Cal App LEXIS* 214, review denied (1997, Cal) 1997 *Cal LEXIS* 3894.

In a prosecution for the unlawful taking of a vehicle, the trial court erred when it found that an alleged prior conviction for assault with a deadly weapon (*Pen C* § 245, subd. (a)(1)) constituted a serious felony, and, therefore, a strike (*Pen C* § 667, subds. (a), (b)-(i)), since the only evidence of defendant's personal use of a dangerous or deadly weapon was the hearsay testimony of the investigating officer at the preliminary hearing. That testimony was inadmissible since it came within no exception to the hearsay rule. A court may look to the entire record of conviction to determine the substance of an alleged prior conviction, and a preliminary hearing transcript is part of that record. Nevertheless, although hearsay testimony of a qualifying police officer given at a preliminary hearing as provided by *Pen C* § 872, subd. (b), violates neither due process nor the confrontation clause, such testimony is inadmissible at a subsequent trial unless it comes within an exception to the hearsay rule (*Evid. Code*, § 1201). *People v. Best* (1997, *Cal App 3d Dist*) 56 *Cal App 4th* 41, 64 *Cal Rptr 2d* 809, 1997 *Cal App LEXIS* 525, review denied (1997, Cal) 1997 *Cal LEXIS* 6480.

Where (1) a jury convicted defendant of committing a lewd act upon a child under the age of 14, (2) the trial court found true the allegation that defendant had two prior convictions of *Penal C* § 288(a) and (b), and (3) the trial court sentenced defendant to life imprisonment with a minimum term of 25 years, plus a five-year enhancement for the prior convictions under *Penal C* § 667(a)(1), the trial court did not abuse its discretion under *Ev C* § 352 when, under *Ev C* §§ 1101(b) and 1108, it admitted evidence of prior, uncharged sexual acts with children under 14 years of age that had occurred between 13 and 19 years earlier. Section 1108 limits the application of § 1101 in criminal cases involving sexual offenses by authorizing admission of evidence of another sexual offense of the accused limited only by the trial judge's discretion to exclude the evidence under § 352. Section 1108 permits courts to admit such evidence on a common sense basis, without a precondition of finding a "non-character" purpose for which it is relevant, and permits rational assessment by juries of evidence so admitted. This includes consideration of the other sexual offenses as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense. *People v. Davis* (1999, *Cal App 4th Dist*) 71 *Cal App 4th* 1492, 84 *Cal Rptr 2d* 628, 1999 *Cal App LEXIS* 465, rehearing granted, unpublished (1999) 88 *Cal Rptr 2d* 586, 982 *P2d* 1258, 1999 *Cal LEXIS* 5690, review dismissed (2002, Cal) 127 *Cal Rptr 2d* 801, 58 *P3d* 930, 2002 *Cal LEXIS* 8137.

A jury found defendant guilty of assault with a deadly weapon and by means of force likely to produce great bodily injury (*Penal C* § 245(a)(1)), during the commission of which he personally inflicted great bodily injury under circumstances involving domestic violence (*Penal C* § 12022.7(d)), misdemeanor battery of a cohabitant (*Penal C* § 243(e)), and misdemeanor assault (*Penal C* § 240). Defendant was sentenced under the three strikes law, *Penal C* § 667(b)-(i), to 25 years to life in prison. The Court of Appeal held that the trial court erred when it allowed the prosecutor to present expert testimony regarding battered women's syndrome because this testimony was irrelevant in that no evidence showed the victim in this case was a battered woman, and the evidence was highly prejudicial. Although *Ev C* § 1107 permits expert testimony regarding battered women's syndrome when it is relevant, other than evidence of the present incident, there was no evidence indicating that defendant abused or behaved violently toward the victim. The expert's testimony regarding battered women's syndrome was irrelevant. Both the trial court and the prosecutor emphasized the expert's inflammatory testimony. On reviewing the whole record, it was reasonably probable

that the jury would have reached a result more favorable to defendant had the court excluded the expert's testimony. *People v. Gomez* (1999, Cal App 2d Dist) 72 Cal App 4th 405, 85 Cal Rptr 2d 101, 1999 Cal App LEXIS 499, review denied (1999) Supreme Court Minute 09-01-1999, 1999 Cal. LEXIS 6135, overruled in part *People v. Brown* (2004) 33 Cal 4th 892, 16 Cal Rptr 3d 447, 94 P3d 574, 2004 Cal LEXIS 7078.

Defendant's silence during sentencing on a prior conviction regarding victim's injuries was admissible as an adoptive admission of the truth of the sentencing court's description of those injuries; in view of this adoptive admission, the evidence was sufficient to support the sentencing court's determination that the prior conviction was a strike under *Three Strikes Law People v. Thoma* (2005, Cal App 2d Dist) 128 Cal App 4th 676, 27 Cal Rptr 3d 309, 2005 Cal App LEXIS 613, modified, rehearing denied (2005) 2005 Cal. App. LEXIS 762, review gr, depublished (2005) 32 Cal. Rptr. 3d 1, 116 P.3d 476, 2005 Cal. LEXIS 8229, 2005 Cal. Daily Op. Service 6652, 2005 D.A.R. 9112, transferred (2007, Cal) 55 Cal Rptr 3d 715, 153 P3d 282, 2007 Cal LEXIS 1543.

Circumstances surrounding an anonymous 911 report of a shot fired provided a reasonable suspicion to detain and pat search defendant because the caller provided detailed descriptions that were quickly confirmed, police were able to trace the call, and fear of retaliation explained the caller's desire for anonymity. Therefore, defendant's motion to suppress was properly denied in a trial for possession of a firearm under *Pen C § 12021(a)(1)*, with allegations of strikes under *Pen C §§ 667(b)-(i)*, 1170.12, a prior prison term under *Pen C § 667.5(b)*, and ineligibility for probation under *Pen C § 1203(e)(4)*. *People v. Lindsey* (2007, Cal App 1st Dist) 148 Cal App 4th 1390, 56 Cal Rptr 3d 619, 2007 Cal App LEXIS 449, modified, rehearing denied (2007, Cal App 1st Dist) 2007 Cal App LEXIS 601, review denied (2007, Cal) 2007 Cal LEXIS 7442.

Only admissions made prior to the acceptance of a defendant's guilty plea may be relied upon in determining whether a prior conviction qualifies as a strike within the meaning of *Pen C §§ 667(b)-(i)*, 1170.12. *People v. Thoma* (2007, Cal App 2d Dist) 150 Cal App 4th 1096, 58 Cal Rptr 3d 855, 2007 Cal App LEXIS 755, rehearing denied (2007, Cal App 2d Dist) 2007 Cal App LEXIS 1079.

14. Miscellaneous Particular Sentencing Determinations

The trial court properly enhanced defendant's sentence by five years for a prior conviction of a serious felony under *Pen C §§ 667 and 1192.7*, subd. (c), which lists "attempted murder" as a serious felony for enhancement purposes, based on defendant's prior conviction of assault with intent to commit murder (former *Pen C § 217*). The former crime of assault with intent to commit murder in fact constitutes attempted murder for purposes of sentence enhancements under the applicable statutes. The absence of the crime "assault with intent to commit murder" from the list of serious felonies in § 1192.7, subd. (c), is not significant. When the Legislature repealed former § 217, it did so in recognition that judicial decisions were holding that the aggravated assault crime was but one form of attempted murder, and its repeal assured that all attempted murders would be punished under the general intent statute. *People v. Koontz* (1984, Cal App 3d Dist) 162 Cal App 3d 491, 208 Cal Rptr 519, 1984 Cal App LEXIS 2755.

In a prosecution for robbery, the trial court properly sentenced defendant to a consecutive term on defendant's admission to a prior serious felony conviction within the meaning of *Pen C §§ 667, 1192.7*, subd. (c) (permitting five-year enhancement). *Pen C § 667*, subd. (b), precluding an enhancement under § 667 when the punishment imposed under other provisions of law would result in a longer term of imprisonment, did not apply since no other provisions of law provided for a longer term of imprisonment. *People v. Lobaugh* (1987, Cal App 3d Dist) 188 Cal App 3d 780, 233 Cal Rptr 683, 1987 Cal App LEXIS 1278.

On sentence, defendant's punishment was properly enhanced for both a prior conviction pursuant to *Pen C § 667*, and for escape while serving a prison term for that prior pursuant to *Pen C § 667.5* (enhancement for prior prison terms). Imposition of both enhancements was not double punishment (*Pen C § 654*), since the sentences for both priors were not a single term. Pursuant to *Pen C § 1170.1* (enhancements for felonies committed in prison), the term for a subsequent in-prison offense is not considered part of the aggregate sentence for the out-of-prison crime, but is a

distinct and separate sentence to which additional enhancements may properly be added. Also, the fact that the escape prior was nonviolent was of no import. *People v. Carr* (1988, Cal App 4th Dist) 204 Cal App 3d 774, 251 Cal Rptr 458, 1988 Cal App LEXIS 870, review denied (1988, Cal) 1988 Cal LEXIS 330.

A single previous prison commitment for two or more serious felony offenses may serve as a basis for sentence enhancements pursuant to *Pen C* § 667 (prior serious felonies), and *Pen C* § 667.5 (prior prison terms). Thus, in prosecution for first degree burglary, the trial court acted well within its discretion in sentencing defendant pursuant to both sections, where defendant had served a prior concurrent prison term for three separate robberies and one grand theft, and the enhancements were for one of the robberies and for the prison term imposed as to another of the robberies. Had the trial court imposed a § 667 and a § 667.5 enhancement based on a single conviction of one count of robbery, *Pen C* § 654 (acts punishable by different provisions), might have been violated. *People v. Medina* (1988, Cal App 5th Dist) 206 Cal App 3d 986, 254 Cal Rptr 89, 1988 Cal App LEXIS 1195.

In determining sentence enhancement under *Pen C* § 667, for a defendant's prior serious felony convictions, the trial court may look beyond the judgment to the entire record of the conviction. Thus, following a first degree burglary conviction (*Pen C* § 459), the trial court was not unreasonable in finding beyond a reasonable doubt that defendant's three convictions of second degree burglary predating the enactment of § 667 were each of a residence and therefore serious felonies for enhancement purposes, even though a residential allegation was not necessary to a charging information for second degree burglary under former *Pen C* § 460. Defendant pleaded guilty to the three residential burglaries charged, and the only rebutting evidence was defendant's assertion the burglaries were nonresidential, which the trial court rejected. *People v. Johnson* (1989, Cal App 1st Dist) 208 Cal App 3d 19, 256 Cal Rptr 16, 1989 Cal App LEXIS 170, review denied (1989, Cal) 1989 Cal LEXIS 1688.

A twenty-seven-year term of imprisonment did not constitute cruel and unusual punishment, where defendant pleaded guilty to residential burglary (*Pen C* § 459), for which he received a two-year term, and stipulated to five prior convictions for serious felonies (*Pen C* § 667, subd. (a)), for which he received five 5-year consecutive terms. *People v. Rivadeneira* (1991, Cal App 2d Dist) 232 Cal App 3d 1416, 284 Cal Rptr 75, 1991 Cal App LEXIS 875, review denied (1991, Cal) 1991 Cal LEXIS 5462.

In a prosecution in which defendant pleaded guilty to residential burglary (*Pen C* § 459) and stipulated to five prior convictions for serious felonies, the trial court did not have discretion to consider imposition of enhancements pursuant to *Pen C* § 667.5 (enhancement for prior prison term), in lieu of *Pen C* § 667, subd. (a). Defendant was charged with five priors under *Pen C* § 667, subd. (a), and the trial court found the allegations to be true. Imposition of a sentence pursuant to *Pen C* § 667, subd. (a), is mandatory and service of a prison term for a felony enhancement within the meaning of *Pen C* § 667.5, subd. (b), is explicitly not an alternative sentencing scheme or a lesser included enhancement of the five-year *Pen C* § 667, subd. (a), enhancement. *People v. Rivadeneira* (1991, Cal App 2d Dist) 232 Cal App 3d 1416, 284 Cal Rptr 75, 1991 Cal App LEXIS 875, review denied (1991, Cal) 1991 Cal LEXIS 5462.

In a prosecution in which defendant pleaded guilty to two counts of petty theft, with a prior conviction for the same offense elevating the current offenses to felonies (*Pen C* § 666), and admitted a prior residential burglary conviction, which triggered application of the "Three Strikes" statute (*Pen C* § 667, subd. (d)(1)), the trial court was required to sentence defendant consecutively for the current felonies, and had no discretion to do otherwise. The language of *Pen C* § 667, subd. (c)(6), is clear: a defendant who is in the "strike zone" by reason of a prior serious or violent felony conviction, and suffers two or more nonserious or violent felonies, must be sentenced consecutively for the new crimes. Although consecutive sentencing is not required if the current felonies arise out of the "same set of operative facts," that prong of the statute did not become applicable simply because the same prior theft conviction was used to elevate both current crimes to felonies. The "operative facts" prong relates to the facts underlying the current offenses, and defendant's current offenses were separate shoplifting incidents. *People v. Martin* (1995, Cal App 2d Dist) 32 Cal App 4th 656, 38 Cal Rptr 2d 776, 1995 Cal App LEXIS 150, review denied (1995, Cal) 1995 Cal LEXIS 3738, overruled *People v. Deloza* (1998) 18 Cal 4th 585, 76 Cal Rptr 2d 255, 957 P2d 945, 1998 Cal LEXIS 4037.

In a prosecution in which defendant pleaded guilty to two counts of petty theft, with a prior conviction for the same offense elevating the current offenses to felonies (*Pen C § 666*), and admitted a prior residential burglary conviction, which triggered application of the "Three Strikes" statute (*Pen C § 667*, subd. (d)(1)), the trial court erred in failing to double the term imposed for the subordinate count. If the Legislature had intended to bar doubling the subordinate term, it would have said so by limiting the doubling effect of *Pen C § 667*, subd. (e)(1), to the "principal term." Although the law does not allow the doubling of an enhancement, *Pen C § 667*, subd. (e)(1), does not provide for any kind of "added term," but rather defines the term for the crime itself. *Pen C § 1170.1*, subd. (a), lists *Pen C § 667* (aggregate and consecutive terms for multiple convictions), as an enhancement law, but with the passage of the "Three Strikes" law in 1994, that reference must be taken to be only to *Pen C § 667*, subd. (a). As defendant's plea was premised on a sentence that did not double the subordinate term, he was entitled to withdraw it and have his earlier not guilty plea reinstated. *People v. Martin* (1995, Cal App 2d Dist) 32 Cal App 4th 656, 38 Cal Rptr 2d 776, 1995 Cal App LEXIS 150, review denied (1995, Cal) 1995 Cal LEXIS 3738, overruled *People v. Deloza* (1998) 18 Cal 4th 585, 76 Cal Rptr 2d 255, 957 P2d 945, 1998 Cal LEXIS 4037.

The appropriate sentence for defendant, who had been convicted of a felony with a prior serious felony conviction within the meaning of *Pen C § 667*, subs. (a), (b)-(i), was a five-year enhancement added to the doubling of the sentence for the current felony conviction, not including enhancements for prior convictions. Under *Pen C § 667*, subd. (e)(1), prescribing that the "term otherwise provided as punishment for the current felony conviction" shall be doubled, the "term" does not include enhancements for prior convictions. The statute consistently distinguishes between the current felony conviction and prior felony convictions. Since there were no applicable offense-related enhancements, the base term was also the principal term, which should have been doubled, with the five-year enhancement imposed consecutively. *People v. Ramirez* (1995, Cal App 2d Dist) 33 Cal App 4th 559, 39 Cal Rptr 2d 374, 1995 Cal App LEXIS 282, review denied (1995, Cal) 1995 Cal LEXIS 3739.

A defendant convicted of a felony, who admitted he had suffered an earlier serious felony conviction that qualified as a "strike" under the "three strikes" statute (*Pen C § 667*, subs. (d), (e)(1)) and had served a prior prison term (*Pen C § 667.5*, subd. (b)), was required to serve 80 percent of "the total term of imprisonment imposed" (*Pen C § 667*, subd. (c)(5)), including the one-year term for the prior prison sentence, a nonviolent and nonserious prior conviction enhancement. By its plain language, *Pen C § 667*, subd. (c)(5), pertains only to repeat offenders, and requires that prison credits not be awarded in an amount exceeding "one-fifth of the total term of imprisonment imposed." The language "total term of imprisonment imposed" means exactly what it says, i.e., that the total or entire term of imprisonment, or the aggregate term imposed, which includes any enhancements, whether mentioned in *Pen C § 667*, or not, is subject to the new credits limitations for persons who fall under the "three strikes" law. The application of the statute did not violate due process or constitute an ex post facto violation; the credit limit statute was in full force and effect when defendant committed the present felony of which he was convicted. *People v. Brady* (1995, Cal App 4th Dist) 34 Cal App 4th 65, 40 Cal Rptr 2d 207, 1995 Cal App LEXIS 362, review denied (1995, Cal) 1995 Cal LEXIS 4478.

A defendant found guilty of two counts of robbery and who admitted a prior serious felony was properly sentenced under the three strikes law by the imposition of a five-year enhancement for a prior serious felony conviction (*Pen C § 667*, subd. (a)(1)), in addition to the doubling of the base term under *Pen C § 667*, subd. (e)(1). The language of *Pen C § 667*, subd. (e)(1), clearly contemplates the doubling of the base term and imposition of all applicable enhancements, which comports with legislative intent to ensure longer prison sentences and greater punishment for recidivists. Defendant's sentence was enhanced once, not twice, since doubling of the base term is not an enhancement. Language in *Pen C § 667*, subd. (e)(2)(A)(iii), addressing the sentencing of an individual with two prior qualifying convictions, was not applicable to defendant. The fact that limitations on custody credit for those sentenced under the three strikes law (*Pen C § 667*, subd. (c)(5)) might result in increased punishment for recidivists had no effect on the propriety of defendant's sentence. The statement in *Pen C § 667*, subd. (a)(2), that "This subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment," did not apply to defendant's situation. Any ambiguity could be attributed to inartful drafting and did not undermine the statute's overall

purpose to lengthen sentences. Nor did the fact that defendant's prior conviction was being utilized twice violate the prohibition against multiple punishment in *Pen C § 654*, which does not preclude the dual use of facts. *People v. Anderson* (1995, Cal App 1st Dist) 35 Cal App 4th 587, 41 Cal Rptr 2d 474, 1995 Cal App LEXIS 504, review denied (1995, Cal) 1995 Cal LEXIS 5175.

The three strikes law clearly mandates that each count of a multiple count conviction will be sentenced independently under *Pen C § 667*, subd. (e). Thus, a defendant's subordinate term for his second count of robbery was correctly doubled. *People v. Anderson* (1995, Cal App 1st Dist) 35 Cal App 4th 587, 41 Cal Rptr 2d 474, 1995 Cal App LEXIS 504, review denied (1995, Cal) 1995 Cal LEXIS 5175.

In a prosecution in which defendant, who had a prior burglary conviction, pled guilty to four counts of forgery (*Pen C § 470*), the trial court did not err in doubling defendant's subordinate terms pursuant to *Pen C § 667*, subd. (e)(1), which provides that, "in addition to any other enhancement...that may apply,...[i]f a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction." Although the provision uses the phrase "in addition to any other enhancement," it actually does not set forth an enhancement based on a prior conviction that can be added only once to the current term (*Pen C § 1170.1*), but rather defines a new term for the crime itself that replaces the term that would apply to a defendant who does not have a prior serious or violent felony conviction. Even if the "first strike" were construed as an enhancement, *Pen C § 667*, applies "[n]otwithstanding any other law" (*Pen C § 667*, subd. (c)), which removed any limitation on applying it only once. Finally, the Legislature's failure to use the phrase "each felony conviction" in *Pen C § 667*, subd. (e)(1), when it did use that phrase in *Pen C § 667*, subd. (e)(2)(A)(i), in dealing with the "third strike" rule, does not indicate that the Legislature intended to bar doubling the subordinate term. If it had so intended, it would have said so by limiting the doubling effect of *Pen C § 667*, subd. (e)(1), to the "principal term." *People v. McKee* (1995, Cal App 2d Dist) 36 Cal App 4th 540, 42 Cal Rptr 2d 707, 1995 Cal App LEXIS 616, review denied (1995, Cal) 1995 Cal LEXIS 6424, overruled *People v. Deloza* (1998) 18 Cal 4th 585, 76 Cal Rptr 2d 255, 957 P2d 945, 1998 Cal LEXIS 4037.

In a prosecution in which defendant pleaded guilty to possession of a firearm by a felon and admitted that he had suffered a prior felony conviction and served a prior prison term, the trial court, in sentencing defendant under the three strikes law (*Pen C § 667*, subds. (b)-(i)), did not err in using the single prior conviction both to prove the felon-with-a-firearm charge and to bar probation under *Pen C § 667*, subd. (c)(2), but did err in refusing to sentence defendant to double the base term pursuant to *Pen C § 667*, subd. (e)(1). *Pen C § 667*, subds. (b)-(i), are not enhancements, but establish a separate sentencing scheme for recidivists, and thus case law indicating that the same prior conviction cannot be used both to establish the prior felony conviction in the offense of felon with a firearm and to enhance the sentence was inapplicable. Further, there is no prohibition against using the same fact both to establish an element of the offense and to deny probation. *People v. Nobleton* (1995, Cal App 2d Dist) 38 Cal App 4th 76, 44 Cal Rptr 2d 611, 1995 Cal App LEXIS 877, review denied (1995, Cal) 1995 Cal LEXIS 7331.

In a prosecution for carjacking, the trial court properly sentenced defendant to the base term for carjacking doubled, excluding the enhancement for personal firearm use (*Pen C § 12022.5*), since the court found true a prior serious felony conviction, a second strike (*Pen C § 667*, subd. (b)-(i)). The terms to be doubled for a second strike defendant do not include enhancements, including the offense-related enhancements, such as for the personal use of a firearm (*Pen C § 12022.5*). *People v. Dominguez* (1995, Cal App 2d Dist) 38 Cal App 4th 410, 45 Cal Rptr 2d 153, 1995 Cal App LEXIS 910.

In sentencing defendant, a violent recidivist who was convicted of 19 offenses arising from his sexually assaulting 3 women, to 15 indeterminate terms of 25 years to life plus a determinate term of 53 years in prison under the three strikes law (*Pen C § 667*, subd. (b)), the trial court did not err in using the same two prior serious felony convictions both as qualifying priors or strikes to bring him under the statute and to impose five-year enhancements under *Pen C § 667*, subd. (a). Such dual use is prohibited by neither *Pen C § 667*, subd. (a)(2), nor *Pen C § 654* (prohibition against double punishment). Although *Pen C § 667*, subd. (a)(2), provides that "this subdivision shall not be applied when the

punishment imposed under other provisions of law would result in a longer term of imprisonment," the enhancement of *Pen C § 667*, subd. (a), applied even though defendant's sentence under the three strikes law resulted in a longer imprisonment term, because the "other provisions of law" at issue—the three strikes law—includes enhancements in calculating the term imposed. Moreover, the Legislature intended that a defendant's sentence under the three strikes law should include a doubled term or a life term, as appropriate under *Pen C § 667*, subd. (e), plus an enhancement under *Pen C § 667*, subd. (a), for each prior serious felony conviction. *People v. Cartwright* (1995, Cal App 3d Dist) 39 Cal App 4th 1123, 46 Cal Rptr 2d 351, 1995 Cal App LEXIS 1054, review denied (1996, Cal) 1996 Cal LEXIS 1016.

In a criminal prosecution of defendant, a violent recidivist who was convicted of 19 offenses arising from his sexual assaults on 3 women, the trial court did not err in imposing consecutive sentences under *Pen C § 667*, subd. (c)(6), which makes consecutive sentencing 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. Even though all of defendant's offenses were committed on only two occasions, consecutive sentences were permissible at the trial court's discretion. First, it is presumed that the trial court properly performed its duty (*Evid. Code, § 664*). Second, although the prosecution's sentencing statement suggested that consecutive sentences might not have been required under *Pen C § 667*, subd. (c)(6), it argued that they were appropriate. Third, the trial court took care to state reasons for its choice of consecutive sentences, and nothing indicated that it misunderstood the discretionary choices before it. Further, defendant neither challenged the reasons the trial court gave for consecutive sentences nor otherwise showed that they were improper. *People v. Cartwright* (1995, Cal App 3d Dist) 39 Cal App 4th 1123, 46 Cal Rptr 2d 351, 1995 Cal App LEXIS 1054, review denied (1996, Cal) 1996 Cal LEXIS 1016.

In sentencing defendant, a violent recidivist who was convicted of 19 offenses arising from his sexual assaults on 3 women, to 15 indeterminate terms of 25 years to life plus a determinate term of 53 years in prison under the three strikes law (*Pen C § 667*, subd. (b)), the trial court properly calculated his sentence by applying the minimum sentence alternatives of *Pen C § 667*, subd. (e)(2)(A), to each count separately rather than to his entire sentence as a whole. In construing a similar habitual criminal statute (*Pen C § 667.7*), the California Supreme Court held that the language of the statute's second alternative for the minimum sentence as to a particular count, which is identical in wording to the third alternative under *Pen C § 667*, subd. (e)(2)(A), makes clear that the Legislature intended that the minimum sentence under *Pen C § 667.7*, be calculated with reference to the entire sentence, including any applicable enhancements, that a defendant would face if he or she were not being sentenced under *Pen C § 667.7*, so as to ensure that a defendant who qualifies for habitual offender sentencing does not receive treatment more lenient than that accorded a nonhabitual offender who commits the same offense. *People v. Cartwright* (1995, Cal App 3d Dist) 39 Cal App 4th 1123, 46 Cal Rptr 2d 351, 1995 Cal App LEXIS 1054, review denied (1996, Cal) 1996 Cal LEXIS 1016.

In a burglary prosecution in which the trial court sentenced defendant under the three strikes law (*Pen C § 667*, subds. (b)-(i)) by doubling the base term due to a prior burglary conviction (*Pen C § 667*, subd. (e)(1)), the trial court erred in refusing to impose an additional five-year enhancement, even though the doubled base term and the enhancement would have been based on the same prior conviction. Doubling of the base term is not an enhancement, but a result dictated by a parallel sentencing scheme for specifically described recidivists. Thus, in doubling the base term and imposing a five-year enhancement, defendant would be receiving only one enhancement. Moreover, *Pen C § 654*, does not preclude use of the same prior conviction to double the base term and impose a five-year enhancement, since that statute does not apply to the dual use of facts. Rather, it prohibits multiple punishment for the same act or omission. Both *Pen C § 666*, and *Pen C § 667.5*, which increase punishment for prior convictions, apply to facts, not acts; they relate to the status of the recidivist offender engaging in criminal conduct, not the conduct itself. *Pen C § 654*, does not apply to enhancements. Although a defendant's status, which is based on prior convictions, may call for increased punishment, it is the conduct underlying the present offense, rather than the status, that is being punished. *People v. Murillo* (1995, Cal App 6th Dist) 39 Cal App 4th 1298, 46 Cal Rptr 2d 403, 1995 Cal App LEXIS 1069, review denied (1996, Cal) 1996 Cal LEXIS 1029.

In a prosecution for first degree residential robbery and false imprisonment by violence, the trial court properly imposed two 5-year enhancements under *Pen C § 667*, subd. (a), based on a finding that defendant had two prior serious

felony convictions, in addition to a twenty-five-years-to-life sentence under the three strikes law (*Pen C § 667*, subs. (b)-(i)), based on the same prior convictions. Although *Pen C § 667*, subd. (a)(2), provides that "this subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment," it is in conflict with *Pen C § 667*, subd. (e), which provides that the sentencing provisions of the three strikes law are in addition to any other enhancement or punishment provisions which may apply. The legislative history of the three strikes law indicates that the Legislature intended the reference in *Pen C § 667*, subd. (e), to "other enhancement or punishment provisions" to include the enhancement provisions in *Pen C § 667*, subd. (a). Further, there is nothing in the language or voter intent materials for Prop. 184, which adopted *Pen C § 1170.12* (aggregate and consecutive terms for multiple convictions), to support the contention that five-year prior conviction enhancements cannot be imposed in addition to a twenty-five-years-to-life habitual offender sentence. Moreover, the voter pamphlet stated that Prop. 184 reaffirmed the earlier amendments to *Pen C § 667*, which allow for the imposition of enhancements in addition to a sentence of 25 years to life. *People v. Turner* (1995, Cal App 2d Dist) 40 Cal App 4th 733, 47 Cal Rptr 2d 42, 1995 Cal App LEXIS 1140, review denied (1996, Cal) 1996 Cal LEXIS 1308, overruled *People v. Deloza* (1998) 18 Cal 4th 585, 76 Cal Rptr 2d 255, 957 P2d 945, 1998 Cal LEXIS 4037.

The dual use of the same prior felony convictions to impose both a life sentence under *Pen C § 667*, subs. (b)-(i) (three strikes law), and five-year enhancements under *Pen C § 667*, subd. (a), does not violate *Pen C § 654* (prohibition against double punishment). *Pen C § 654*, is not violated by imposing the double term for a single prior conviction, since the Legislature created an express exception to the statute. Similarly, it is not violated by imposing the life term for one or more prior convictions; the statute is inapplicable because it prohibits double punishment for the same act or omission, and a prior conviction establishes a defendant's status as a recidivist and does not involve an act within the meaning of the statute. *People v. Turner* (1995, Cal App 2d Dist) 40 Cal App 4th 733, 47 Cal Rptr 2d 42, 1995 Cal App LEXIS 1140, review denied (1996, Cal) 1996 Cal LEXIS 1308, overruled *People v. Deloza* (1998) 18 Cal 4th 585, 76 Cal Rptr 2d 255, 957 P2d 945, 1998 Cal LEXIS 4037.

In sentencing defendant, who had been convicted of the attempted murders of three victims on a single occasion and of being an ex-felon in possession of a firearm, and who admitted a single prior serious felony conviction, the trial court erred in imposing three life terms to be served concurrently, rather than consecutively. *Pen C § 667*, subd. (c)(6), of the three strikes law (*Pen C § 667*, subs. (b)-(i)), mandates consecutive sentencing for felony counts "not committed on the same occasion, and not arising from the same set of operative facts." The language of *Pen C § 667*, subd. (c)(7), applying its provisions to serious and violent felonies "as described in paragraph (6)," incorporates the "same occasion or set of operative facts" language. This language applies the principles of *Pen C § 654* (proscription against multiple punishment for single act), to multiple current crimes. The proscription against multiple punishment is not applicable to crimes of violence against multiple victims. Thus, where a defendant has been convicted of crimes of violence against multiple victims and an allegation of a prior felony conviction within the meaning of *Pen C § 667*, subs. (b)-(i), has been found to be true, consecutive sentencing for the violent crimes is mandatory pursuant to *Pen C § 667*, subd. (c). *People v. Carter* (1995, Cal App 2d Dist) 41 Cal App 4th 683, 48 Cal Rptr 2d 726, 1995 Cal App LEXIS 1264, review denied (1996, Cal) 1996 Cal LEXIS 1671, cert den (1996) 519 US 845, 136 L Ed 2d 79, 117 S Ct 130, 1996 US LEXIS 5157, overruled *People v. Deloza* (1998) 18 Cal 4th 585, 76 Cal Rptr 2d 255, 957 P2d 945, 1998 Cal LEXIS 4037.

The trial court did not err in sentencing defendant to nineteen years in prison, consisting of the base term for residential burglary, plus six years pursuant to *Pen C § 667*, subd. (e)(1) (if defendant has prior serious or violent felony, "in addition to any other enhancement or punishment provisions which may apply," base term is doubled), plus five years for a prior residential burglary under *Pen C § 667*, subd. (a)(1) (five-year enhancement when current charge is serious felony and defendant previously convicted of serious felony), plus two 1-year terms under *Pen C § 667.5*, subd. (b) (one year for each prior prison term served for felony). The rule that *Pen C § 667* (three strikes, habitual criminal sentence enhancement) does not prohibit the dual use of a prior felony both as a strike and as an enhancement, applied despite the fact that defendant's sentence otherwise would have been greater under the three strikes law than under preexisting law. Notwithstanding *Pen C § 667*, subd. (a)(2) (five-year enhancement inapplicable when punishment imposed under other provisions of law would result in longer term of imprisonment), the Legislature did not establish

any distinction between defendants whose sentences would be greater under the three strikes law than under preexisting law, and those whose sentences would be the same or less. *People v. Nelson* (1996, Cal App 2d Dist) 42 Cal App 4th 131, 49 Cal Rptr 2d 361, 1996 Cal App LEXIS 75, review denied (1996, Cal) 1996 Cal LEXIS 2157.

The trial court did not err in sentencing defendant to nineteen years in prison, consisting of the base term for residential burglary, plus six years pursuant to *Pen C* § 667, subd. (e)(1) (if defendant has prior serious or violent felony, "in addition to any other enhancement or punishment provisions which may apply," base term is doubled), plus five years for a prior residential burglary under *Pen C* § 667, subd. (a)(1) (five-year enhancement when current charge is serious felony and defendant previously convicted of serious felony), plus two 1-year terms under *Pen C* § 667.5, subd. (b) (one year for each prior prison term served for felony). Using a prior serious felony both as a qualifying strike and as a five-year enhancement did not violate the prohibition against the dual use of enhancements because *Pen C* § 667, subd. (e)(1), is not an enhancement. Instead, it defines the term for the crime itself, supplanting the term that would apply but for the prior serious or violent felony. The legislative determination, that under these circumstances the base term is doubled, does not constitute an enhancement. Instead, it is the articulation of a parallel sentencing scheme for specifically described recidivists. Although the application of *Pen C* § 654 (acts not punishable under more than one code provision), to the dual use of enhancements was debatable, it was inapplicable because there was no dual use of an enhancement. *People v. Nelson* (1996, Cal App 2d Dist) 42 Cal App 4th 131, 49 Cal Rptr 2d 361, 1996 Cal App LEXIS 75, review denied (1996, Cal) 1996 Cal LEXIS 2157.

Following defendant's conviction for four counts of forcible rape, several other related sex and false imprisonment offenses, and dissuading a witness, the trial court erred in determining that since defendant's prior 1982 Texas attempted murder conviction had been used to qualify defendant for treatment under the three strikes law (*Pen C* § 667, subds. (b)-(i)), imposition of an additional five-year enhancement term for the prior serious felony pursuant to *Pen C* § 667, subd. (a)(1) would constitute a dual use of that prior. Hence, the court imposed an unauthorized sentence. A trial court is required to impose the higher sentence of the three strikes law in addition to any enhancement upon conviction of a serious felony in the current case, and proof of a prior serious felony conviction; the trial court has no discretion and imposition of both sentences is mandatory. *People v. Purata* (1996, Cal App 4th Dist) 42 Cal App 4th 489, 49 Cal Rptr 2d 664, 1996 Cal App LEXIS 88, review denied (1996, Cal) 1996 Cal LEXIS 2397.

In a prosecution for three counts of residential burglary in three incidents (*Pen C* §§ 459, 460), where proof of allegations of two prior serious or violent felony convictions mandated that defendant be sentenced on a third strike according to the sentencing provisions of the three strikes law (*Pen C* § 667, subds. (b)-(i)), the trial court erred in sentencing defendant to only one 25-year-to-life term. Although the three current burglaries were committed on the same day, within a block or two from each other, and within a short time span of a few hours, they were not committed on the "same occasion" (*Pen C* § 667, subd. (c)(6)), so as to exempt them from the mandatory consecutive sentencing provisions of the three strikes law, since each was perpetrated on a different victim, at different times, in separate residences. Separate punishment for these crimes was entirely appropriate under *Pen C* § 654, and consistent with the legislative intent to ensure greater punishment for recidivist felons. Thus, three consecutive indeterminate life terms should have been imposed, the seventy-five-year determinate term to be served prior to the life terms mandated by the three strikes law. *People v. Samuels* (1996, Cal App 2d Dist) 42 Cal App 4th 1022, 50 Cal Rptr 2d 157, 1996 Cal App LEXIS 136, review denied (1996, Cal) 1996 Cal LEXIS 2503, overruled *People v. Deloza* (1998) 18 Cal 4th 585, 76 Cal Rptr 2d 255, 957 P2d 945, 1998 Cal LEXIS 4037.

In a prosecution for three counts of residential burglary (*Pen C* §§ 459, 460), the trial court had no discretion to suspend or waive imposition of two 5-year sentence enhancements for two prior felony convictions pursuant to *Pen C* § 667, subd. (a), which also subjected defendant to the sentencing provisions of the three strikes law (*Pen C* § 667, subds. (b)-(i)). To hold otherwise with a three strikes defendant would improperly construe the three strikes law in a fashion contrary to the law's stated intent, which is to ensure greater punishment for recidivist felons. Thus, the trial court erred in striking the two additional five-year enhancements. *People v. Samuels* (1996, Cal App 2d Dist) 42 Cal App 4th 1022, 50 Cal Rptr 2d 157, 1996 Cal App LEXIS 136, review denied (1996, Cal) 1996 Cal LEXIS 2503, overruled *People v. Deloza* (1998) 18 Cal 4th 585, 76 Cal Rptr 2d 255, 957 P2d 945, 1998 Cal LEXIS 4037.

In a prosecution for two counts of robbery, in which defendant was sentenced pursuant to the three strikes law (*Pen C* § 667, subds. (b)-(i)), the trial court's sentence of one year, four months for the second count of robbery (one-third of the three-year midterm for the robbery, plus one-third of the one-year enhancement sentence for firearm use pursuant to *Pen C* § 12022, subd (a)(1)) was a legally unauthorized sentence. Under the three strikes law, the court had no jurisdiction other than to impose a 26-year-to-life sentence (including the full year enhancement sentence) as to the first count of robbery (*Pen C* § 667, subd. (e)(2)(A)(ii)). Furthermore, consecutive sentencing was mandated by *Pen C* § 667, subd. (e)(2)(B), so long as a consecutive sentence could be imposed. Consecutive sentencing here would have been lawful as there were two different robbery victims. As a result, the 26-year-to-life sentence had to run consecutively to the 36-year-to-life sentence (including enhancements) imposed for the first count of robbery. *People v. Miles* (1996, *Cal App 2d Dist*) 43 *Cal App 4th* 364, 51 *Cal Rptr 2d* 87, 1996 *Cal App LEXIS* 204, review denied (1996, Cal) 1996 *Cal LEXIS* 2793.

In sentencing proceedings under the three strikes law (*Pen C* § 667, subds. (b)-(i)), the trial court committed reversible error in failing to obtain valid waivers of defendant's constitutional rights to confront witnesses and against self-incrimination before accepting his admissions of three prior convictions. Although defendant was admonished as to his right to a jury or court trial and waived that right, he was not admonished as to his rights to confrontation and against self-incrimination explicitly, or in terms amounting to a reasonable substitute for an explicit admonition. Defendant therefore did not make a valid waiver of his constitutional rights. Neither the prosecutor nor the court gave defendant any explanation of what would occur at a trial on the prior convictions; thus there was no advice from which defendant could infer he had the right to confront witnesses in such a trial even if he had observed he had that right in the trial-in-chief. Defendant's crime did not show sophistication, and nothing in his prior exposure to the criminal justice system suggested he had notice of his constitutional rights. *People v. Garcia* (1996, *Cal App 2d Dist*) 45 *Cal App 4th* 1242, 53 *Cal Rptr 2d* 256, 1996 *Cal App LEXIS* 486, overruled in part *People v. Mosby* (2004) 33 *Cal 4th* 353, 15 *Cal Rptr 3d* 262, 92 *P3d* 841, 2004 *Cal LEXIS* 6234.

The trial court, in sentencing a three strikes defendant, erred in failing to impose three 5-year enhancements for defendant's three prior serious felony convictions (*Pen C* § 667, subd. (a)(1)). Where a person has been convicted of a serious felony in the current case, and it has been alleged and proved the person suffered a prior serious felony conviction within the meaning of § 667, subd. (a)(1), the trial court must impose a consecutive five-year term for each such prior conviction that has been brought and tried separately. The trial court has no discretion in the matter; the imposition of such a term is mandatory. Imposition of a five-year enhancement for a prior conviction brought and tried with other priors that were used to qualify as strikes does not constitute a prohibited dual use of such a conviction. *People v. Ayon* (1996, *Cal App 4th Dist*) 46 *Cal App 4th* 385, 53 *Cal Rptr 2d* 853, 1996 *Cal App LEXIS* 555, overruled *People v. Deloza* (1998) 18 *Cal 4th* 585, 76 *Cal Rptr 2d* 255, 957 *P2d* 945, 1998 *Cal LEXIS* 4037.

The trial court erred in dismissing a misdemeanor count for possession of a smoking device (*Health & Saf. Code*, § 11364), together with five prior felony convictions alleged pursuant to *Pen C* § 667.5, subd. (b), in exchange for defendant's plea of guilty to felony possession of cocaine (*Health & Saf. Code*, § 11350, subd. (a)), with an "agreed disposition" of three years in prison (the high term for the felony). Such an arrangement constituted an illegal plea bargain under *Pen C* § 667, subd. (g). The record did not show that defendant entered a plea to the misdemeanor count or admitted the allegations of the prior convictions. Moreover, there was no indication that the court took into account the circumstances of the current offenses, the nature of defendant's past criminal history, or any other individualized consideration. *People v. Allan* (1996, *Cal App 2d Dist*) 49 *Cal App 4th* 1507, 57 *Cal Rptr 2d* 269, 1996 *Cal App LEXIS* 956.

In a prosecution for burglary and other offenses, the 20 percent conduct credit limitation of the three strikes law (*Pen C* § 667, subd. (c)(5)) applied only to that portion of defendant's sentence imposed for the offense that he committed after the three strikes law became effective, and could not be imposed on sentences for offenses committed before the law's enactment. Because the language of *Pen C* § 667, subd. (c)(5), is ambiguous in this regard, the interpretation most favorable to the defendant must be adopted. Even though the credit limitation is properly imposed for enhancement terms, which are part of the total term of imprisonment, an enhancement is totally dependent on

conviction for the underlying, postenactment, substantive charge. By contrast, substantive offenses that preceded enactment are discrete, independent charges. Furthermore, the Department of Correction is not applying the credit limitation to current substantive offenses committed before the three strikes law; the department's application of statutory language, although not controlling, is entitled to respect as a significant factor to be considered in ascertaining the meaning of a statute. *People v. Williams* (1996, Cal App 6th Dist) 49 Cal App 4th 1632, 57 Cal Rptr 2d 448, 1996 Cal App LEXIS 972, review denied (1997, Cal) 1997 Cal LEXIS 615.

In sentencing defendant, who was convicted of burglary and forcible rape, the trial court did not err in imposing, rather than staying, a four-year term for the burglary to run concurrent with the term for the rape. The fact that defendant committed the rape after he burglarized his victim's house did not mean that he entered the house with only one objective. Defendant's intent and objective were factual questions for the trial court, and the finding of separate objectives was supported by the record. The People's theory was that defendant entered the apartment with the intent to commit an assault by means of force likely to produce great injury, and the jury was so instructed. The prosecutor argued to the jury that at the time defendant broke down the victim's door, he was carrying out his threat to come over and "kick her ass." It was only after he hit and kicked her several times over a half-hour period, and after he watched her feed her child, that he decided to and did rape her. *People v. Ervin* (1996, Cal App 2d Dist) 50 Cal App 4th 259, 57 Cal Rptr 2d 728, 1996 Cal App LEXIS 1001, review denied (1997, Cal) 1997 Cal LEXIS 679, overruled *People v. Fuhrman* (1997) 16 Cal 4th 930, 67 Cal Rptr 2d 1, 941 P2d 1189, 1997 Cal LEXIS 4982

In a prosecution for possession of methamphetamine (*Health & Saf. Code*, § 11377, subd. (a)), where defendant, by virtue of his admitted four prior serious felony convictions, was subject to the sentencing provisions of the three strikes law (*Pen C* § 667, subds. (b)-(i)), the trial court did not abuse its discretion at sentencing when it reduced defendant's current offense to a misdemeanor pursuant to *Pen C* § 17, subd. (b), and placed defendant on probation. The standard in reviewing such an exercise of discretion is extremely deferential and restrained. Notwithstanding defendant's recidivist status (four residential burglaries which he apparently committed to support a drug habit), the balance of other factors warranted reduction of the charge: defendant cooperated with law enforcement, his burglary priors were relatively old and did not involve violence, and the trial court observed his demeanor during the course of the trial, including his testimony he had been caring for a disabled friend when he was stopped and the drugs were discovered. Furthermore, the record did not evidence a purposeful intent to evade a three strikes sentence solely because of personal antipathy to the law on the part of the trial court. *People v. Superior Court (Alvarez)* (1997) 14 Cal 4th 968, 60 Cal Rptr 2d 93, 928 P2d 1171, 1997 Cal LEXIS 7, rehearing denied (1997, Cal) 1997 Cal LEXIS 1229.

A four-year prison sentence, which was imposed as the result of the revocation of probation that had been granted for an offense committed prior to the electorate's enactment of three strikes law (*Pen C* § 1170.12), was properly made consecutive to an indeterminate three strikes law sentence that had been imposed for a subsequent felony committed after the enactment of the three strikes law. *Pen C* § 1170.12, subd. (c)(2)(B), provides that a third strike term "shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law." Although this language is imprecise, the most reasonable interpretation is that the voters intended for the third strike term to be served consecutively to any other for which a consecutive term was legally permissible, without regard to the chronology of imposition and execution of judgment and sentence. Further, the consecutive sentence did not implicate constitutional ex post facto principles, since the three strikes law had no effect on the punishment for defendant's original offense. Defendant had violated the terms of probation, and the trial court chose to impose the sentence it had previously suspended. Nothing in the three strikes law compelled the trial court to take any action regarding that earlier offense. *People v. Helms* (1997) 15 Cal 4th 608, 63 Cal Rptr 2d 620, 936 P2d 1230, 1997 Cal LEXIS 2310.

In sentencing defendant, who was convicted of two counts of robbery and two counts of attempted robbery arising from a single incident in which defendant pointed a gun at four victims and demanded money, the trial court had discretion to sentence defendant to four consecutive terms of twenty-five years to life under *Pen C* § 667, subd. (e)(2)(A)(ii), of the three strikes law. The imposition of consecutive sentences is not mandatory, but merely discretionary, when a defendant has suffered two or more prior felony convictions within the meaning of *Pen C* § 667, subd. (d), and is convicted of multiple felony convictions based on a single act of violence against multiple victims.

Consecutive sentences are mandatory under *Pen C § 667*, subd. (c)(6), only if multiple current felonies are not committed on the same occasion or do not arise from the same set of facts. Similarly, consecutive sentences are mandatory under *Pen C § 667*, subd. (c)(7), only if any two current felony convictions are serious or violent, were not committed on the same occasion, and do not arise from the same set of operative facts. Since consecutive sentences are not mandatory when the offenses are committed on the same occasion, the court retains its discretion to impose either consecutive or concurrent terms. Further, *Pen C § 667*, subd. (e)(2)(B), does not control to mandate consecutive sentences in these cases, since that subdivision's requirement that indeterminate sentences be imposed consecutively to other terms required by law refers to other terms that apply to one felony conviction, such as enhancements, and not to terms for other felony convictions. *People v. Hendrix (1997) 16 Cal 4th 508, 66 Cal Rptr 2d 431, 941 P2d 64, 1997 Cal LEXIS 4418*.

In sentencing a defendant convicted of a serious felony with four prior serious felony convictions under the three strikes law (*Pen C § 1170.12*, subd. (c)(2)(A)(iii)) to an indeterminate term of twenty-six years to life (six years for the current offense and five years for each prior conviction), the trial court erred in failing to impose a separate twenty-year determinate term under *Pen C § 667*, subd. (a), for defendant's prior serious felony convictions, even though those priors were also used to calculate the indeterminate life term. *Pen C § 667*, subd. (a), mandates a five-year enhancement for each prior serious felony conviction brought and tried separately. *Pen C § 1170.12*, subd. (c) (sentencing scheme applies "in addition to any other enhancements or punishment provisions which may apply") and (c)(2)(B) (requiring indeterminate term to be to be "served consecutive to any other term of imprisonment"), establish that a separate determinate term for enhancements is required for all three sentencing options available under *Pen C § 1170.12*, subd. (c)(2)(A). The fact that option (iii) requires the trial court to utilize enhancements to determine the length of the indeterminate life term does not mean that there are then no remaining "enhancement or punishment provisions" (*Pen C § 1170.12*, subd. (c)) to add to the minimum term. Under option (iii), enhancements are used to calculate the minimum indeterminate life term, not as an additional term of imprisonment added to the base term. Once the minimum term is calculated, other enhancement or punishment provisions, such as *Pen C § 667*, subd. (a), enhancements, are added as a separate determinate term. *People v. Dotson (1997) 16 Cal 4th 547, 66 Cal Rptr 2d 423, 941 P2d 56, 1997 Cal LEXIS 4416*.

Under the three strikes law, a trial court must sentence a defendant with two or more qualifying prior felony convictions or strikes to an indeterminate term of life imprisonment. These defendants become eligible for parole on a date calculated by reference to a "minimum term." This minimum term of the indeterminate sentence is the "greater" of three options (*Pen C § 1170.12*, subd. (c)(2)(A)(i)-(iii)). Under option (i), the defendant's minimum indeterminate term is calculated by tripling "the term otherwise provided as punishment" for the current conviction. The term under option (ii) is 25 years. Under option (iii), the defendant's minimum indeterminate term is calculated, with certain exceptions, by adding applicable enhancements to the term selected for the current conviction. Generally, option (iii) will be the "greatest" sentence when the defendant has an extensive criminal recidivist history, and hence there are numerous applicable enhancements. Moreover, under *Pen C § 667*, subd. (a), when the defendant is convicted of a current serious felony within the meaning of section *Pen C § 1192.7*, subd. (c), and has been previously convicted of a serious felony, the trial court must impose a five-year enhancement for each such prior conviction that was brought and tried separately. The terms of the present offense and each *Pen C § 667*, subd. (a), enhancement must run consecutively. *People v. Dotson (1997) 16 Cal 4th 547, 66 Cal Rptr 2d 423, 941 P2d 56, 1997 Cal LEXIS 4416*.

In sentencing defendant who had pleaded no contest to committing a lewd act upon a child and who had suffered a prior serious felony conviction within the meaning of the three strikes law (*Pen C §§ 667*, subds. (b)-(i), 1170.12, subds. (a)-(d)), the trial court did not err in limiting defendant's award of precommitment conduct credit to 15 percent of the actual precommitment custody. Neither the three strikes law nor *Pen C § 4019*, operated to preempt the 15 percent limitation of *Pen C § 2933.1*. Under either the legislative or the initiative version of the three strikes law, the 20 percent postcommitment limit on the accrual of credit (*Pen C §§ 667*, subd. (c)(5), 1170.12, subd. (a)(5)) is inapposite to precommitment credit. Also, the award of presentence credits under the three strikes law is generally governed by *Pen C § 4019*, which in this case would yield 208 days conduct credit. However, defendant's conviction was for a violent

felony under *Pen C § 667.5*. *Pen C § 2933.1*, governed, since it expressly preempts "Section 4019 or any other provision of law" in cases involving felonies listed in *Pen C § 667.5*. Thus, an award of precommitment conduct credits to a three strikes defendant whose current conviction is for a violent felony is limited to 15 percent of the actual period of confinement. *People v. Caceres (1997, Cal App 2d Dist) 52 Cal App 4th 106, 60 Cal Rptr 2d 415, 1997 Cal App LEXIS 37*, review denied (1997, Cal) 1997 Cal LEXIS 2234.

The three strikes law (*Pen C §§ 667*, subds. (b)-(i), 1170.12) does not preempt the 15 percent worktime credit limit (*Pen C § 2933.1*) applied to sentences. The three strikes law provides that credits shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison. *Pen C § 2933.1*, provides that, notwithstanding any other law, any person who is convicted of a felony offense listed in *Pen C § 667.5*, shall accrue no more than 15 percent of worktime credit. There is no conflict. The three strikes law applies where the defendant's current conviction is any felony. In contrast, *Pen C § 2933.1*, applies only where the defendant's current conviction is a violent felony listed in *Pen C § 667.5*. Thus, *Pen C § 2933.1*, is a statute which specifically pertains to defendants convicted of a violent felony and therefore prevails over the 20 percent credit limit of the three strikes law, which pertains to felons in general. Also, the language of the three strikes law states that the convicted felon shall be eligible for "no more than" 20 percent credits. The limits of *Pen C § 2933.1*, fall within this limitation. Further, imposing the 15 percent limit furthers the purpose of the three strikes law of ensuring longer prison terms. *People v. Caceres (1997, Cal App 2d Dist) 52 Cal App 4th 106, 60 Cal Rptr 2d 415, 1997 Cal App LEXIS 37*, review denied (1997, Cal) 1997 Cal LEXIS 2234.

Defendant, who was convicted of petty theft with a prior theft conviction (*Pen C § 666*), was subject to punishment under the three strikes law (*Pen C § 667*, subds. (b)-(i)), since defendant had two prior serious or violent felony convictions and his current conviction was for a felony rather than a misdemeanor. A felony is a crime that is punishable with death or by imprisonment in the state prison (*Pen C § 17*, subd. (a)). When a crime is punishable, in the court's discretion, by imprisonment in state prison or by imprisonment in the county jail, it is a misdemeanor for all purposes only when a punishment other than state prison is imposed or the offense is designated or charged as a misdemeanor or determined or declared to be a misdemeanor (*Pen C § 17*, subd. (b)). Thus, it is the potential punishment for an offense that determines whether the offense is a felony or a misdemeanor. Under *Pen C § 666*, defendant's offense was "punishable...by imprisonment in the state prison" and none of the circumstances set forth in *Pen C § 17*, subd. (b), that would have made the offense a misdemeanor were applicable. *People v. Nguyen (1997, Cal App 6th Dist) 54 Cal App 4th 705, 63 Cal Rptr 2d 173, 1997 Cal App LEXIS 324*, review denied (1997, Cal) 1997 Cal LEXIS 5298.

The trial court did not err in sentencing a third strike defendant convicted on multiple counts to a minimum maximum of 25 years to life on each count under *Pen C § 667*, subd. (e)(2)(A)(ii), of the three strikes law. When a third strike defendant is convicted on multiple counts and the life sentence on each count is to run consecutively, the minimum term of the indeterminate life sentence is calculated separately as to each count. Calculating a third strike defendant's minimum maximum term on each count separately is consistent with the intent of the statute to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious or violent felony offenses. *People v. Thomas (1997, Cal App 2d Dist) 56 Cal App 4th 396, 65 Cal Rptr 2d 425, 1997 Cal App LEXIS 555*, review denied (1997, Cal) 1997 Cal LEXIS 7558.

In sentencing a third strike defendant convicted on multiple counts, the trial court erred in failing to exercise its discretion with respect to imposing sentence on deadly weapon (*Pen C § 12022.7*, subd. (b)) and great bodily injury (*Pen C § 12022.7*, subd. (a)) enhancement allegations found true by the jury, on the ground that the enhancements merged into the 25-year minimum term imposed on each count under *Pen C § 667*, subd. (e)(2)(A)(ii). Enhancements used in calculating the minimum term of the indeterminate sentence do not merge into the minimum term but may be separately punished. Under *Pen C § 1170.1*, subd. (h), the trial court may strike the additional punishment for the enhancements provided in *Pen C § 12022.7*, if it determines that there are circumstances in mitigation of the additional punishment. *People v. Thomas (1997, Cal App 2d Dist) 56 Cal App 4th 396, 65 Cal Rptr 2d 425, 1997 Cal App LEXIS 555*, review denied (1997, Cal) 1997 Cal LEXIS 7558.

The trial court erred in imposing a concurrent term of 25 years to life for 1 count of aggravated assault on a third strike defendant convicted on multiple counts. Multiple convictions for serious or violent felonies not arising on the same occasion from the same set of facts must be sentenced consecutively. Since this offense, a serious felony under *Pen C § 1192.7*, subd. (c)(8), was committed on a separate occasion and arose out of a separate set of facts, consecutive punishment was mandatory under *Pen C § 667*, subd. (c)(7), of the three strikes law. *People v. Thomas* (1997, Cal App 2d Dist) 56 Cal App 4th 396, 65 Cal Rptr 2d 425, 1997 Cal App LEXIS 555, review denied (1997, Cal) 1997 Cal LEXIS 7558.

A sentence of 25 years to life under the three strikes law (*Pen C § 667*, subds. (b)-(i)) was not cruel and unusual punishment as applied to defendant who had been convicted of grand theft and who had suffered multiple prior convictions. Although defendant's current crime involved no violence and the victim did not lose any money, defendant's punishment was imposed because of his recidivism. Defendant had been convicted of receiving stolen property, for which he served a local commitment and was placed on probation. The same year, he was convicted of 12 separate residential burglaries, for which he received a prison term of 8 years. He was paroled, and two years later he was convicted of petty theft with a prior theft conviction, for which he received twenty-eight months in prison. He was paroled and committed the current offense just two months later. It was apparent that incarceration had not deterred him from committing more crimes. Further, it was not necessary to compare defendant's punishment with punishments in this state for more serious crimes, since this analysis is inapposite to three strikes sentencing. Finally, a comparison of California's punishment for recidivists with punishment for recidivists in other states shows that California's scheme is part of a nationwide pattern of statutes calling for severe punishments for recidivist offenders. Thus, defendant's punishment was not out of all proportion to the offense so as to shock the conscience and offend fundamental notions of human dignity. *People v. Cline* (1998, Cal App 4th Dist) 60 Cal App 4th 1327, 71 Cal Rptr 2d 41, 1998 Cal App LEXIS 46, review denied (1998, Cal) 1998 Cal LEXIS 2395.

Where the defendant was convicted for forgery (*Pen C § 470*) and possession of a completed check with the intent to defraud (under former *Pen C § 475a*), and was also found to have served four prior prison terms (*Pen C § 667.5(b)*) and to have previously been convicted of four serious felonies (*Pen C §§ 667(b)-(i), 1170.12(a)-(d)*), the trial court erred in failing to impose a one-year prior prison term enhancement pursuant to *Pen C § 667.5(b)*, with respect to one of the the defendant's prior prison terms. At the time of sentencing the trial court imposed three of the four prior prison term enhancements found to be true by the jury, but never indicated a disposition as to the other prior prison term. To neither strike nor impose a prior prison term enhancement is a legally unauthorized sentence. The power to strike a prior prison term enhancement pursuant to *Pen C § 1385(a)* survived the adoption of *Pen C §§ 667(b)* through (i) and *1170.12*. Effective January 1, 1998, there was no longer the authority to strike a prior prison term pursuant to former *Pen C § 1170.1(h)*; and remand was appropriate for the trial court to exercise discretion pursuant to *Pen C § 1385(a)* as to the unresolved prior prison term. *People v. Bradley* (1998, Cal App 2d Dist) 64 Cal App 4th 386, 75 Cal Rptr 2d 244, 1998 Cal App LEXIS 488, review denied (1998, Cal) 1998 Cal LEXIS 6071.

When a sentence imposed under the "Three Strikes" law is reversed, and, on remand the trial court exercises its discretion by not striking the prior convictions for sentencing, the trial court must calculate the actual number of days defendant spent in custody, whether in jail or prison, add *Pen C § 4019* conduct credits and issue an amended abstract of judgment. Credits for good behavior and work accrued while in prison are to be calculated by the California Department of Corrections (CDC). Thus, where the defendant was convicted of possession of a controlled substance and was found to have been previously convicted of a serious felony within the meaning of *Pen C § 667*, subds. (b) through (i) and *1170.12*, the Three Strikes law, and on remand, the trial court declined to strike defendant's prior conviction and once again imposed a four-year prison term, the trial court erred in denying the defendant's request for additional custody credits and a new abstract of judgment. Under the circumstances, it would be a waste of judicial resources to force defendant to renew his previous request before entertaining the issue on appeal. Second, it is the duty of the sentencing court to calculate actual days spent in custody pursuant to *Pen C § 2900.5*, subd. (d). This includes time spent in jail pending resentencing. It is the sole province of the CDC to determine prison behavior and work credits. Thus, the trial court should have calculated the total number of actual days spent in custody, whether jail or

prison, added the appropriate number of *Pen C* § 4019 conduct credits, and issued an amended abstract. Further, Three Strikes defendants do not receive fewer credits for time spent in jail awaiting resentencing than defendants sentenced under other sentencing schemes. *Pen C* § 667, subd. (c)(5) does not override existing credit provisions with respect to presentence credits where the cause is remanded for resentencing. *People v. Thornburg* (1998, *Cal App 4th Dist*) 65 *Cal App 4th* 1173, 77 *Cal Rptr 2d* 288, 1998 *Cal App LEXIS* 685, overruled in part *People v. Buckhalter* (2001) 26 *Cal 4th* 20, 108 *Cal Rptr 2d* 625, 25 *P3d* 1103, 2001 *Cal LEXIS* 4234.

In a prosecution for attempted carjacking (*Pen C* §§ 215, 664) and attempted kidnapping (*Pen C* §§ 207, subd. (a), 664), the sentence of 30 years to life in state prison under the Three Strikes law (*Pen C* §§ 667, 667.5) did not violate the federal and state constitutional prohibitions against cruel and unusual punishment. The defendant contended that the sentence was grossly disproportionate to the severity of his crimes. The sentence was not disproportionate given the defendant's lengthy criminal history, particularly his recidivist behavior, and the nature of his current offense. The record showed that the defendant committed his current offense while on parole. The probation report indicated that the defendant had a long criminal history. He had been sentenced to prison four previous times, for larceny, assault with a dangerous weapon, retail fraud, and robbery. According to the report, the defendant's crimes had been increasing in frequency and severity. He admitted a drug problem, but had not taken any serious steps toward recovery. He had a propensity toward theft and intimidation, and was a potential danger to the community. In addition, the defendant's current offense involved threats to the victim that caused her to fear for her life. *People v. Gray* (1998, *Cal App 1st Dist*) 66 *Cal App 4th* 973, 78 *Cal Rptr 2d* 191, 1998 *Cal App LEXIS* 776, review denied (1998, *Cal*) 1998 *Cal LEXIS* 7448.

On remand following the defendant's partially successful appeal, the trial court did not err in resentencing the defendant without obtaining a supplemental probation report. The defendant waived his right to object to the absence of a supplemental report by failing to do so in the trial court. In any event, he could not prevail on the merits. The defendant was statutorily ineligible for probation due to his strike. (*Pen C* § 667, subd. (c)(2).) A probation report was therefore discretionary. *CRC, rule 411(c)* does not compel a different result. In light of *CRC, rule 411(a)* and (b), a supplemental report is required only if the defendant is eligible for probation. Similarly, *Pen C* § 1203, subd. (g) expressly states that as to a defendant ineligible for probation, the judge, in his or her discretion, may direct the probation officer to investigate all facts relevant to the sentencing of the person. *Pen C* § 1203c, which the defendant claimed mandated a report, in fact refers to a postsentencing report by the probation officer to the Department of Corrections. A probation report is advisory only. Nothing would have been added to the defendant's efforts to persuade the court to dismiss his strike and make more lenient sentencing choices had a supplemental report reiterated information conveyed by other sources (the defendant's statement, the show of support from family and friends, counsel's argument and documentation, the statement in mitigation, and the original probation report). *People v. Llamas* (1998, *Cal App 4th Dist*) 67 *Cal App 4th* 35, 78 *Cal Rptr 2d* 759, 1998 *Cal App LEXIS* 841, review denied (1999, *Cal*) 1999 *Cal LEXIS* 615.

Following his conviction of burglary, forgery, intimidation of a witness, and grand theft, with two prior serious or violent felonies and one enhancement for a prior prison term under *Penal C* § 667.5, defendant was properly sentenced to a total of 81 years to life. *Penal C* § 667(c)(6), (c)(7), and (e)(2)(B) mandate consecutive sentencing only when the current felony convictions were "not committed on the same occasion, and do not arise from the same set of operative facts." In this case, defendant's offenses were not committed on the same occasion, nor did they arise from the same operative facts. The burglary, forgery, and threatening phone calls were neither temporally nor spatially proximate. Instead, they occurred at different times and locations. Nor were the offenses based on the same operative facts. The burglary conviction was based on breaking and entering the residence, the forgery conviction on cashing a check at Toys-R-Us, and the dissuading-a-witness conviction on the numerous threatening phone calls defendant made. Furthermore, there is no exception to mandatory consecutive sentences when one offense is in furtherance of another. *People v. Jones* (1998, *Cal App 2d Dist*) 67 *Cal App 4th* 724, 79 *Cal Rptr 2d* 258, 1998 *Cal App LEXIS* 910.

The Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in noncapital sentencing proceedings. Petitioner was convicted on three counts of violating California drug laws; the State sought to have his sentence enhanced based on a previous assault conviction; the trial court doubled petitioner's sentence and added a

1-year enhancement. Although the California Court of Appeal ruled that a remand for retrial on the sentence enhancement would violate double jeopardy principles, the State Supreme Court reversed, holding that the Double Jeopardy Clause, though applicable in the capital sentencing context, does not extend to noncapital sentencing proceedings; and the U.S. Supreme Court affirmed. *Monge v. California* (1998) 524 US 721, 141 L Ed 2, 118 S Ct 2246, 1998 US LEXIS 4218.

Under the applicable punishment provision (*Penal C* § 664) in a prosecution in which defendants, each of whom had a prior strike, were convicted of attempted willful, deliberate, and premeditated murder, attempted premeditated murder is punishable by life imprisonment with the possibility of parole, which is an indeterminate prison term. While § 664 says nothing about service of a minimum term subject to doubling under *Penal C* § 667(e)(1), two other statutes, *Penal C* §§ 3046 and 186.22(b)(4), established a minimum term for defendants' life sentences. Under § 3046, a defendant sentenced to life in prison with the possibility of parole must, before becoming eligible for release on parole, serve at least seven calendar years or a term established pursuant to any other section of law that establishes a minimum period of confinement in prison. Here, the other section of law was *Penal C* § 186.22(b)(4), which provides that when a defendant commits a felony for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members and receives an indeterminate sentence, the defendant shall not be paroled until a minimum of 15 calendar years have been served. By requiring a defendant to serve at least 15 years of imprisonment before parole, § 186.22(b)(4), read together with § 3046, establishes a minimum term of 15 years that is subject to doubling under § 667(e)(1) of the *Three Strikes* law. *People v. Jefferson* (1999) 21 Cal 4th 86, 86 Cal Rptr 2d 893, 980 P2d 441, 1999 Cal LEXIS 4851.

Penal C § 667(e)(1) of the *Three Strikes* law requires the minimum term for an indeterminate term to be twice the term otherwise provided as punishment for the current felony conviction. Unlike an enhancement, which provides for an additional term of imprisonment, the 15-year minimum term in § 186.22(b)(4) sets forth an alternate penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute. Thus, § 186.22(b)(4) establishes the punishment for the current felony conviction within the meaning of, and is subject to sentence-doubling under, § 667(e)(1). The trial court here therefore erred when it attempted to comply with the sentence-doubling requirement of § 667(e)(1) by sentencing defendants to two life terms instead of one. Instead, it should have doubled the minimum term established by *Penal C* § 3046, which in this case was the 15-year minimum set by the criminal street gang provision of § 186.22(b)(4). *People v. Jefferson* (1999) 21 Cal 4th 86, 86 Cal Rptr 2d 893, 980 P2d 441, 1999 Cal LEXIS 4851.

A criminal defendant, charged with having suffered a prior felony conviction, may move in the trial court to strike the alleged prior conviction on the ground that the trial court in the prior proceeding failed to comply with the defendant's *Boykin-Tahl* (*Boykin v. Alabama* (1969) 395 US 238, 23 L Ed 2d 274, 89 S Ct 1709, 1969 US LEXIS 1434; *In re Tahl* (1969) 1 Cal 3d 122, 81 Cal Rptr 577, 460 P2d 449, 1969 Cal LEXIS 196, cert den (1970) 398 US 911, 90 S Ct 1708, 26 L Ed 2d 72, 1970 US LEXIS 1864, overruled *Mills v. Municipal Court for San Diego Judicial Dist.* (1973) 10 Cal 3d 288, 110 Cal Rptr 329, 515 P2d 273, 1973 Cal LEXIS 155) rights, but only as to prior felony convictions suffered after the California Supreme Court's 1969 decision in *In re Tahl*. Because the prior felony conviction of defendant in the present narcotics prosecution occurred a few months before the *Tahl* decision, the trial court correctly ruled that defendant could not challenge his prior conviction. *People v. Allen* (1999) 21 Cal 4th 424, 87 Cal Rptr 2d 682, 981 P2d 525, 1999 Cal LEXIS 5310, rehearing denied (1999, Cal) 1999 Cal LEXIS 7035.

Defendant was convicted by a jury of residential burglary (*Penal C* §§ 459, 460) and two attempted residential burglaries (*Penal C* §§ 664, 459, 460), and at the time of resentencing, the court imposed a sentence consisting of 3 concurrent 25-year-to-life terms plus the 5-year serious felony prior conviction enhancement. On appeal, the court held that imposition of concurrent sentences for defendant's multiple current offenses constituted an unauthorized sentence under the *three strikes* law. Under the facts and law controlling in this case, defendant's offenses were not committed "on the same occasion" nor did they arise "from the same set of operative facts" as required for application of the narrow discretionary exception to the imposition of mandatory consecutive terms for multiple current offenses under *Penal C* §§ 667(c)(6) and (7), and 1170.12(a)(6) and (7). Defendant committed two attempted burglaries, which by their

nature and elements were completed before he committed a burglary. The crimes did not occur on the "same occasion" as that term is commonly understood. Nor did the duration of the crimes overlap the other, each being complete when defendant attempted to enter or successfully entered a residence and then left to go to another residence. *People v. Durant* (1999, Cal App 4th Dist) 68 Cal App 4th 1393, 81 Cal Rptr 2d 207, 1999 Cal App LEXIS 6.

The trial court acted in excess of its jurisdiction in deferring sentencing and releasing defendant postconviction to attend a rehabilitation program. It was undisputed that defendant came within the scope of the three strikes law because he pled guilty to a current felony and four prior convictions of serious or violent felonies. While the trial court's procedure reflected a sincere desire to make rulings in the interest of justice, the court's procedure was unauthorized. Defendant's release to a rehabilitation program more closely resembled informal probation than a release on OR. The trial court erred because it had no authority to grant informal probation to defendant. Thus, the trial court had only one procedural option with regard to the disposition of defendant after he pled guilty to one current felony and four prior convictions, to proceed with sentencing at which time the court could have exercised its discretion to remove defendant from the scope of the three strikes law by striking his prior convictions. *People v. Superior Court(Roam)* (1999, Cal App 6th Dist) 69 Cal App 4th 1220, 82 Cal Rptr 2d 119, 1999 Cal App LEXIS 109.

Where defendant's prior juvenile adjudication was not proved to be either a serious or violent felony offense, the trial court erred in imposing a second-strike sentence under *Penal C* § 667(d)(3) even though the prior adjudication was an offense enumerated in *W & I C* § 707(b). Use of a nonserious, nonviolent juvenile adjudication to impose a second-strike sentence was contrary to the intent of the three strikes law and violated defendant's right to equal protection of the laws. *People v. Leng* (1999, Cal App 5th Dist) 71 Cal App 4th 1, 83 Cal Rptr 2d 433, 1999 Cal App LEXIS 301, rehearing denied (1999, Cal App 5th Dist) 71 Cal App 4th 1259, 1999 Cal App LEXIS 426.

Defendant was found guilty of second degree murder (*Penal C* §§ 187(a), 189), in the commission of which she used a deadly weapon, a knife (*Penal C* § 12022(b)). The court found true the allegations defendant previously had been convicted of two serious or violent felonies (*Penal C* §§ 667 (a-i), 1170.12), after which the court sentenced defendant to state prison for a triple term of 45 years to life. Although defendant argued that the word "term" in § 667(e)(2)(A) meant determinate terms, defendant's interpretation would lead to absurd results. A first degree murderer with only one prior strike would receive an indeterminate term of 50 years to life under (e)(1), which doubles the minimum term of an indeterminate sentence for a "second strike" defendant. But if the same murderer had two or more strikes, he could receive only an indeterminate term of 25 years to life. Adopting an interpretation which does not limit the use of the work "term" to determinate terms would serve the object of the three strikes law, which is to provide longer sentences for those with histories of serious or violent recidivism. The trial court did not err in imposing a tripled sentence. *People v. Bolden* (1999, Cal App 2d Dist) 71 Cal App 4th 730, 84 Cal Rptr 2d 111, 1999 Cal App LEXIS 356, review gr, depublished *Supreme Court Minute 08-11-1999* (1999, Cal) 88 Cal Rptr 2d 281, 982 P2d 152, 1999 Cal LEXIS 5316.

Where (1) a jury convicted defendant of committing a lewd act upon a child under the age of 14, and (2) the trial court found true the allegation that defendant had two prior convictions of *Penal C* § 288(a) and (b), the trial court erred when it sentenced defendant to life imprisonment with a minimum term of 25 years, plus a five-year enhancement for the prior convictions under *Penal C* § 667(a)(1). Defendant should have been sentenced under both *Penal C* § 667.61 and *Penal C* § 667(c)-(e), and the People did not waive the sentencing error by not challenging it at the trial level. While waiver is the general rule, it does not apply where a sentence could not lawfully be imposed under any circumstances, as where the court violates mandatory provisions governing the length of confinement. Accordingly, the sentence was modified to life in prison with a minimum term of 75 years, and to a consecutive additional term of five years, for a total of 80 years. *People v. Davis* (1999, Cal App 4th Dist) 71 Cal App 4th 1492, 84 Cal Rptr 2d 628, 1999 Cal App LEXIS 465, rehearing granted, depublished (1999) 88 Cal Rptr 2d 586, 982 P2d 1258, 1999 Cal LEXIS 5690, review dismissed (2002, Cal) 127 Cal Rptr 2d 801, 58 P3d 930, 2002 Cal LEXIS 8137.

Where defendant used a firearm in the commission of several robberies and had two prior strike convictions under *Penal C* §§ 667 and 1170.12, the trial court did not err in imposing an indeterminate term of 125 years to life in prison, plus a determinate term of 33 years. Contrary to defendant's contention that enhancements to his prison sentence for

firearm use should have been reduced to one-third the middle term, the trial court correctly added full-term firearm use enhancements to defendant's indeterminate terms under the three strikes sentencing law. Life sentences imposed under either version of the three strikes law are clearly indeterminate terms. When indeterminate terms are imposed consecutively, as was done here, § 1170 does not apply. Instead, the sentencing is controlled by *Penal C* §§ 1168(b), and 669, as well as Cal. Rules of Court, former Rule 451(a) (see now Rule 4.451). When the three are read together, the legislative intent to treat and compute determinate and indeterminate terms separately is plain. Although the Determinate Sentencing Act is vast, intricate, and frequently amended, its basic parameters have become familiar to courts and counsel over the years, and a basic parameter is that there is no provision for making a determinate term either principal or subordinate to an indeterminate term. Consequently, § 1170.1 was inapplicable by its own terms because it applies only to consecutive sentences imposed under § 1170. *People v. Lyons* (1999, Cal App 5th Dist) 72 Cal App 4th 1224, 85 Cal Rptr 2d 581, 1999 Cal App LEXIS 578, review denied (1999, Cal) 1999 Cal LEXIS 6573.

The three strikes law requires that a triggering prior felony conviction be pleaded and proved. This means pleaded and proved in the current proceeding; the fact that the prior was a serious or violent felony need not have been pleaded or proved in the prior proceeding. Here, the information alleged that pursuant to *Penal C* §§ 1170.12(a) through (d) and 667(b) through (i), defendant had suffered the prior conviction of the serious or violent felony of shooting at a motor vehicle in violation of *Penal C* § 246 on a stated date, in a stated court, with a stated case number. Even if this gave insufficient notice of the factual basis of the alleged "strike," defendant waived the defect by failing to demur. *People v. Blackburn* (1999, Cal App 4th Dist) 72 Cal App 4th 1520, 86 Cal Rptr 2d 134, 1999 Cal App LEXIS 608, review denied (1999, Cal) 1999 Cal LEXIS 7366.

In a prosecution for violation of *Penal C* § 12021(a) (convicted felon in possession of a firearm) in which defendant stipulated to the fact that he had a prior convictions of *Veh C* §§ 23153(b) and 2800.2 and that they were felony convictions, defendant's conviction of a violation of § 12021, and the revocation of his probation, did not have to be reversed because he did not personally waive his constitutional rights before stipulating regarding his status as a convicted felon. Since defendant's factual stipulation did not dispose of all elements of the charged offense, it was not tantamount to a guilty plea, and the waivers were not required. *People v. Rodriguez* (1999, Cal App 6th Dist) 73 Cal App 4th 1324, 83 Cal Rptr 2d 265, 1999 Cal App LEXIS 882.

In a prosecution for various narcotics offenses, the trial court did not abuse its discretion in refusing to vacate one of defendant's strikes in the interest of justice (*Penal C* § 1385). At sentencing, the trial court announced it had considered both the probation report and defendant's comments. The court stated that its sworn duty was to uphold the Three Strikes law regardless of its personal approval or disapproval of that law. In declining to vacate either of defendant's two strikes, the court found no basis for concluding that defendant was outside the spirit of the Three Strikes law. Specifically, in considering defendant's likelihood of future change, it saw nothing in his past conduct which would indicate he would be a more law-abiding citizen. The court did note, however, defendant's efforts to read and study while in prison. Further, with respect to the current crime, the court found no factors in mitigation and identified the following aggravating factors: (1) the manner in which the crime was committed indicated planning, sophistication, and professionalism; (2) defendant had served prior prison terms; (3) defendant was on parole when the crime was committed; (4) his prior performance while on parole and probation was unsatisfactory; and (5) his adult convictions were numerous and of increasing seriousness. *People v. Stone* (1999, Cal App 2d Dist) 75 Cal App 4th 707, 89 Cal Rptr 2d 401, 1999 Cal App LEXIS 905, review denied (2000, Cal) 2000 Cal LEXIS 94.

In choosing the "minimum term" of the indeterminate life term for a third strike offender under *Pen C* § 667(e)(2)(A), in a case where the term otherwise provided for the current offense is a life sentence with possibility of parole but no minimum term is stated, the trial court should select between option two and option three, whichever produces the greater sentence. While the three strikes law essentially provides for doubling the sentence of a second strike offender, it does not provide for simply tripling the sentence of a third strike offender. *People v. Dozier* (2000, Cal App 2d Dist) 78 Cal App 4th 1195, 93 Cal Rptr 2d 600, 2000 Cal App LEXIS 168, review denied (2000, Cal) 2000 Cal LEXIS 5090, overruled in part *People v. Acosta* (2002) 29 Cal 4th 105, 124 Cal Rptr 2d 435, 52 P3d 624, 2002 Cal LEXIS 5245.

In a prosecution against a "three strike" defendant for multiple offenses, including the attempted murder of a woman and an aggravated assault on her daughter, defendant was properly sentenced to consecutive terms on these counts under *Pen C § 667(c)(6)*, where the offenses were separated both in time and location, although they all occurred within the same apartment. Under the circumstances, the offenses were not committed on the same occasion and did not arise from the same set of operative facts for purposes of § 667(c)(6). *People v. Jenkins (2001, Cal App 2d Dist) 86 Cal App 4th 699, 104 Cal Rptr 2d 77, 2001 Cal App LEXIS 48*, review denied (2001, Cal) 2001 Cal LEXIS 3012.

Where a defendant with at least two strikes is sentenced for multiple offenses, the minimum term for each indeterminate life term is calculated separately for each new offense, without regard to the other new offenses. The consecutive sentencing provisions of *Pen C § 1170.1* have no relevance in this context. Therefore, in computing the minimum term for each determinate term on numerous counts of robbery, the trial court correctly included, on each term, a total of 15 years for defendant's three prior serious felony convictions incurred pursuant to *Pen C § 667(a)*. *People v. Byrd (2001, Cal App 3d Dist) 89 Cal App 4th 1373, 108 Cal Rptr 2d 243, 2001 Cal App LEXIS 468*, review denied (2001, Cal) 2001 Cal LEXIS 6422.

Petitioner's life sentence, imposed through application of California's Three Strike Law, was grossly disproportionate to his offense, possession of 1.55 grams of heroin: in the judgment of the legislators and voters of California, simple possession of heroin was neither a serious nor violent crime; California's Three Strikes law itself did not categorize simple possession of heroin as a serious or violent crime, nor, outside of the context of the Three Strikes law, was simple possession penalized harshly. *Duran v. Castro (2002, ED Cal) 227 F Supp 2d 1121, 2002 US Dist LEXIS 20157*.

Trial court properly based defendant's 25-years-to-life terms for the convictions of violating *Pen C § 288(a), (b)(1)* in part on the One Strike law, *Pen C § 667.61(a), (c)(7), (d)(1)*, given defendant's previous conviction under *Pen C § 288(a)*, even though defendant was granted probation for the prior conviction; the matter was remanded for a new sentencing hearing at which the trial court was authorized to exercise its discretion under the Three Strikes law, *Pen C § 667(b)-(i)*, and the Habitual Sexual Offender law, *Pen C § 667.71*. *People v. Hammer (2003) 30 Cal 4th 756, 134 Cal Rptr 2d 590, 69 P3d 436, 2003 Cal LEXIS 3490*.

Because petitioner had been previously convicted of robbery and burglary which were considered serious felonies, petitioner was sentenced pursuant to the California's three strike law, *Pen C §§ 667(e)(1) and 667.5*; petitioner's sentence of 25 years to life for felony theft was not considered disproportionate to the crime and there was no constitutional violation. *Ewing v. California (2003) 538 US 11, 155 L Ed 2, 123 S Ct 1179, 2003 US LEXIS 1952*.

In sentencing defendant, a trial court erred when it determined that it did not have discretion under *Pen C § 1385* to strike an additional circumstance that was not necessary for a sentence enhancement under the One Strike Law, *Pen C § 667.61*. *People v. Rivas (2004, Cal App 5th Dist) 119 Cal App 4th 565, 14 Cal Rptr 3d 611, 2004 Cal App LEXIS 916*, review denied (2004, Cal) 2004 Cal LEXIS 9102.

In an unpublished portion of the decision, defendant's sentence for mayhem and battery charges was modified by striking a three-year enhancement for inflicting great bodily injury. A jury had also found enhancement allegations true that defendant had three strike priors, one five-year prior, and one prison prior, and the court had sentenced him to state prison for 25 years to life, plus 11 years. *People v. Hayes (2004, Cal App 6th Dist) 120 Cal App 4th 796, 15 Cal Rptr 3d 884, 2004 Cal App LEXIS 1130*, review denied (2004, Cal) 2004 Cal LEXIS 9732.

Where defendant on charges of lewd conduct had previously been convicted of lewd conduct, the trial court had a jurisdictional obligation to impose, at a minimum, consecutive, 25-years-to-life indeterminate sentences as to each of nine counts, rather than 16-year determinate terms. Consecutive sentencing was mandatory because the acts of lewd conduct occurred on separate days. *People v. Chan (2004, Cal App 2d Dist) 123 Cal App 4th 734, 20 Cal Rptr 3d 359, 2004 Cal App LEXIS 1813*, transferred (2005, Cal App 2d Dist) 128 Cal App 4th 408, 26 Cal Rptr 3d 878, 2005 Cal App LEXIS 573.

Where defendant was driving under the influence of alcohol and caused an automobile accident resulting in severe injuries to the driver of the other car and her passenger, defendant was convicted with driving under the influence causing bodily injury and driving with a 0.08 percent blood alcohol level causing injury; the jury found true allegations that defendant caused bodily injury to more than one victim, and personally inflicted great bodily injury on both victims. Based on findings that defendant had suffered two prior strike convictions within the meaning of *Pen C § 667(a)(1)* and two prior serious felony convictions within the meaning of *Pen C § 667.5(b)*, the trial court properly sentenced him to 22 years in state prison. *People v. Wilson (2003, Cal App 1st Dist) 114 Cal App 4th 953, 8 Cal Rptr 3d 167, 2003 Cal App LEXIS 1956*, review denied (2004, Cal) 2004 Cal LEXIS 2244.

Conviction for evading an officer was reversed because there was no evidence that a siren was sounded or that the officer wore a uniform, as required by *Veh C § 2800.1(a)(2)* and (4). Defendant, who had admitted two prior serious felonies, remained subject to sentencing on three other counts, and the trial court was free to impose any sentence it deemed appropriate so long as it did not exceed the sentence of 25 years to life that was previously entered. *People v. Shakhvaladyan (2004, Cal App 2d Dist) 117 Cal App 4th 232, 11 Cal Rptr 3d 590, 2004 Cal App LEXIS 407*, overruled in part *People v. Hudson (2006) 38 Cal 4th 1002, 44 Cal Rptr 3d 632, 136 P3d 168, 2006 Cal LEXIS 7394*.

State prisoner's petition for a writ of habeas corpus pursuant to 28 USCS § 2254 was denied on the prisoner's Eighth Amendment claim where (1) although the prisoner was convicted of commercial burglary and petty theft for stealing items worth approximately 20 dollars, the value of the items taken was not the only consideration, (2) seven of the prisoner's nine prior felonies, specifically, five counts of attempted murder, attempted manslaughter and arson, were found to be serious or violent within the meaning of California's Three Strikes Law, (3) a sentence of 25 years to life did not raise an inference of gross disproportionality to the prisoner's crime in light of the length and seriousness of the prisoner's criminal record, and (4) the state appellate court's conclusion that the prisoner's sentence was not grossly disproportionate to the crime was not an unreasonable application of or contrary to clearly established federal law within the meaning of 28 USCS § 2254(d)(1). *Barnes v. Hamlet (2004, ND Cal) 2004 US Dist LEXIS 6037*.

Defendant who had previously been convicted of terrorist threats in a domestic dispute, a violation of *Pen C § 422*, before terrorist threats were added to the list of statutes in *Pen C § 1192.7(c)(38)* of the Three Strikes Law, was properly sentenced under *Pen C §§ 667.5(c), 1192.7(c)(38), 667(b)-(i), and 1170.12* of the Law because "terrorist threats" as contemplated in the Law were not limited to those made for political or ideological gain against a government or society. *People v. Moore (2004, Cal App 6th Dist) 118 Cal App 4th 74, 12 Cal Rptr 3d 649, 2004 Cal App LEXIS 634*, review denied (2004, Cal) 2004 Cal LEXIS 7398.

Defendant's sentence for two counts of robbery in violation of *Pen C § 211* was in accord with the sentencing template, and thus the court found no error in the trial court's sentence, as follows: on the first count, the court added 25 years to life under *Pen C § 12022.53(d)* to the original five-year term, as well as 10 years under *Pen C § 667(a)*, and to this indeterminate term, the trial court added 25-years-to-life based on *Pen C § 12022.53(d)*, and on the second count, the court added 20 years under § 12022.53(c) to the original five-year term, as well as 10 years under *Pen C § 667(a)*, and to this indeterminate term, the court added a 20-year determinate term based on the enhancement under *Pen C § 12022.53(c)*, and the counts were ordered to run consecutively under *Pen C §§ 667(e)(2)(B), 1170.12(a)(6)*, and a 10-year determinate term was then added under *Pen C § 667(a)*; the court rejected defendant's argument that *Pen C § 12022.53(j)* limited the imposition of enhancements. *People v. Coker (2004, Cal App 3d Dist) 120 Cal App 4th 581, 15 Cal Rptr 3d 553, 2004 Cal App LEXIS 1093*, review denied (2004, Cal) 2004 Cal LEXIS 9697.

Use of a prior felony conviction as an enhancement pursuant to *Pen C § 667(d), (e)(1)*, in a hit and run case did not violate the doctrine of specialty, although the extradition order stated that defendant was not to be subjected to prosecution for facts other than those specified; the language of the foreign court's decision indicated that it was opposed to probation revocation, not sentence enhancement. *People v. Minor (2004, Cal App 4th Dist) 121 Cal App 4th 1430, 18 Cal Rptr 3d 238, 2004 Cal App LEXIS 1460*, rehearing granted, republished (2004, Cal App 4th Dist) 2004 Cal App LEXIS 1671.

Prisoner was sentenced pursuant to California's Three Strikes Law, *Pen C § 667(e)(2)(A)*, which was triggered because by the prisoner's driving a vehicle while under the influence of alcohol, after having suffered two prior convictions for the same offense within the preceding ten years. Based on the prisoner's history of criminal recidivism, which included crimes of violence, his sentence could not be said to be grossly disproportionate in violation of the *Eighth Amendment*. *Roy v. Ryan (2005, ND Cal) 2005 US Dist LEXIS 4119*.

Prisoner was not entitled to federal habeas corpus relief on his due process claim because the prison officials reasonably determined that the prisoner, as a three strikes offender, could not reduce his determinate 18-year sentence by more than 20 percent, and could not reduce any portion of his indeterminate 25-year-to-life sentence because the Supreme Court of California had determined that California's Three Strikes Law did not authorize or allow time credits against a mandatory indeterminate term of life imprisonment and that, when a prisoner was sentenced under the Three Strikes Law, the total amount of credits authorized for use against a determinate term of imprisonment could not exceed 20 percent. *Sevier v. Goughner (2005, ND Cal) 2005 US Dist LEXIS 6103*.

Death penalty for a murder in the course of a robbery was not rendered cruel and unusual punishment by defendant's circumstances, given his extensive prior record and the fact that he shot the victim at point-blank range to halt resistance to the robbery. It was alleged under *Pen C §§ 667(a), 667.5(b), 1192.7* that defendant had suffered a prior serious felony conviction and had served a separate prison term for robbery. *People v. Cornwell (2005) 37 Cal 4th 50, 33 Cal Rptr 3d 1, 117 P3d 622, 2005 Cal LEXIS 9060, cert den (2006) 126 S. Ct. 1432, 164 L. Ed. 2d 135, 2006 U.S. LEXIS 1866, 74 U.S.L.W. 3485*.

Habeas petitioner's claim of cruel and unusual punishment under the Eighth Amendment was without merit because her sentence was not based on the individual offenses, but rather arose out of her recidivism under the California Three Strikes Law, *Pen C § 667*, which had been upheld by the U.S. Supreme Court as constitutional. Recidivism has long been recognized as a legitimate basis for increased punishment and states have a valid interest in deterring and segregating habitual criminals. *Connelly v. Henry (2005, ND Cal) 2005 US Dist LEXIS 33829*.

Habeas corpus petitioner, a state prisoner, argued that application of a great bodily injury enhancement under *Pen C § 12022.7* violated the Eighth Amendment because it caused his assault conviction to become his third strike; the factual premise was incorrect because under *Pen C § 667(c)* and *(e)(2)(A)(ii)*, the three strikes sentencing provisions are triggered by a conviction for any felony whether or not it was violent or serious. Pursuant to § 667(a), however, five-year enhancements are imposed only if the prior and current offenses are serious felonies. Further, the prisoner's argument that his sentence violated California's double jeopardy statute, *Pen C § 654*, failed because both that statute and *Pen C § 12022.7* are provisions of state law for which federal habeas relief does not lie. *Spence v. Runnels (2006, ED Cal) 2006 US Dist LEXIS 3092*.

In a case in which defendant had agreed to waive his right to a jury trial in exchange for a maximum sentence of 15 years, the trial court was required to restructure the sentence as authorized by law, subject to the agreed-upon maximum sentence of 15 years, after the trial court stayed a five-year enhancement on defendant's second prior serious felony conviction because defendant had not agreed to waive his jury trial right in exchange for a specific sentence or any specified term other than a 15-year maximum sentence, and because, more significantly, defendant had not agreed that his waiver was conditioned upon the trial court staying one of the two five-year enhancements required by *Pen C § 667(a)*. Therefore, his claim that his sentence was unauthorized because the trial court improperly stayed a five-year enhancement in violation of § 667(a)(1) was cognizable on appeal, and the People had not disputed defendant's contention that the trial court was not authorized to stay the five-year enhancement for a prior serious felony conviction that was required by § 667(a)(1). *People v. Jordan (2006, Cal App 6th Dist) 141 Cal App 4th 309, 45 Cal Rptr 3d 719, 2006 Cal App LEXIS 1069*.

In a case in which defendant was convicted of offenses that arose from his attack on the prosecutor when the jury's verdicts were being read during his prior trial for making criminal threats under *Pen C § 422*, defendant's prior convictions for criminal threats were properly treated as strikes. Defendant had been found guilty by a jury of three

violations of § 422, which could be punished as a felony or misdemeanor, but were prosecuted as felonies and, when the jury rendered guilty verdicts, they constituted strike convictions subject only to their reduction to misdemeanors at sentencing, which did not occur because defendant was ordered to serve a state prison term. *People v. Queen* (2006, Cal App 3d Dist) 141 Cal App 4th 838, 46 Cal Rptr 3d 332, 2006 Cal App LEXIS 1145, review denied (2006, Cal) 2006 Cal LEXIS 13558.

On a petition to extend a commitment, the trial court's failure to consider whether defendant had serious difficulty in controlling his dangerous behavior was reversible error under *Pen C § 1026.5(b)(1)*; although there was abundant evidence that he did not control his dangerous behavior, that fact did not prove that he was unable to do so, thus making him dangerous beyond his control. The commitment originated with a plea of insanity to the felony of possession of a firearm by a convicted felon, with strike and prior prison term allegations under *Pen C §§ 12021(a), 667(d), (e), and 667.5(b)*. *People v. Galindo* (2006, Cal App 3d Dist) 142 Cal App 4th 531, 48 Cal Rptr 3d 241, 2006 Cal App LEXIS 1319.

Following defendant's conviction on three counts of committing lewd and lascivious acts upon a child under the age of 14 years under *Pen C § 288(a)*, the trial court did not err in imposing consecutive sentences based on the fact that defendant had time between the offenses to reflect on his actions but proceeded anyway. Where the trial court found either that multiple offenses occurred on the same occasion or arose from the same set of operative facts, it retained discretion under *Pen C § 667(c)(6)*, to impose consecutive sentences. *People v. Isom* (2006, Cal App 3d Dist) 145 Cal App 4th 1371, 52 Cal Rptr 3d 336, 2006 Cal App LEXIS 2035, modified (2006) 2006 Cal. App. LEXIS 2036, review gr, republished (2007, Cal) 56 Cal Rptr 3d 476, 154 P3d 1002, 2007 Cal LEXIS 2935.

In a criminal malpractice action, the attorney was entitled to summary judgment in part because the client failed to create a triable issue as to his actual innocence for felony vandalism, to which the attorney advised him to plead guilty in exchange for dismissal of a pending criminal threats charge under *Pen C § 422*. Although the client emphasized his innocence of the criminal threat charge because his threat was not taken seriously, the prosecution could have prosecuted him for attempted criminal threat, a strike under *Pen C §§ 667(c) and 1170.12(a)*. *Sangha v. LaBarbera* (2006, Cal App 4th Dist) 146 Cal App 4th 79, 52 Cal Rptr 3d 640, 2006 Cal App LEXIS 2050.

In a death penalty case, the trial court correctly denied defendant's motion for sentencing under the three strikes law, *Pen C § 667(b)-(i)* and concluded that such legislation had no retroactive ameliorative effect. *People v. DePriest* (2007, Cal) 2007 Cal LEXIS 8291.

15. Rights of Defendant in Proceedings

In a prosecution for two counts of petty theft with a prior conviction (*Pen C § 666*), in which defendant admitted a prior conviction that was charged both for purposes of *Pen C § 666*, and for purposes of sentence enhancement under *Pen C § 667*, subs. (c), (d), and (e) (three strikes law), and *Pen C § 667.5*, subd. (b) (prior prison term enhancement), the trial court erred in failing to adequately admonish defendant concerning the consequences of his admission. Specifically, the trial court told defendant that the only right he was waiving in admitting the priors was the right to trial by jury on that issue. Defendant was never advised of his privilege against compulsory self-incrimination and his right to confront his accusers, and he did not expressly waive those rights. Moreover, he was never informed of the penal consequences of his admission of the priors. Defendant's four prior convictions did not establish that defendant was so familiar with his rights in the criminal justice system that such admonitions were not required, as the record did not reflect whether the convictions resulted from trials or guilty pleas. Moreover, although defendant was represented by counsel throughout the proceedings, the record reflected that defendant, in admitting the priors, was merely taking his attorney's advice, and that the attorney may have been unclear in his explanations to defendant. *People v. Witcher* (1995, Cal App 1st Dist) 41 Cal App 4th 223, 48 Cal Rptr 2d 421, 1995 Cal App LEXIS 1241.

In a prosecution in which a jury convicted defendant of robbery (*Pen C § 211*), the trial court erred in finding true allegations of two prior robbery convictions and one prior prison term, pursuant to *Pen C § 667*, subs (b)-(i) (three

strikes law), since the true findings were based solely on defendant's admissions of guilt and since the record failed to demonstrate that the admissions were intelligent and voluntary under the totality of the circumstances. Although defendant was advised of and expressly waived his right to a jury trial on the prior conviction allegations, there was no advisement of the constitutional rights to confront his accusers and to remain silent. Further, even though defendant was in fact aware of his rights to confront witnesses and to remain silent, which he exercised at trial, it was impossible to determine from the silent record whether he not only was aware of these rights, but was also prepared to waive them as a condition to admitting his prior offenses. *People v. Torres* (1996, Cal App 2d Dist) 43 Cal App 4th 1073, 51 Cal Rptr 2d 77, 1996 Cal App LEXIS 250, review denied (1996, Cal) 1996 Cal LEXIS 2791, overruled in part *People v. Mosby* (2004) 33 Cal 4th 353, 15 Cal Rptr 3d 262, 92 P3d 841, 2004 Cal LEXIS 6234.

In a burglary prosecution, for purposes of determining whether defendant's prior conviction in a foreign state was a qualifying strike under the three strikes law (*Pen C* § 667, subs. (b)-(i)), because it was based on his personal use of a deadly weapon (*Pen C* § 1192.7, subd. (c)(23)), the trial court properly admitted a foreign state appellate court opinion for the nonhearsay purpose of showing what the out-of-state trial court found on the issue of whether the prior conviction was based on defendant's personal use of the weapon rather than vicarious liability. Based on the appellate court opinion and the remaining documents presented to prove the prior conviction, a reasonable trier of fact could have found beyond a reasonable doubt that the out-of-state trial court impliedly found that defendant was convicted of the assault because of his personal use of a deadly weapon, and not because of vicarious liability for weapon use by some third party. *People v. Woodell* (1998) 17 Cal 4th 448, 71 Cal Rptr 2d 241, 950 P2d 85, 1998 Cal LEXIS 481, modified (1998) 17 Cal 4th 969b, 1998 Cal LEXIS 2100.

In a prosecution for theft and burglary, in which the prosecution alleged multiple prior convictions (*Pen C* § 667, subs. (b)-(i)), the trial court did not abuse its discretion in granting the People's motion to bifurcate the jury trial of the current offenses from that of the allegations of the priors. In ruling on a bifurcation motion, a trial court should be guided by the specific circumstances of the case before it. The court in this case noted that it had presided over two trials in which the jury apparently had refused to follow the law and had found the defendants not guilty of offenses falling under the three strikes law. Although these circumstances were not specific to the current case, the court was also entitled to consider the prejudice to defendant from having the jury learn of his 12 prior convictions in a unitary trial. Also, defendant had no constitutional right to a unitary trial or to have the jury, rather than the court, adjudicate the matter; indeed, a bifurcated trial is often more fair to the defendant. Further, defendant had no right to jury nullification, which may have occurred had the jury known of the 12 priors when trying the current charges. Finally, even if the court abused its discretion, defendant suffered no prejudice, since it was not reasonably likely that the jury would have acquitted defendant had it known of the priors. *People v. Cline* (1998, Cal App 4th Dist) 60 Cal App 4th 1327, 71 Cal Rptr 2d 41, 1998 Cal App LEXIS 46, review denied (1998, Cal) 1998 Cal LEXIS 2395.

Defendant was convicted by a jury of receiving stolen property with findings by the court that he had sustained five prior serious felony convictions within the meaning of the three strikes law, and two prior felony convictions for which he served separate prison terms. Defendant was sentenced to prison for 25 years to life. Defendant asserted that the trial court abused its discretion when it denied him a jury trial on his prior conviction allegations under *Penal C* § 1025. The Legislature, in amending § 1025, did not intend to abrogate the statutory right to jury trial on prior conviction allegations, except to preclude the jury from deciding "whether the defendant is the person who has suffered the prior conviction." Here, it was apparent that the only issues raised were the identity of the person who suffered the prior convictions and whether the prior convictions were for serious felonies. The trial court found, after considering fingerprint testimony from an expert witness and examining the photograph provided in the prior packet, together with the documentary proof of the prior convictions, that defendant was indeed the person who suffered the prior convictions and that they constituted serious felonies. *People v. Gonzalez* (1999, Cal App 2d Dist) 73 Cal App 4th 885, 87 Cal Rptr 2d 28, 1999 Cal App LEXIS 687, review gr, depublished (1999, Cal) 90 Cal Rptr 2d 803, 988 P2d 1082, 1999 Cal LEXIS 8008, review dismissed (2001, Cal) 2001 Cal LEXIS 3812.

Defendant was not entitled to a writ of habeas corpus on grounds that the trial court failed to take a valid waiver of his right to a jury trial before the court determined he had sustained prior serious felony convictions within the meaning

of the three strikes law (*Pen C § 667*). Although convictions for 1991 first degree burglaries required looking beyond the face of the judgment in order to establish that the convictions were a serious felony, here the trial court had proof before it in the form of the record of the prior proceeding that the convictions were for residential burglaries. Further, a reading of the language in the incorporated complaints demonstrated that the prior convictions were previously proven to be residential burglaries and no further factual determinations were required. *In re Taylor* (2001, Cal App 5th Dist) 88 Cal App 4th 1100, 106 Cal Rptr 2d 454, 2001 Cal App LEXIS 333, rehearing denied (2001, Cal App 5th Dist) 2001 Cal App LEXIS 398, review denied (2001, Cal) 2001 Cal LEXIS 6075.

The trial court in a robbery prosecution acted in excess of its jurisdiction in allowing the prosecution to amend the information to allege a Nevada state robbery conviction as a strike prior and as a five-year enhancement (*Pen C §§ 667, 1170.12*) after the jury had been discharged. A new jury found the Nevada prior to be true. Defendant was denied his statutory right to have the same jury decide the guilt issue on the underlying offenses and the truth issue on the Nevada state robbery conviction allegations. Defendant only waived his statutory right to have the same jury decide the guilt issue on the underlying offense and the truth issue on the California prior allegations. Defendant did not object to the discharge of the jury because the Nevada state robbery conviction had not yet been alleged. Thus, defendant's failure to object to the discharge of the jury did not constitute waiver. Defendant did object when the prosecutor moved to amend the information to add the Nevada state robbery conviction allegations. *People v. Gutierrez* (2001, Cal App 3d Dist) 93 Cal App 4th 15, 112 Cal Rptr 2d 568, 2001 Cal App LEXIS 833, review denied (2002, Cal) 2002 Cal LEXIS 127.

Defendant was not entitled to a reduction of his stipulated prison sentence because of the trial court's error in applying the Three Strikes law to him where, in exchange for the plea and admissions, defendant avoided a possible punishment of life imprisonment with the possibility of parole for attempted premeditated murder; defendant, after having gained the benefit of his plea bargain, could not prevail on his claims that the Three Strikes law did not apply and that his 12-year term had to be reduced by four years. *People v. Flood* (2003, Cal App 3d Dist) 108 Cal App 4th 504, 133 Cal Rptr 2d 516, 2003 Cal App LEXIS 658, review denied (2003, Cal) 2003 Cal LEXIS 4588.

State's failure to retry defendant within 60 days, as directed in a federal district court condition habeas corpus order, did not allow defendant to attack the validity of his plea or his admission to a prior serious felony conviction, which were entered after the 60-day time period. The expiration of the time period did not prevent defendant from being retried on the information, and even if defendant was unlawfully held on the pending information, his plea broke the chain of events and precluded him from litigating the failure to commence the trial during the 60-day time period. *People v. Black* (2004, Cal App 2d Dist) 116 Cal App 4th 103, 10 Cal Rptr 3d 113, 2004 Cal App LEXIS 223, review denied (2004, Cal) 2004 Cal LEXIS 4245.

Explaining that recent U.S. Supreme Court case law resulted in a paradigm shift in Confrontation Clause analysis, the court held that a statement by an unavailable assault victim to police at the police station was inadmissible, even though it came under the hearsay rule exceptions in *Ev C §§ 1240, 1370*, but that the error in admitting that statement was harmless; statements made by the victim to a doctor and to a police officer at the hospital were properly admitted. Defendant's conviction for assault with a deadly weapon, with sentencing enhancements, was affirmed. *People v. Cage* (2004, Cal App 4th Dist) 120 Cal App 4th 770, 15 Cal Rptr 3d 846, 2004 Cal App LEXIS 1121, review gr, depublished (2004, Cal) 19 Cal Rptr 3d 824, 99 P3d 2, 2004 Cal LEXIS 9657, aff'd, superseded (2007) 40 Cal 4th 965, 56 Cal Rptr 3d 789, 155 P3d 205, 2007 Cal LEXIS 3522.

Petitioner was entitled to habeas corpus relief because the state trial court erred when it did not allow petitioner to testify at petitioner's sentencing hearing about the particular circumstances that resulted in petitioner's 1976 conviction for assault with a deadly weapon and assault by means of force under *Pen Code § 245(a)*, because petitioner had a due process right to testify in the hearing when there was an issue as to whether the 1976 conviction could qualify as a "third strike" under *Pen Code § 667(d)*. *Gill v. Ayers* (2003, 9th Cir Cal) 322 F3d 678, 2003 US App LEXIS 3929, opinion withdrawn (2003, 9th Cir Cal) 342 F3d 911, 2003 US App LEXIS 17979, substituted opinion (2003, 9th Cir Cal) 342 F3d 911, 2003 US App LEXIS 17970.

Assistance of counsel was not rendered ineffective by counsel's stipulation in open court to an increased prison term based on a strike prior without defendant's written consent. The record showed that defendant was present during the sentencing hearing, she did not object when her counsel stipulated to the sentence on her behalf and in her presence, and the court directed its remarks to her when it imposed the sentence and advised her of her right to appeal. *People v. Johnson* (2003, Cal App 4th Dist) 114 Cal App 4th 284, 7 Cal Rptr 3d 492, 2003 Cal App LEXIS 1852, rehearing denied (2004, Cal App 4th Dist) 2004 Cal App LEXIS 28, review denied (2004, Cal) 2004 Cal LEXIS 2291.

California inmate was entitled to habeas relief under 28 USCS § 2254 following his conviction for possession of a controlled substance in violation of H & S C § 11350(a) and the imposition of a three strikes term of 25 years to life in a state prison under Pen C § 337(e)(2)(A) where the jury selection process violated the inmate's Equal Protection Rights under U.S. Const. amend. XIV; the California Court of Appeal's decision that the prosecutor did not engage in purposeful discrimination was an unreasonable determination of the facts in light of the evidence presented at trial. *Collins v. Rice* (2004, 9th Cir Cal) 365 F3d 667, 2003 US App LEXIS 27767, rev'd (2006) 546 US 333, 163 L Ed 2, 126 S Ct 969, 2006 US LEXIS 913.

Defendant was not entitled to a jury trial on the issue as to whether his determinate criminal threats sentences were required by Pen C §§ 667(c)(6), (7), 669, and 1170.12(a)(6), (7) to run consecutively to an arson of a structure count. Apprendi does apply to the decision to impose consecutive sentences. *People v. Sykes* (2004, Cal App 2d Dist) 120 Cal App 4th 1331, 16 Cal Rptr 3d 317, 2004 Cal App LEXIS 1233, modified (Cal App 2nd Dist) 2004 Cal App LEXIS 1250, review gr, depublished (2004) 20 Cal. Rptr. 3d 418, 99 P.3d 1007, 2004 Cal. LEXIS 10017, 2004 Cal. Daily Op. Service 9412, 2004 D.A.R. 12882, review dismissed (2005) 34 Cal. Rptr. 3d 190, 119 P.3d 956, 2005 Cal. LEXIS 9966, 2005 D.A.R. 11131 .

Sentence enhancement for prior convictions under Pen C § 667(a) was set aside because defendant was not represented by counsel during the hearing at which the trial court imposed it. The court noted that the enhancement could be imposed at a new hearing at which defendant was represented by counsel, if the hearing established that the enhancement was applicable. *People v. Huggins* (2006) 38 Cal 4th 175, 41 Cal Rptr 3d 593, 131 P3d 995, 2006 Cal LEXIS 4393, rehearing denied (2006) 2006 Cal. LEXIS 6329, 2006 D.A.R. 6385, cert den (2006), 127 S. Ct. 501, 166 L. Ed. 2d 374, 2006 U.S. LEXIS 8101, 75 U.S.L.W. 3233.

In an assault and robbery case, defendant was not entitled to have the jury determine whether prior convictions in Nevada were serious felony convictions for purposes of Pen C §§ 667(a)(1), 667.5(c)(9), 1170.12(b)(12), 1192.7(c)(19); the recidivism exception to the Apprendi rule permitted the trial court to determine the nature of the convictions. *People v. McGee* (2006) 38 Cal 4th 682, 42 Cal Rptr 3d 899, 133 P3d 1054, 2006 Cal LEXIS 6173.

In a trial for grand theft, with a prior strike allegation under Pen C §§ 667(b)-(i) and 1170.12(a)-(d)), defendant forfeited his Fifth Amendment claim of improper comment on his election not to testify because defendant failed to object to the prosecutor's comments and to request a curative admonition. Counsel's assistance was not rendered ineffective by those failures because the jury was properly instructed as to the impact of defendant's silence. *People v. Mesa* (2006, Cal App 2d Dist) 144 Cal App 4th 1000, 50 Cal Rptr 3d 875, 2006 Cal App LEXIS 1793, review denied (2006, Cal App 2d Dist) 2006 Cal App LEXIS 1997, review denied (2007, Cal) 2007 Cal LEXIS 1755.

Criminal defendant was entitled to a second competency hearing at the beginning of trial because substantial evidence showed a substantial change of circumstances from the time of the first hearing, which had been held nine months earlier, at the beginning of the proceedings involving enhancement allegations under Pen C §§ 12022.7, 1192.7, 422, 667, and 1170.12. A doctor's report stated that defendant's mental condition had decompensated as the result of a change in medications. *People v. Kaplan* (2007, Cal App 4th Dist) 149 Cal App 4th 372, 57 Cal Rptr 3d 143, 2007 Cal App LEXIS 494, modified, rehearing denied (2007, Cal App 4th Dist) 2007 Cal App LEXIS 591.

Defendant was not denied his due process rights to a jury trial and finding of guilt beyond a reasonable doubt under Blakely by a trial court's imposition of consecutive terms upon his six robbery convictions where he had committed the

robbery offenses one after another unabated until he was captured after his final robbery of a bank. Defendant's sentence was not out of all proportion to the punishment in California for commission of multiple, serious robbery offenses by a recidivist offender, and thus the imposition of a sentence upon defendant under the three strikes law of 210 years to life did not constitute cruel and unusual punishment. *People v. Sullivan* (2007, Cal App 1st Dist) 151 Cal App 4th 524, 59 Cal Rptr 3d 876, 2007 Cal App LEXIS 860, modified, rehearing denied (2007, Cal App 1st Dist) 2007 Cal App LEXIS 1021, review denied (2007, Cal) 2007 Cal LEXIS 9575.

Sentencing judge violated the spirit of the law by refusing to grant defendant a two-day continuance of the sentencing hearing so that the trial judge could impose sentence for convictions under *Pen C* §§ 459 and 496, with a prior strike under *Pen C* §§ 1170.12, 667. A finding of prejudice was supported by defendant's argument that a more lenient sentence could have been received, based on sentencing to the lower term instead of the middle term on one or both of two auto burglary convictions, or to concurrent sentences instead of consecutive ones, or if the prior strike had been stricken. *People v. Jacobs* (2007, 1st Dist) 156 Cal App 4th 728, 2007 Cal App LEXIS 1799.

15.5. Right to Jury Trial

Sentencing court did not violate Blakely standards when it imposed a seven-year term for failing to register as a sex offender, based on defendant's admission to prior strikes and a prison prior; as a Three Strikes offender, defendant's maximum statutory sentence under Blakely was 25 years to life, more than the term imposed. The fact that the sentencing court struck one of the "strike" priors did not impact the calculation of the statutory maximum penalty. *People v. Ackerman* (2004, Cal App 6th Dist) 124 Cal App 4th 184, 21 Cal Rptr 3d 142, 2004 Cal App LEXIS 1938, review gr, depublished (2005) 25 Cal. Rptr. 3d 222, 106 P.3d 894, 2005 Cal. LEXIS 2023, 2005 Cal. Daily Op. Service 1627, 2005 D.A.R. 2233, review dismissed (2005) 34 Cal. Rptr. 3d 196, 119 P.3d 960, 2005 Cal. LEXIS 9956, 2005 D.A.R. 11116, cert den (2007) 127 S. Ct. 1213, 167 L. Ed. 2d 73, 2007 U.S. LEXIS 2063, 75 U.S.L.W. 3435.

Where defendant waived a jury trial regarding prior allegations, it was proper for the trial court to determine whether defendant's current offense was a serious felony for purposes of *Pen C* § 667(a)(1). Thus, the trial court was warranted in concluding that defendant's battery with serious bodily injury in violation of *Pen C* § 243(d) was such a felony. *People v. Arnett* (2006, Cal App 3d Dist) 139 Cal App 4th 1609, 44 Cal Rptr 3d 206, 2006 Cal App LEXIS 820, rehearing denied (2006, Cal App 3d Dist) 2006 Cal App LEXIS 1080, review denied (2006, Cal) 2006 Cal LEXIS 11465, cert den (2007, US) 127 S Ct 2247, 167 L Ed 2d 1096, 2007 US LEXIS 5231.

16. Appeal and Review

In a burglary prosecution, defendant's admission that he had previously been convicted of a serious felony within the meaning of *Pen C* § 667, subd. (a), was improperly induced by the trial court's misrepresentation that his ability to appeal the legality of the prior conviction was preserved. The trial court was incorrect in advising defendant that his admission preserved his right to appeal whether his federal bank robbery conviction constituted a serious felony under subd. (a). While defendant could properly contest the validity of his admission because of the trial court's faulty advice, he was not entitled on appeal to contest matters going to the merits or validity of the prior conviction as a serious felony under subd. (a). The improper inducement constituted reversible error, and on remand, the prosecution would be entitled to turn to other evidence in the record of the bank robbery conviction to determine whether all the elements of a California robbery were present. *People v. Bowie* (1992, Cal App 2d Dist) 11 Cal App 4th 1263, 15 Cal Rptr 2d 22, 1992 Cal App LEXIS 1470.

In a prosecution for carjacking, the trial court erred in striking a five-year enhancement term for the prior conviction of a serious felony (*Pen C* § 667, subd. (a)(1)), even though the same prior conviction was used as a second strike to double the base term for carjacking (*Pen C* § 667, subd. (b)-(i)). The express provisions of *Pen C* § 1385, subd. (b), and *Pen C* § 667, subd. (c)(2), prohibit the court from dismissing, staying, or striking the five-year enhancement, if it is pled and proved, even though it is the same prior felony used to trigger the provisions of the three strikes law. Imposition of the five-year enhancement is part and parcel of the three strikes statutory scheme, which contemplated the

doubling of the base term (in the case of one prior felony strike), plus imposition of all applicable enhancements. *Pen C § 654* does not require that the enhancement be stayed. Nevertheless, a sentencing remand to the trial court to exercise its discretion to strike the three one-year enhancement terms imposed for separate prior prison terms (*Pen C § 667.5*, subd. (b)), was deemed just in this case, since the trial court did not indicate how it would have exercised its discretion in that regard had it been aware imposition of the enhancement for a prior serious felony was mandatory. *People v. Dominguez (1995, Cal App 2d Dist) 38 Cal App 4th 410, 45 Cal Rptr 2d 153, 1995 Cal App LEXIS 910.*

The Supreme Court's holding to the effect that a trial court sentencing a defendant under the three strikes law (*Pen C § 667*, subds. (b)-(i)) has discretion to dismiss an allegation of a prior felony conviction in the furtherance of justice pursuant to *Pen C § 1385*, subd. (a), is fully retroactive. A defendant serving a sentence under the three strikes law imposed by a court that misunderstood the scope of its discretion in this regard may file a petition for a writ of habeas corpus in the sentencing court to secure reconsideration of the sentence. *People v. Superior Court (Romero) (1996) 13 Cal 4th 497, 53 Cal Rptr 2d 789, 917 P2d 628, 1996 Cal LEXIS 3025*, modified, rehearing denied (*1996) 13 Cal 4th 1016, 1996 Cal LEXIS 4445.*

In a prosecution for possession of a controlled substance (0.13 grams of cocaine base) (*Health & Saf. Code, § 11350*, subd. (a)), the trial court's failure to explain the reasons for its dismissal of two prior felony conviction allegations that made defendant subject to the sentencing provisions of the three strikes law (*Pen C § 667*, subds. (b)-(i)), pursuant to the requirements of *Pen C § 1385*, subd. (a) (dismissal in furtherance of justice), rendered its dismissal order ineffective. Since the court's expressed willingness to consider striking the allegations manifestly influenced defendant's decision to plead guilty, the appropriate remedy was to vacate the judgment, to permit defendant to withdraw his plea, and to allow the court the opportunity to exercise its discretion to dismiss the priors in strict compliance with *Pen C § 1385*, subd. (a). Any such decision, if the court should again choose to dismiss the priors, would be reviewable for abuse of discretion. *People v. Superior Court (Romero) (1996) 13 Cal 4th 497, 53 Cal Rptr 2d 789, 917 P2d 628, 1996 Cal LEXIS 3025*, modified, rehearing denied (*1996) 13 Cal 4th 1016, 1996 Cal LEXIS 4445.*

In a narcotics prosecution, the trial court, in sentencing a defendant who had two prior felony convictions under the three strikes law (*Pen C § 667*, subds. (b)-(i)), erred in finding that it had no discretion under *Pen C § 1385* (dismissal in furtherance of justice), to strike the prior conviction allegations for purposes of sentencing on the ground that the three strikes law was not retroactive, i.e., that the determination that the prior conviction was a strike had to be made at the time of the prior conviction. Thus, the judgment had to be vacated and the case had to be remanded to the trial court to permit it to resentence defendant with an accurate view of its powers. *People v. Metcalf (1996, Cal App 4th Dist) 47 Cal App 4th 248, 55 Cal Rptr 2d 164, 1996 Cal App LEXIS 634.*

On appeal from a three strikes sentence by a defendant with three prior serious felony convictions under *Pen C § 667*, subds. (b)-(i) (three strikes law), defendant was entitled to reconsideration of his sentence on remand, where the trial court misunderstood the scope of its discretion to strike prior felony conviction allegations in furtherance of justice, under *Pen C § 1385* (striking of priors for purposes of sentence enhancement). Although, in ruling on defendant's pretrial motion to strike, the trial court had stated that even if it did have discretion to strike those allegations, it would not have done so, and although this would not have provided any basis for resentencing, the trial court's later comments at sentencing (under a different judge) did provide such basis. Defendant had not formally and explicitly renewed his motion to strike, but a defendant seeking reconsideration of sentence need not show he or she brought a motion to strike the allegations in the trial court. The trial court had been unaware of its sentencing discretion; defendant had urged the court not to apply the three strikes law; the court believed it had no discretion to strike or dismiss the prior serious felony conviction allegations at the time of sentencing; and the court's comments at sentencing suggested it would have been inclined to strike or dismiss, if it had discretion to do so. *People v. Sotomayor (1996, Cal App 2d Dist) 47 Cal App 4th 382, 54 Cal Rptr 2d 871, 1996 Cal App LEXIS 678*, review denied (*1996, Cal) 1996 Cal LEXIS 5865.*

On direct appeal, a defendant serving a prison term pursuant to *Pen C § 667*, subds. (b)-(i) (three strikes law), imposed by a court that misunderstood the scope of its discretion to strike prior felony conviction allegations in furtherance of justice, is entitled to a remand for reconsideration of the sentence. Of course, remand is inappropriate if

the record clearly indicates the sentencing court would not, in any event, have exercised its discretion to strike the allegations. *People v. Sotomayor* (1996, Cal App 2d Dist) 47 Cal App 4th 382, 54 Cal Rptr 2d 871, 1996 Cal App LEXIS 678, review denied (1996, Cal) 1996 Cal LEXIS 5865.

The lack of any requirement that a defendant seeking reconsideration of three strikes sentence must show he or she brought a motion to strike the triggering allegations in the trial court, is logical given that the sentencing court has authority to strike such allegations on its own motion. A sentencing court believing it had no discretion to strike prior serious or violent felony conviction allegations would not do so on its own motion. Therefore, in cases where the record actually reflects the sentencing judge misunderstood the scope of her or his discretion pursuant to *Pen C § 1385* (striking of priors for purposes of sentence enhancement), a motion to strike the prior serious felony conviction allegations in the trial court is not a prerequisite to obtaining reconsideration (by way of a habeas corpus petition or on direct appeal) of a sentence imposed pursuant to *Pen C § 667*, subds. (b)-(i) (three strikes law). *People v. Sotomayor* (1996, Cal App 2d Dist) 47 Cal App 4th 382, 54 Cal Rptr 2d 871, 1996 Cal App LEXIS 678, review denied (1996, Cal) 1996 Cal LEXIS 5865.

On appeal from a conviction and sentence for robbery and attempted robbery, in which the jury found allegations of three prior convictions, one of which was alleged pursuant to *Pen C § 667*, subds. (b)-(i) (three strikes law), to be true, reconsideration of the sentence was not required even though the trial court may not have believed it had discretion to strike prior convictions in the interest of justice. The trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence. It stated that imposing the maximum sentence was appropriate. It increased defendant's sentence beyond what it believed was required by the three strikes law, by imposing the high term for one count and by imposing two additional discretionary one-year enhancements. Under the circumstances, no purpose would be served in remanding for reconsideration. In light of defendant's record and the facts of the present offense, imposition of the maximum term was well within the trial court's sentencing discretion. *People v. Gutierrez* (1996, Cal App 2d Dist) 48 Cal App 4th 1894, 56 Cal Rptr 2d 529, 1996 Cal App LEXIS 844.

A defendant sentenced under the three strikes law (*Pen C § 667*) was not entitled to a reconsideration of his sentence even though the trial court may have erroneously believed it lacked discretion to strike prior convictions in the interest of justice (*Pen C § 1385*). Whether the trial court believed it had discretion to strike the alleged prior felony convictions or not, defendant suffered no prejudice since it would have been a manifest abuse of that discretion to exercise it. In 1969, at age 18, defendant was convicted of 2 counts of robbery and was committed to the California Youth Authority. He was discharged from parole in 1974 but was again convicted in 1979 of robbery and robbery of a common carrier with use of a firearm, for which he was sentenced to state prison. He was paroled in March 1982 and was arrested three months later for burglary. He was subsequently convicted of those charges and returned to state prison. He was again paroled in 1983 but was convicted of assault with a firearm use allegation, was returned to prison, was paroled in June 1992, and absconded from parole in October 1992. He was arrested in July 1994 for the offenses underlying his current conviction: robbery of an inhabited dwelling, false imprisonment, first degree burglary with use of a deadly weapon, three counts of second degree burglary, auto theft, and transportation of cocaine. The probation report listed seven circumstances in aggravation and none in mitigation. There was no hint in the record that the trial court ever entertained the slightest thought of leniency toward defendant. *People v. DeGuzman* (1996, Cal App 1st Dist) 49 Cal App 4th 1049, 57 Cal Rptr 2d 577, 1996 Cal App LEXIS 934, review denied (1996, Cal) 1996 Cal LEXIS 6870.

Following defendant's entry of a negotiated plea of no contest to cocaine possession and his admissions that he had three prior felony convictions under the three strikes law (*Pen C § 667*, subds. (b)-(i)), in exchange for the trial court dismissing, on the prosecution's motion (*Pen C § 667*, subd. (f)(2)), two of his three priors and sentencing him to a second strike eight-year sentence, although the court's conclusional entry in the minute order that the two priors were struck "for sentencing purposes" did not comply with the requirements of *Pen C § 1385*, subd. (a) (dismissal in furtherance of justice), defendant was not entitled to have his plea bargain set aside. Where a defendant has pleaded guilty in return for a specified sentence, an appellate court is not inclined to find error even though the trial court acted in excess of its jurisdiction in reaching that figure, as long as the court did not lack fundamental jurisdiction. Thus, defendant was estopped from complaining that he was entitled to a remand for resentencing so that he could request the

trial court to exercise its discretion under *Pen C § 1385*, and the three strikes law to strike his remaining prior in the interests of justice. Further, the plea bargain accomplished everything defendant could have hoped for had the trial court exercised its own discretion instead of following the prosecution's lead by agreeing to dismiss the two prior "strike" convictions. *People v. Cepeda* (1996, *Cal App 2d Dist*) 49 *Cal App 4th* 1235, 57 *Cal Rptr 2d* 246, 1996 *Cal App LEXIS* 937, overruled *People v. Mendez* (1999) 19 *Cal 4th* 1084, 81 *Cal Rptr 2d* 301, 969 *P2d* 146, 1999 *Cal LEXIS* 4.

On appeal in a three strikes law case (*Pen C § 667*, subds. (b)-(i)), if the record reflects that the sentencing court was aware that it had the power to strike the prior felony allegation and did not do so, or if the court clearly indicated that it would not strike the prior in any event, then the judgment should be affirmed. Conversely, if the record clearly reflects that the sentencing court thought it had no power to strike, then the matter should be remanded to the trial court for proper exercise of its sentencing discretion. *People v. Davis* (1996, *Cal App 1st Dist*) 50 *Cal App 4th* 168, 57 *Cal Rptr 2d* 659, 1996 *Cal App LEXIS* 991, review denied (1997, *Cal*) 1997 *Cal LEXIS* 650.

In a prosecution for indecent exposure (*Pen C § 314*), where defendant admitted his prior conviction for lewd and lascivious acts with a child under the age of 14 (*Pen C § 288*) prior to trial as a prior strike under the three strikes law (*Pen C § 667*, subds. (b)-(i)), remand for resentencing was warranted to permit the trial court to exercise its sentencing discretion under *Pen C § 1385*, to strike the prior. Although the record did not affirmatively demonstrate that the trial court misunderstood its sentencing discretion, remand was warranted due to reversal of the indecent exposure conviction owing to the trial court's prejudicial error when it denied defendant's motion *in limine* to prevent the jury from hearing of his prior conviction. *People v. Merkle* (1996, *Cal App 1st Dist*) 51 *Cal App 4th* 472, 58 *Cal Rptr 2d* 21, 1996 *Cal App LEXIS* 1233.

In a prosecution in which a jury convicted defendant of stalking in violation of a restraining order (*Pen C § 646.9*, subd. (b)), and found true a serious felony prior conviction allegation (*Pen C § 667*, subds. (b)-(i)), and in which the trial court doubled the four-year high term for the crime of stalking, defendant was not entitled to a remand for a new sentencing hearing. The sentence imposed by the trial court was authorized by *Pen C § 667*, subd. (e)(1), of the three strikes law, and it is inappropriate for an appellate court to consider matters not raised below, given that appellate jurisdiction is limited to the four corners of the record on appeal. Defendant did not move to strike his prior serious felony conviction, and, at sentencing, his attorney acquiesced in the second strike sentence that doubled the four-year high term for the crime of stalking. Thus, there was no indication that the court misunderstood the scope of its discretion to strike the prior felony conviction allegation in furtherance of justice pursuant to *Pen C § 1385*, subd. (a). Further, on the record, the Court of Appeal was not required to determine whether defense counsel's performance was incompetent for failing to move to strike the prior conviction, since defendant failed to show that he was prejudiced by counsel's performance. Moreover, defendant was first required to seek any relief from the sentence in the trial court in a petition for a writ of habeas corpus. *People v. Gams* (1996, *Cal App 2d Dist*) 52 *Cal App 4th* 147, 60 *Cal Rptr 2d* 423, 1997 *Cal App LEXIS* 93, review denied (1997, *Cal*) 1997 *Cal LEXIS* 2032.

Defendant, who was convicted of robbery and unlawfully driving or taking a vehicle and sentenced as a third strike defendant under the three strikes law (*Pen C § 667*, subds. (b)-(i)), was not entitled, on appeal, to have the matter remanded to the trial court for exercise of its discretion to strike either of defendant's prior serious felony convictions pursuant to *Pen C § 1385*, where the trial record was silent as to whether the trial court understood its discretionary power under *Pen C § 1385*. Under *Pen C § 1385*, when the record is silent, a remand on appeal is not required; a defendant instead must seek relief through a petition for a writ of habeas corpus. *People v. Fuhrman* (1997) 16 *Cal 4th* 930, 67 *Cal Rptr 2d* 1, 941 *P2d* 1189, 1997 *Cal LEXIS* 4982.

Defendant who was sentenced pursuant to the three strikes law (*Pen C § 667*, subds. (b)-(i)), was not entitled to remand for resentencing, since his sentencing hearing took place 53 days after filing of the California Supreme Court decision that held that a three strikes recidivist is entitled to have the trial judge exercise discretion to strike a prior conviction pursuant to *Pen C § 1385*. Although that Supreme Court holding is retroactive in effect, it could be presumed that defendant's trial judge was aware at defendant's sentencing hearing of his power to strike the prior serious felony conviction and chose not to do so. There was no indication that the trial judge was unaware of the scope of his

discretion; hence, the normal presumption that the trial judge exercised discretion correctly applied. *People v. Mosley* (1997, Cal App 2d Dist) 53 Cal App 4th 489, 62 Cal Rptr 2d 268, 1997 Cal App LEXIS 164, review denied (1997, Cal) 1997 Cal LEXIS 2873.

A convicted felon subject to the enhanced recidivist sentencing provisions of the three strikes law (*Pen C* § 667, subs. (b)-(i)), is entitled to have the trial judge exercise discretion pursuant to *Pen C* § 1385, subd. (a), to determine whether to strike a prior serious felony conviction in the interests of justice. This California Supreme Court holding, which related only to sentencing, was fully retroactive, and a defendant serving a three strikes sentence imposed by a court that misunderstood the scope of its discretion can raise the issue on appeal, or if relief on appeal is no longer available, can file a petition for habeas corpus in the sentencing court to secure reconsideration of the sentence. Such a petition may be summarily denied if the record shows that the sentencing court was aware that it possessed the discretion to strike prior felony conviction allegations without the concurrence of the prosecuting attorney and did not strike the allegations, or if the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations. Retroactive application of this holding represented an exception to the normal presumption of regularity concerning the exercise of sentencing discretion, since the controlling Court of Appeal authority prior to the Supreme Court decision was that there was no or only a limited power to strike prior serious felony convictions. *People v. Mosley* (1997, Cal App 2d Dist) 53 Cal App 4th 489, 62 Cal Rptr 2d 268, 1997 Cal App LEXIS 164, review denied (1997, Cal) 1997 Cal LEXIS 2873.

Defendant who was sentenced under the three strikes law (*Pen C* § 667, subs. (b)-(i)), was entitled to seek habeas corpus relief, where the record was silent as to whether the sentencing court misunderstood its authority or discretion to strike the prior conviction in the furtherance of justice (*Pen C* § 1385), even though defendant did not move to strike the prior before trial. The filing of such a motion is not a prerequisite to seeking habeas corpus relief. *In re Iveys* (1997, Cal App 2d Dist) 54 Cal App 4th 1288, 63 Cal Rptr 2d 453, 1997 Cal App LEXIS 364.

In a habeas corpus proceeding, the trial court properly reconsidered defendant's sentence and struck a prior conviction under the three strikes law (*Pen C* § 667, subs. (b)-(i)), even though the Court of Appeal, in affirming the original conviction and sentence, had found that, in light of defendant's criminal history, striking a prior convictions would have been an abuse of discretion. Following the ruling of the Court of Appeal, the California Supreme Court issued two decisions that justified making an exception to the law of the case doctrine. The first Supreme Court decision set forth what constitutes an abuse of discretion in three strikes cases, and the second decision clarified the law further, stating that any exercise of sentencing discretion must be a fact-based inquiry taking all relevant factors, including the defendant's criminal past and public safety, into due consideration; considering only a defendant's criminal history is incompatible with the very nature of sentencing discretion. Thus, the trial court properly reconsidered defendant's sentence in light of the Supreme Court's decisions. Furthermore, the doctrine only controls the outcome of a second proceeding if the evidence is substantially the same, and in the second proceeding, the trial court considered facts concerning defendant that had not previously been considered. *In re Saldana* (1997, Cal App 2d Dist) 57 Cal App 4th 620, 67 Cal Rptr 2d 183, 1997 Cal App LEXIS 704, review denied (1997, Cal) 1997 Cal LEXIS 8257.

In a habeas corpus proceeding, the second appeal rule did not preclude the trial court from reconsidering defendant's sentence and striking a prior conviction under the three strikes law (*Pen C* § 667, subs. (b)-(i)), even though the Court of Appeal, in affirming the original conviction and sentence, had found that, in light of defendant's criminal history, striking a prior convictions would have been an abuse of discretion. The general rule is that a party may not raise in a habeas corpus petition an issue that was raised and rejected on direct appeal, or that could have been, but was not, raised on direct appeal. However, an exception permits a petitioner to raise in a petition for a writ of habeas corpus an issue previously rejected on direct appeal when there has been a change in the law affecting the petitioner. Following the ruling of the Court of Appeal, the California Supreme Court issued two decisions that affected this case. The first Supreme Court decision set forth what constitutes an abuse of discretion in three strikes cases, and the second decision clarified the law further, stating that any exercise of sentencing discretion must be a factbound inquiry taking all relevant factors, including the defendant's criminal past and public safety, into due consideration; considering only a defendant's criminal history is incompatible with the very nature of sentencing discretion. *In re Saldana* (1997, Cal App

2d Dist) 57 Cal App 4th 620, 67 Cal Rptr 2d 183, 1997 Cal App LEXIS 704, review denied (1997, Cal) 1997 Cal LEXIS 8257.

In a prosecution in which defendant was sentenced under the three strikes law for having suffered two prior felony convictions that the trial court stated it had no discretion to dismiss, defendant was entitled to a remand for a hearing on his motion to dismiss one or more of the prior convictions. A trial court has the power to dismiss prior convictions under *Pen C § 1385* (court may dismiss criminal action in furtherance of justice), and where a trial court ruled that it lacked power to dismiss prior convictions, the appellate court must remand to the trial court for further proceedings. Furthermore, the trial court was required to conduct a hearing with defendant present and represented by counsel. *Pen C § 977*, subd. (b)(1), provides that defendants in felony cases shall be personally present at certain specified proceedings and "at all other proceedings" unless presence is waived by the defendant. Defendant's motion to dismiss a strike under *Pen C § 1385*, was an "other proceeding" at which his personal presence was required, since an opportunity to persuade the trial court to exercise its discretion to strike a prior conviction in the interest of justice is extremely important to persons in defendant's position. *People v. Vong* (1997, Cal App 2d Dist) 58 Cal App 4th 1063, 68 Cal Rptr 2d 436, 1997 Cal App LEXIS 873.

On appeal from convictions for attempted residential burglary and residential burglary and a sentence of 75 years to life under the three strikes law (*Pen C § 667*, subds. (b)-(i)), defendant was entitled to remand for the trial court to exercise its discretion to dismiss prior convictions, where the trial court stated that it believed it lacked discretion to dismiss a strike. A trial court may exceed its limited discretion to dismiss strikes if it dismisses a strike to accommodate judicial convenience or court congestion or because a defendant has pleaded guilty. Also, it would exceed its discretion if guided by a personal antipathy for the effect that the three strikes law would have on a defendant or if a defendant's instant crime is horrific or the defendant's past crimes violent and life threatening. In this case, considering the sentence for this 43-year-old defendant, he was entitled to a hearing where he, represented by counsel, would have an opportunity to persuade the trial court to exercise its limited dismissal discretion. The trial court was required to decide whether the circumstances of the instant offenses, the absence of violence, defendant's age, the nature of his previous offenses, his willingness to undergo psychotherapy and drug counseling, his computer skills, and all other relevant considerations justified dismissal of one or more strikes. *People v. Banks* (1997, Cal App 2d Dist) 59 Cal App 4th 20, 68 Cal Rptr 2d 731, 1997 Cal App LEXIS 914, review denied (1998, Cal) 1998 Cal LEXIS 1335.

A criminal defendant serving a sentence under the three strikes law (*Pen C § 667*, subds. (b)-(i)) imposed by a court that misunderstood the scope of its discretion to strike prior felony conviction allegations may raise the issue on appeal. *People v. Banks* (1997, Cal App 2d Dist) 59 Cal App 4th 20, 68 Cal Rptr 2d 731, 1997 Cal App LEXIS 914, review denied (1998, Cal) 1998 Cal LEXIS 1335.

In a prosecution in which defendant was convicted of two counts of second degree robbery and two counts of second degree burglary, and in which the trial court found defendant had suffered two prior serious felony convictions within the meaning of the three strikes law (*Pen C § 667*, subds. (b)-(i)), remand for resentencing was required, since the trial court did not clarify whether it intended to strike both prior convictions or just one prior conviction as to each of the burglary counts. The trial court imposed a third strike sentence of 25 years to life on one robbery count, stayed sentence on the second robbery count pursuant to *Pen C § 654* (prohibition against multiple punishment), then used its discretion under *Pen C § 1385*, to strike the 2 prior convictions as to the burglary counts. However, the trial court ordered that the midterm sentences on the burglary counts be doubled, the calculation for a defendant with one prior conviction. Hence, it was not clear whether the trial court intended to strike both prior convictions or just one prior conviction as to the burglary counts. *People v. Garcia* (1997, Cal App 2d Dist) 59 Cal App 4th 834, 69 Cal Rptr 2d 463, 1997 Cal App LEXIS 980, rehearing denied (1997, Cal App 2d Dist) 60 Cal App 4th 1241A, 1997 Cal App LEXIS 1083, review denied (1998, Cal) 1998 Cal LEXIS 1539.

A trial court's discretion to strike or vacate an allegation or finding of a defendant's previous conviction of a serious and/or violent felony under the three strikes law (*Pen C § 667*, subds. (b)-(i)), on its own motion, "in furtherance of justice" pursuant to *Pen C § 1385*, subd. (a), is reviewable. *Pen C § 1385*, subd. (a), anticipates and facilitates appellate

review with the requirement that the reasons for the dismissal must be set forth in an order entered upon the minutes. The statement of reasons is not merely directory, and neither trial nor appellate courts have authority to disregard the requirement. It is not enough that on review the reporter's transcript may show the trial court's motivation; the minutes must reflect the reason so that all may know why this great power was exercised. *People v. Williams* (1998) 17 Cal 4th 148, 69 Cal Rptr 2d 917, 948 P2d 429, 1998 Cal LEXIS 3, modified, rehearing denied (1998) 17 Cal 4th 643b, 1998 Cal LEXIS 1151.

In ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the three strikes law (*Pen C* § 667, subs. (b)-(i)), on its own motion, "in furtherance of justice" pursuant to *Pen C* § 1385, subd. (a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of the present felonies and the prior serious and/or violent felony convictions, and the particulars of the defendant's background, character, and prospects, the defendant may be deemed outside the spirit of the three strikes sentencing scheme, in whole or in part, and hence should be treated as though he or she had presently not committed one or more felonies and/or had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, the court must set forth its reasons in an order entered on the minutes, and if it is reviewing the striking or vacating of such an allegation or finding, it must pass on the reasons so set forth. *People v. Williams* (1998) 17 Cal 4th 148, 69 Cal Rptr 2d 917, 948 P2d 429, 1998 Cal LEXIS 3, modified, rehearing denied (1998) 17 Cal 4th 643b, 1998 Cal LEXIS 1151.

On appeal of a drug possession prosecution in which the trial court mistakenly believed it had no discretion to dismiss defendant's three serious felonies under the three strikes law (*Pen C* § 667, subs. (b)-(i)), the Court of Appeal, in remanding the case with directions to the trial court to decide whether to exercise its discretion to dismiss defendant's prior convictions, erred in instructing the trial court that defendant's presence was not required if the trial court decided not to exercise its discretion to dismiss one or more of the prior convictions under *Pen C* § 1385, subd. (a) (furtherance of justice). The presence of defendant and his counsel was required on remand at the first occasion on which the trial court would consider whether to exercise its sentencing discretion in defendant's favor. The reviewing court's power to order a limited remand includes the authority to direct the trial court to conduct such further proceedings as may be just under the circumstances (*Pen C* § 1260). *Pen C* § 1260, provided sufficient authority to require defendant's presence on remand, since permitting the trial court to decide how to exercise its discretion under *Pen C* § 1385, without affording defendant and his counsel an opportunity to address the subject, would have been manifestly unfair. *People v. Rodriguez* (1998) 17 Cal 4th 253, 70 Cal Rptr 2d 334, 949 P2d 31, 1998 Cal LEXIS 10, superseded by statute as stated in *People v. Luna* (2003, Cal App 2d Dist) 113 Cal App 4th 395, 6 Cal Rptr 3d 539, 2003 Cal App LEXIS 1700.

In determining whether a defendant has a right to a resentencing hearing after the trial court failed to exercise its discretion to dismiss prior convictions under the three strikes law (*Pen C* § 667, subs. (b)-(i)), if (1) the record is silent on the question of the trial court's discretion to strike the prior convictions and (2) the matter is raised for the first time in a habeas corpus proceeding, the trial court can summarily deny the petition without first conducting a hearing in the presence of the defendant and counsel if the trial court concludes the petition has no possible merit. On the other hand, if (1) the matter is raised on appeal and (2) the record affirmatively demonstrates the trial court believed it lacked discretion, the presence of the defendant and counsel is required at a new sentencing hearing. *In re Barfoot* (1998, Cal App 2d Dist) 61 Cal App 4th 923, 71 Cal Rptr 2d 870, 1998 Cal App LEXIS 147.

In a habeas corpus proceeding arising from the trial court's failure to exercise its discretion to dismiss a prior felony conviction under the three strikes law (*Pen C* § 667, subs. (b)-(i)), the trial court erred in summarily denying defendant's motion for a resentencing hearing. Subsequent to the original sentence, the California Supreme Court made three separate rulings: (1) courts have discretion to dismiss prior convictions; (2) a defendant seeking relief under this rule must allege more than a silent record concerning the trial court's belief on this matter; (3) when the record on appeal indicates that the trial court believed it had no discretion, the defendant is entitled to a hearing in the presence of the defendant and counsel. In this case, the record was not silent as to the court's belief concerning its sentencing discretion. Its statement made when sentencing defendant, "And pursuant to 667(b) through (i), I am required to double that term," essentially stated that the three strikes law compelled it to sentence defendant in a particular manner and

divested it of discretion to do otherwise. Although defendant failed to allege that the sentencing court believed it had no discretion to strike the prior, the petition was filed prior to the Supreme Court's second ruling. Furthermore, the Supreme Court's third rule applies equally to habeas corpus proceedings as to remands following appeal. Thus, since defendant made a prima facie case for relief, he was entitled to a new sentencing hearing in the presence of himself and counsel. *In re Barfoot* (1998, Cal App 2d Dist) 61 Cal App 4th 923, 71 Cal Rptr 2d 870, 1998 Cal App LEXIS 147.

In a prosecution for receiving stolen property and conspiracy to commit robbery, where the defendant was sentenced to two consecutive terms of 25 years to life under the Three Strikes Law (*Pen C* § 667, subds. (b)-(i)), remand was required for a hearing to determine whether the offenses occurred "on the same occasion" and arose "from the same set of operative facts," and if not, to afford the trial court an opportunity to exercise its discretion to impose consecutive or concurrent sentences. In sentencing, the trial court made no explicit statement as to whether it believed consecutive sentencing was required. If the trial court believed it had discretion to impose a consecutive or concurrent term, it was required to apply the normal rules governing sentence choice. Those rules require the court to provide a statement of reasons for choosing a consecutive term. (*Pen C* § 1170, subd. (c); *CRC*, rule 406(b)(5).) None were provided. On the other hand, if the court believed that it had no discretion to exercise because consecutive terms were required by the statute, a statement of reasons was not required. The record did not support the statutory requisites for the application of the second alternative. *People v. Hall* (1998, Cal App 2d Dist) 67 Cal App 4th 128, 79 Cal Rptr 2d 690, 1998 Cal App LEXIS 848.

In considering an equal protection challenge, a reviewing court must first determine the appropriate standard of review, which depends on the classification involved in, and the interests affected by, the challenged law. Personal liberty is a fundamental right, and a classification infringing on such a right is subject to strict judicial scrutiny. Under this very severe standard, a discriminatory law will not be given effect unless the state establishes that the classification (1) bears a close relation to the promotion of a compelling state interest, (2) is necessary to achieve the government's goal, and (3) is narrowly drawn to achieve the goal by the least restrictive means possible. All other legislation satisfies the requirements of equal protection if it bears a rational relationship to a legitimate state interest. *Penal C* § 667(d)(3) runs afoul of this compelling state interest by including nonserious, nonviolent juvenile adjudications as strikes. Such a classification is not necessary or narrowly drawn to achieve the express purpose of the three strikes law of ensuring longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses. *People v. Leng* (1999, Cal App 5th Dist) 71 Cal App 4th 1, 83 Cal Rptr 2d 433, 1999 Cal App LEXIS 301, rehearing denied (1999, Cal App 5th Dist) 71 Cal App 4th 1259, 1999 Cal App LEXIS 426.

Where the court had construed the term "committed on the same occasion" in *Pen C* § 1170.12(a)(6) in a prior action as referring at least to a close temporal and spatial proximity between the acts underlying the convictions, because the defendant's crimes were clearly committed on the same occasion, consecutive sentencing was not mandated and hence the court had no occasion to further construe the phrase "arising out of the same set of operative facts" also found in § 1170.12(a)(6); therefore, where the crimes were committed on the same occasion and arose from the same set of operative facts, thus permitting concurrent sentencing. Review was granted to determine whether defendant's offenses were committed on the same occasion, and if not, whether they also did not arise from the same set of operative facts, *Pen C* § 667(c)(6), such that the appellate court erred in concluding that consecutive sentences were not mandated. *People v. Lawrence* (2000) 24 Cal 4th 219, 99 Cal Rptr 2d 570, 6 P3d 228, 2000 Cal LEXIS 6688, rehearing denied (2000, Cal) 2000 Cal LEXIS 7888.

In a criminal prosecution in which, on appeal, the evidence was found to be insufficient to support a finding that the defendant had suffered a prior serious felony conviction that qualified as a "strike" under the Three Strikes Law (*Pen C* §§ 667, 1170.12), retrial of the prior conviction allegation was not barred by double jeopardy, law of the case, or res judicata. In addition, the burden on the People on remand was simply to present additional evidence, not newly discovered evidence which they, in due diligence, could not have presented at the first trial on the truth of the prior. *Cherry v. Superior Court* (2001, Cal App 2d Dist) 86 Cal App 4th 1296, 104 Cal Rptr 2d 131, 2001 Cal App LEXIS 91, review denied (2001, Cal) 2001 Cal LEXIS 3167, cert den *Cherry v. California* (2001) 534 US 854, 151 L Ed 2d 80, 122 S Ct 125, 2001 US LEXIS 6042.

Although the trial court erred by applying the Three Strikes law when sentencing defendant, defense counsel did not waive this error by stipulating that there was a factual basis for the strike allegation; defendant's admission and his counsel's stipulation took the place of a factfinder's determination that the prior conviction existed. It was the trial court's function to determine whether that prior conviction constituted a "strike." *People v. Flood* (2003, Cal App 3d Dist) 108 Cal App 4th 504, 133 Cal Rptr 2d 516, 2003 Cal App LEXIS 658, review denied (2003, Cal) 2003 Cal LEXIS 4588.

Husband's conviction for vandalism of his wife's property was proper. The reviewing court modified the enhanced sentence to correct the trial court's miscalculation of presentence custody credit and failure to award presentence conduct credit; the court discussed its reasoning in a non-published portion of the opinion. *People v. Wallace* (2004, Cal App 5th Dist) 123 Cal App 4th 144, 19 Cal Rptr 3d 790, 2004 Cal App LEXIS 1736, review denied (2005) 2005 Cal. LEXIS 957.

Inmate was not entitled to habeas corpus relief on his claim that the use of his 1990 conviction to enhance his current sentence under California's three strikes law, *Pen C* § 667(e)(1)(A), breached the plea agreement's terms that resulted in the 1990 conviction and violated his due process rights because he presented no evidence to overcome the presumption of correctness of the state courts' decisions. There was no suggestion that the state court misapprehended the record or misstated it, and the "fact" on which the inmate relied, the advisement of the collateral consequence of the priorability, was specifically considered and rejected by the state trial and appellate courts. *Wheeler v. Yarbrough* (2005, CD Cal) 352 F Supp 2d 1085, 2005 US Dist LEXIS 3340, aff'd (2006, 9th Cir Cal) 176 Fed Appx 847, 2006 US App LEXIS 10080.

Court rejected defendant's argument that a retrial of a strike allegation against defendant under *Pen C* § 667(b)(i) should have been barred under the law of the case doctrine unless the prosecution could establish that it had discovered new evidence that could not have been presented at the first trial through the exercise of due diligence; case law did not support any due diligence limitation and the argument was inconsistent with the separate scheme that long governed retrials after appellate reversals for insufficient evidence, including *Pen C* §§ 1262, 1180. *People v. Barragan* (2004) 32 Cal 4th 236, 9 Cal Rptr 3d 76, 83 P3d 480, 2004 Cal LEXIS 679.

Court rejected defendant's due process argument that the Due Process Clause of the federal and state constitutions essentially barred the retrial of a strike allegation against defendant under *Pen C* § 667(b)(i); the court declined to use the Clause as a device for extending double jeopardy protection to cases where it would not otherwise have been extended, and a retrial was proper where the defects in proof of the prior convictions were capable of correction on a retrial, which afforded defendant a fair hearing. *People v. Barragan* (2004) 32 Cal 4th 236, 9 Cal Rptr 3d 76, 83 P3d 480, 2004 Cal LEXIS 679.

Defendant was foreclosed from raising error in the denial of his Marsden motions by his valid no-contest plea to the murder of his sister and admission to a strike conviction of attempted voluntary manslaughter. The claimed errors did not go to the legality of the proceedings resulting in the plea; the legal advice concerning the plea was not inappropriate, given that the plea was entered over counsel's objection; and no claim that the plea was unintelligent or involuntary could succeed given the trial court's finding to the contrary and the jury's competency finding. *People v. Lovings* (2004, Cal App 1st Dist) 118 Cal App 4th 1305, 13 Cal Rptr 3d 710, 2004 Cal App LEXIS 796, review denied (2004, Cal) 2004 Cal LEXIS 8110.

Resolving a conflict among the courts of appeal, the California Supreme Court held that a court's failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard. Defendant did not fall outside spirit of three strikes law, however, and therefore the trial court had not abused its discretion in refusing to strike his priors and sentencing defendant to 26 years to life for failure to register as a sex offender; defendant had been reminded of the requirement to register, and he appeared to be a revolving-door career criminal. *People v. Carmony* (2004) 33 Cal 4th 367, 14 Cal Rptr 3d 880, 92 P3d 369, 2004 Cal LEXIS 6235.

Inmate's pro se petition for a writ of habeas corpus in federal court was denied, which was based on the inmate's argument that his 25-to-life sentence amounted to cruel and unusual punishment and put him twice in jeopardy for the prior offenses, because that sentence under California's Three Strikes Law was properly based on two proven prior strikes of a burglary and an assault, and the inmate had a lengthy recidivist history, had spent time in state prison as well as county jail, and his prior criminal history involved violence, with no favorable response to rehabilitation. *Montano v. Lamarque* (2005, ND Cal) 2005 US Dist LEXIS 6137, aff'd (2006, 9th Cir Cal) 202 Fed Appx 246, 2006 US App LEXIS 24136.

California prisoner's 28 U.S.C.S. § 2254 habeas petition challenging a sentence that was imposed pursuant to "Pen C" § 667 was untimely under 28 U.S.C.S. § 2244(d); the petition was not filed until almost three years after the statute of limitations under 28 U.S.C.S. § 2244(d)(1)(A) had run, the prisoner was aware of the factual predicate of his ineffective assistance of counsel claim at the time of sentencing for purposes of 28 U.S.C.S. § 2244(d)(1)(D), the prisoner's state habeas petitions were filed after the limitations period expired for purposes of 28 U.S.C.S. § 2244(d)(2), and habeas counsel's inexperience and heavy case load did not provide a basis to equitably toll the statute of limitations. *Earls v. Warden* (2005, CD Cal) 403 F Supp 2d 985, 2005 US Dist LEXIS 38798.

Where, in 1986, state had expressly agreed to treat robbery conviction as only one "strike" for purposes of later recidivist sentencing, counting that conviction as eight strikes violated terms of plea agreement. Denial of inmate's habeas petition was based on unreasonable determination of facts in light of evidence within meaning of § 2254(d)(1). *Davis v. Woodford* (2006, 9th Cir Cal) 446 F3d 957, 2006 US App LEXIS 10464.

17. Federal habeas three strikes claims

Defendant's amended 28 U.S.C.S. § 2254 habeas application, which was filed after the AEDPA's one-year statute of limitations had expired, related back to defendant's original application under *Fed. R. Civ. P. 15(c)* because the amendments did not appear to depend on events separate in time and type from the originally raised episodes. Because the original application alleged claims related to ineffective counsel and DNA testing, it was found that defendant sought to challenge his attorney's conduct related to DNA testing, which defendant also challenged in his amended application; additionally, defendant's California three strikes law claim in his original application concerned the law's application to his sentence, which provided a common legal and factual core with the three strikes claim in his amended application. *Young v. McGrath* (2007, ED Cal) 2007 US Dist LEXIS 22940.