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**Win the Big Battle, But the Fight Continues: Three Strikes Reform Act Interpretation and Implementation, 18 Months After Prop. 36**

by William M. Robinson, Assistant Director,
Sixth District Appellate Program

***Introduction***

The morning of November 8, 2012 will always stand out for me. Sure, Barack Obama was reelected, but that was not a particular surprise. By contrast, the overwhelming passage of Proposition 36 was an astonishment, an historic moment in the history of criminal law in California. Never before in the decades of California's initiative process had the electorate so overwhelmingly passed an initiative designed to *reduce* punishment for crime in a meaningful way. I outlined much of the history leading up to this watershed event in my two prior seminar articles about the Three Strikes law, "Guerilla War Against the Three Strikes Law" from 2005, and my follow-up article written last year, which bore a ridiculously long title.[1]

For present purposes, it suffices to say that the landslide passage of Proposition 36, the "Three Strikes Reform Act of 2012" (hereinafter "the Reform Act"), signaled a near about-face from the cruelest facet of California's draconian Three Strikes law, the provision which required a 25 to life, third strike sentence even if the current offense was not itself a serious or violent felony.

If the preceding sentence describes the parameters of the Reform Act, the rest of this article will be zeroing in on a single word of that sentence – "near." The first initiative which sought to amend the Three Strikes Law in an ameliorative manner, Prop. 66 in 2004 – which was barely defeated after late opposition from former Governor Schwarzenegger, and Once-

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[1] See "The Revised Guerilla (and Ground) War Against the Three Strikes Law: Prop. 36 [the Second] and What's Still Left to Do to Fight This Unjust Law (Since Prop. 36 is No Help for Many of Our Clients)," [phew], at http://sdap.org/r-criminal.html. Charles Mingus got nothing on me. (See "All the Things You Could Do Right Now if Sigmund Freud's Wife Was Your Mother."

and-Future Governor Brown, then Attorney General – really would have done away with this punishment in a thoroughgoing manner. But it lost.

So the drafters of Prop. 36, hoping to avoid a second defeat based on the phantom menace of released rapists and murderers that proved fatal in 2004, wrote the Reform Act in such a manner as to steer clear of this potential minefield. To gain the support of several relatively progressive prosecutors, including Santa Clara County District Attorney Jeff Rosen, the drafters reached a number of compromises concerning reduced sentences and resentencing.

The details of the compromises, and the limitations on the benefits of the Reform Act are laid out in my previous article; and by now, most of you are familiar enough with them. I will group them into four categories.

— First, persons whose "current offense" – i.e., the one that gets or got them the Third Strike life sentence – is or was a "serious and/or violent felony" are excluded.

— Second, persons whose current offense(s) includes certain specified Really Bad Facts – including using or being armed with a deadly weapon, and intending to inflict great bodily injury – are also excluded.

— Third, persons with specified Very Bad Strikes – mostly sex crimes and homicides – are excluded from the benefits of the new law.

— And fourth and finally, the drafters wrote an escape hatch into the resentencing portion of the initiative, Penal Code section 1170.126,[2] which allows the judge presiding over the resentence proceeding to veto resentencing if he or she concludes that the inmate seeking resentencing "pose[s] an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

The purpose of the present article is to zoom in on the controversies and skirmishes which have arisen from these four categories of compromise written into the Reform Act, with the primary focus on the ways they affect our work as appellate advocates for persons

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[2]Statutory references are to the Penal Code unless otherwise indicated.

denied sentencing and, more often, resentencing benefits from the Reform Act. Many of the problems discussed herein have arisen because of some, shall we say, "imprecision" in the drafting of key provisions of the Act. There are various theories put forward by the Sixth District Appellate Program's CRiminal Appellate Pundit Squad (SDAP-CRAPS) to account for the ambiguities and incongruities left in the text of key provisions of the Reform Act.[3] For now, though, the origin of this series of ambiguities, incongruities, and textual balls of confusion, doesn't matter; it's just "water under the bridge," as Sam told Ilsa in *Casablanca*.

What does matter is the very hot set of battles, starting in trial courts, and now landing hard in the Courts of Appeal, over the meaning of key provisions of the Reform Act. What follows is a discussion of some selected key issues now percolating through the appellate courts. A few have been the subject of published appellate decisions, with review already granted in a handful of cases, and likely to be granted in many more, since the courts are divided, the stakes are big, and the issues are just starting to really percolate.

In last year's article, I suggested many of these potential controversies, but did not anticipate all of them. And, as I learned this year in the series of eligibility denial appeals I have worked on over the past nine months, it is one thing to theorize appellate issues, and another to actually write the arguments up in a brief. Some ideas get lost in the shuffle; but many new and better arguments are discovered, cobbled together, and advanced in the course of work on the appeal.

Much of what follows is summarized from my own briefs and those of my colleagues at SDAP and throughout the state, who will all (hopefully) be credited as to what I have borrowed. The full-blown briefing is available to anyone who asks. What I provide here are sketches of the arguments, with some of the pertinent authority cited. My hope is that this will be a useful resource to anyone working on the range of issues involving interpretation of the Reform Act.

[3] Most discussions of this subject end with either Yours Truly, or our Executive Director, in our best Vito Corleone imitation, saying "Why didn't they come to us sooner with the draft of this initiative of theirs . . .", or words to such effect.

A. **Preliminary Bouts**

Before we even get to the details of the eligibility and dangerousness interpretation questions, we first need to address a series of controversial issues that have arisen around the edges of the Reform Act. Some of these are more important than others. All of them are controversial and unsettled.

1. **Retroactivity of the Prospective Provisions of the Reform Act.** We all saw this one coming. The Reform Act applies in a different, and far less favorable manner, to prisoners already sentenced for a Third Strike life term, than it does to defendants facing prospective sentencing for a non-serious felony Third Strike offense. The most obvious difference is the complete absence of discretionary "dangerousness" review for persons facing prospective sentencing.

There are potentially other differences, some of which will come up in discussion of "eligibility" issues. One obvious example will be noted here. Picture the person with two strike priors who has two current offense crimes, one of which is a serious felony, but the other of which is not. If he (or she) is sentenced today, he would be almost certainly subject to only *one* 25 to life sentence, for the current offense serious felony offense, but only a consecutive, doubled determinate term for the non-serious felony. Although our argument, laid out below, is that the same rule applies to persons seeking resentencing under section 1170.126, at least one published decision has already disagreed with this position, holding that in this situation the inmate is flat-out ineligible for any resentencing because he has *one* current serious felony conviction. (*In re Martinez* (2014) 223 Cal. App. 4th 610, rev. ptn. pending, hereinafter "*Martinez*.") *Martinez* is a rather poorly reasoned decision, as I argue below, and we should win this issue; but we may not, our appellate courts being what they are. So the retroactivity issue could well mean a lot to persons in this category.

The retroactivity argument is premised on the *Estrada* doctrine (*In re Estrada* (1965) 63 Cal.2d 740). Sample briefing is available. The issue is not likely to arise except in a narrow category of cases. No one seems to have challenged the notion that if a defendant's

current offense was *committed* before the effective date of the Reform Act but he was *sentenced* after that date, he is entitled to the benefits of its application prospectively.

The issue has arisen, instead, in a handful of cases where both the commission of the crime(s) and the sentencing date fell before the effective date of the Reform Act. A series of published cases came out on this issue, with the lower appellate courts split, though leaning towards no retroactivity, largely on the grounds that the Electorate implicitly made the law prospective only by including, as a provision of the Reform Act, the limited retroactive provisions of section 1170.126.

There is no point recounting the various opinions and arguments, as they have all been depublished, and the issue is now pending before the California Supreme Court, which granted review in *People v. Conley*, S211275, [formerly (2013) 215 Cal.App.4th 1482], to consider the musical question, "Does the . . . Reform Act . . ., which reduces punishment for certain non-violent third-strike offenders, apply retroactively to a defendant who was sentenced before the Act's effective date but whose judgment was not final until after that date?" Most of us are not particularly hopeful about the outcome of this controversy, particularly after a similar type of issue was shot down in *People v. Brown* (2012) 54 Cal.4th 314, concerning section 4019. But the Supreme Court seems to have granted review in every case where this issue has arisen, which could signal that the Court's collective mind is not yet made upon this issue, which, more so than the credits issue in *Brown*, evokes the heart of the *Estrada* doctrine.

2. **Right to Appeal and Fallback Position.** It seems a rather simple point that inmates who petition for resentencing but are denied on eligibility grounds have a right to appeal based on an order after judgment affecting their substantial rights. (§ 1237, subd. (b).) However, several courts have rejected this contention, and the Supreme Court has granted review in *Teal v. Superior Court*, S211708, to address whether a defendant has ". . . the right to appeal the trial court's denial of his petition to recall his sentence under . . . section 1170.126, part of the . . . Reform Act . . ., when the trial court held he did not meet the

threshold eligibility requirements for resentencing?" (Cal. Supreme Court E-Docket, S211708.[4])

One appellate court, in a now depublished opinion, came up with the clever compromise position that there is a right to appeal where there is a colorable argument, based on all the interpretation questions raised by the Reform Act, as to whether the defendant is eligible, but not in cases where the defendant is just flat-out ineligible under any interpretation. (See *People v. Leggett* (2013) 219 Cal.App.4th 846, not citable, rev. gtd. 12-18-13, S214264, with briefing ordered deferred.)

The Supreme Court, having granted review in *Teal*, will no doubt resolve this important question some time in 2015 or 2016. Meanwhile, courts seem to be accepting and deciding appeals under section 1237(b) while the issue is undecided. And the appellate court that decided *Martinez* recently suggests a backup position, which I am now including, thusly, in my appealability statements in eligibility cases, after citing section 1237(b) and noting that review has been granted in *Teal*:

> Alternatively, appellant respectfully asks this Court to treat the present appeal as a petition for writ of habeas corpus concerning denial of his resentencing petition pursuant to section 1170.126. (See *In re Martinez*, *supra,* 223 Cal. App. 4th at p. 615 [court exercises discretion to treat appeal as habeas petition, per *People v. Segura* (2008) 44 Cal.4th 921, 928, fn. 4, rather than "adding another voice to the appealability debate prior to any decision by the California Supreme Court"].)

3. **Is There a Right to Counsel for Eligibility Determinations?** This is an issue that is creeping in around the edges. For the most part, Prop. 36 petitions are being initiated by the zealous efforts of public defender offices and attorneys associated with the Stanford Three Strikes clinic, with counsel typically appointed right away in these cases. But I have had several cases on appeal where a petition was filed pro per, and summarily denied on eligibility grounds without appointment of counsel. Many of these involved tough legal

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[4] http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2049716&doc_no=S211708.)

issues, e.g., involving the "arming" exception, on which denial was based. In these cases, I have included the following two-part "right to counsel" argument.

The first argument invokes the settled principle that a defendant has a Sixth Amendment right to counsel at all sentencing hearings. (*Gardner v. Florida* (1977) 430 U.S. 349, 358; *Mempa v. Ray* (1967) 389 U.S. 128, 134-137) From this premise, I argue that the presumption in favor of resentencing written into the Reform Act puts any potentially eligible person in the same position as a person facing any kind of factfinding and legal conclusion by a judge at a sentencing hearing. The virtue of this aspect of the argument is that it is based on the federal constitution, and thus, as will be noted below, will allow appellate counsel to potentially raise claims of ineffective assistance of counsel in connection with deficient performance by counsel at Prop. 36 resentence hearings.

The second argument is premised on state court rulings requiring appointment of counsel in cases involving petitions for writs of coram nobis and habeas corpus, so long as a prima facie case for relief has been shown. (*People v. Shipman* (1965) 62 Cal.2d 226, 232-233 [coram nobis], and *In re Clark* (1993) 5 Cal.4th 750, 780 [habeas].) Thus, in a case where the inmate's Prop. 36 petition satisfies the statutory requirement of prima facie eligibility, by pleading that he has current offense conviction(s) for non-serious felony offenses, and listing his prior strikes, as required by subdivision (d) of section 1170.126, we argue that he has established entitlement to counsel under these cases for purposes of the complex legal/factual questions which are entrusted to the court for determination as to eligibility under subdivisions (d) and (e) of section 1170.126. The virtue of this argument is that it has strong case law support, whereas the "sentencing" right to counsel argument seems like something of a stretch as applied to the eligibility determination. It may not, however, give rise to a federal constitutional right to counsel, which could potentially undermine IAC claims at sentence hearings.[5]

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[5]However, a secondary argument can and should be raised in cases where the client is found *eligible*, but is denied sentencing on *dangerousness* grounds. In this situation, the argument for application of the federal constitutional right to counsel under cases like

I have sample briefing on this issue which I am happy to provide. Why is this important? Because in many of the eligibility determinations, a decision made without counsel will deprive the client of the kind of effective advocacy for some very complex mixed factual-legal questions. For example, in the "arming" exemption cases, to be discussed below, not only will there be complicated legal issues to be decided (which we can handle just fine on appeal), but there may be issues about what parts of the record count, and whether the factual record supports a conclusion that the defendant was, in fact "armed" when he committed the crime. This is but one example. Thus, in all cases where resentencing is denied without counsel on eligibility grounds, and there is at least a colorable legal and/or factual argument that this was error, the deprival of right to counsel argument should be raised as a separate claim.

4. **Getting Those Petitions Filed Before the Shoe Drops.** Section 1170.126 requires that any inmate seeking resentencing file a petition for recall of his sentence "within two years after the effective date of [the Reform Act] or at a later date upon a showing of good cause. . . ." (§ 1170.126, subd. (b).) The two-year anniversary is fast approaching, and will be upon us when those mid-term elections are happening in the Fall. We can, for the most part, be fairly confident that *most* of the eligible and arguably eligible persons have been identified and that petitions have already been filed. This is due in principal part to the outstanding work in the field by the Stanford Three Strikes Clinic and the many PD offices throughout the state, who had considerable assistance from CDCR, which provided them with lists of potentially eligible inmates, not to mention the work of eager Third Strikers out

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*Gardner* and *Mempa* is much stronger, because section 1170.126 plainly provides a presumption in favor of resentencing once eligibility is established, and the "factfinding" by the trial judge is, at a minimum, the equivalent of judicial factfinding at a traditional sentencing hearing to which the right to counsel attaches. Although the entitlement to appointed counsel is not likely to arise on appeal in these circumstances, as counsel appears to have been appointed in every case where there is a dangerousness sentencing hearing, this "right to counsel" argument can and will matter for purposes of raising claims of ineffective assistance of counsel in connection with dangerousness hearings. More on this below.

there who have taken on the task for themselves.

The worry is that there is still a small but significant group of prisoners out there who are potentially eligible, but who have missed the boat for a variety of reasons.

a. **Potential Slip-Through-Cracks Inmates.** Four categories of inmates come readily to mind, three of which relate to "hot" issues of eligibility determinations.

i. Inmates with *multiple* third strike sentences, where only one is for a current offense serious felony. As will be discussed below, there is a hot legal interpretation issue as to whether these folks are eligible or not. But it is pretty clear that CDCR, when they put their "eligible inmate" list together, simply made a blanket exclusion of anyone who had one or more current offense serious felony conviction. While some efforts have been expended to find these folks, there is a concern that many will be left out.

ii. Inmates whose current offense conviction for which the life sentence was imposed is a serious felony *now* but was not a serious felony when it was committed. For example, anyone whose crimes were committed before March 7, 2000 whose current offense conviction is for criminal threats (§ 422), or a non-serious felony with a gang enhancement (§ 186.22, subd. (b)) or for the gang crime (§ 186.22, subd. (a)) is in this category, since those offenses became serious felonies only after passage of Prop. 21 in March of 2000. This is another hot interpretation issue, to be discussed below. But this group, like those noted above, were likely not included in the CDCR list, and may, in fact, believe themselves to be ineligible.

iii. Inmates whose current offense is for a serious felony, but where the judge struck enhancement punishment for the "fact" that made the crime a serious felony, e.g., infliction of GBI (§ 12022.7). This issue, also to be discussed below, is something of a longshot, but again one where a credible argument for eligibility can and should be made, as will be explained below. And it is likely that these folks were left off the CDCR lists and may have fallen through the cracks.

iv. Inmates with severe mental illnesses. A number of inmates may be out there who did not respond to notices from CDCR about eligibility or to requests from PD offices or the

Stanford clinic concerning petitions. While there has been follow-up with some of these folks, there may be some who will slip through the cracks. This worry is all the more considerable for such mentally ill inmates who also fit within the i-iii categories described above, and thus may also have never been contacted about potential eligibility.

b. **How Appellate Lawyers Can Help in the Search for These People Before Time Runs Out.** If you haven't done so already, go back over all your old Three Strikes cases, and follow-up to see whether petitions have been filed in these cases. You can start, as I did in many of my older cases, by checking the CDCR locator to see if the clients are still in custody. If they are not, it's a pretty good bet they were resentenced already, or they have died. In either case, no problem. If they are still in CDCR custody, figure out why, writing to them and/or contacting the PD office of that inmate's county to see if there is a petition pending. I have done this in several cases and got the ball rolling where it was not. At least one such person, who had slipped through the CDCR cracks and was thought ineligible, is now home after a contested hearing and resentencing. What if I had done nothing? Would he have been found and a petition filed? I don't know. But maybe not. So do what I did.

If you are not up for this level of effort, you should, at a minimum, write back to every former client who writes to ask you about Prop 36, no matter how hopeless you think it is. The law is very unsettled, and many of the cases originally screened as ineligible turn out to be eligible or at least arguably eligible. The case I mentioned above was one that was screened out because of a belief – erroneous as it turned out – that one of his prior strikes was for attempted murder. In fact, it had been originally *charged* as attempted murder, but pled down to an aggravated assault with a knife. which is not a strike prior which made him ineligible.

c. **Late Petitions?** Late petitions can be filed where there is "good cause" for doing so. (§ 1170.126, subd. (b).) Presumably, this would include inmates who had been erroneously told by CDCR that they were ineligible, clients with mental illnesses, persons in administrative segregation who were not able to file petitions, etc. We will cross that

bridge when we get to it, but at least there is the "out" of good cause if the petition is filed after the two year deadline.

B. **Selected Eligibility Issues**

Imprecise statutory language can create problems. We certainly are used to such controversies, especially with initiative measures. I well remember some wise presenter, at a CACJ appellate seminar in the early 90's, describing how poorly written criminal justice initiatives get written: "A bunch of DA's and AG's get together, they get drunk, and they start writing things on cocktail napkins." Something like that. Over the years, we have occasionally been able to take advantage of their imprecision. Two choice examples are the dismal failure to use the magic words necessary to exclude 1385 authority in Third Strike sentences, which led to *Romero* and its progeny, and the botched manner of amending the definition of serious felonies with Prop. 21, in 2000, which was obviously intended to include *any* violation of section 245(a)(1), but still managed to lead the courts to conclude that an assault by means likely to inflict GBI was still not a strike. OK, those are the nice examples; but mostly we lose fights over the interpretation of the meaning of the Bad Criminal Justice Initiatives.

This time around, the fights are over imprecise statutory language in a favorable, ameliorative criminal justice initiative. And like the previous times, our chances of winning these battles in the appellate courts are probably also poor. Looking at the first two such published decisions on the issues to be discussed, *Martinez*, *supra*, 223 Cal. App. 4th 610, and *People v. White* (2014) 223 Cal.App.4th 512 ("*White*"), one is struck by the manner in which the two appellate courts take an approach toward interpreting the Reform Act which is virtually identical to the one taken towards the Bad Criminal Justice Initiatives, pointing to language in the ballot arguments and statements of purpose of the law which emphasize the desire to keep punishing really bad criminals harshly. Our job, of course, is to remind the courts that will be deciding these issues that the fundamental purpose of the Reform Act was to "Restore the Three Strikes law to the public's original understanding by requiring life

sentences only when a defendant's current conviction is for a violent or serious crime." (Ballot Pamp., Gen. Elec. (Nov. 6, 2012) text of Prop. 36, p. 105.)

But let's not get ahead of ourselves here, that's just one piece of our statutory construction argument. Instead, let's start with a broader look at the "ground rules" for interpretation, which will be applied to each and every statutory controversy on which our client's potential eligibility depends.

1. **Principles of Statutory Construction.**

a. **Initiatives are interpreted just like statutes.** (*People v. Rico* (2000) 22 Cal.4th 681, 685.)

b. **The intent of voters is what we are trying to figure out, with plain language the primary guide, and viewing the initiative act as a whole.** The primary task of such interpretation is to ascertain the intent of the voters, based on the language used in the initiative, giving the words employed their usual, ordinary meaning, and interpreting the overall scheme of the initiative as a whole. (*Ibid.*) Put simply, the task for a reviewing court is to "interpret and apply the initiative's language so as to effectuate the electorate's intent." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.)

c. **Initiative measures should be viewed as a whole, while harmonizing the various provisions.** Reviewing courts must "not . . . consider the statutory language in isolation, but rather examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts." (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1040, citations omitted.)

d. **Special Rules About Ambiguity and Purposes.**

i. **Avoid constitutional problems.** Courts are obligated to construe any ambiguity in a penal statute in a manner which avoids constitutional problems. (*People v. Leila* (2013) 56 Cal.4th 498, 506-507.) This will come in handy because lurking behind many of the pro-prosecution interpretations of the provisions at issue concerning eligibility, as will be shown below, are potential constitutional problems involving ex post facto laws, equal protection,

and the Sixth Amendment *Apprendi* doctrine.

ii. **Laws designed to cure particular wrongs must be interpreted in this light.** Enactments which seek to remedy a particular inequity are generally liberally construed to accomplish that objective. (*Estate of Stoker* (2011) 193 Cal.App.4th 236, 242, citing *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688) Please note that this does not mean, at least in my biased understanding of the point, to secure retrenchment of the same mentality which gave rise to the injustice in the first place.

iii. **The rule of lenity.** Where there are "two reasonable interpretations of the statute [which] stand in relative equipoise . . ." a court is obligated to follow the "rule of lenity, "giving the defendant the benefit of every reasonable doubt on questions of interpretation." (*In re M.M.* (2012) 54 Cal. 4th 530, 545.) The SDAP-CRAPs often refer to this principle *in practice* in California courts as "the rule of severity," which is a bit like Murphy's law of the criminal appellate practitioner, i.e., the dictum to interpret any conceivable ambiguity in a manner which disfavors the criminal defendant. But where does that kind of cynicism get us? (To some measure of sanity, perhaps.) Still, the rule of lenity remains an accepted principle which can be applied in Reform Act eligibility cases, especially where it goes hand in glove with the other rules of interpretation noted above.

2. **The Arming Exception and its Friends.**

a. **The Statutory Language and Background**. Like many of the controversies concerning interpretation of the Reform Act, the statutes at issue with arming cross over between the amended Strikes law provisions in sections 667 and 1170.12, and the resentencing provisions of section 1170.126. For simplicity, here and throughout, I will only reference the Three Strikes law as amended by the Reform Act in the version found in section 1170.12, and leave out the identical (for our purposes) language of section 667.[6]

[6]It is yet another drafting mystery why the Reform Act amendments kept alive the two versions of the law in two different sections of the Penal Code, an historical anomaly which originally stemmed from there being a legislative and initiative version.

Where the current offense is not a serious felony, a defendant with two or more strike priors can only receive a doubled-determinate, second-strike sentence unless a set of enumerated exceptions apply, making him subject to the old, awful, third strike sentence, normally 25 years to life. The "arming" exception is found in clause (iii) of section 1170.11(c)(2)(C), which basically provides that a defendant is disqualified from reduced, "second strike" sentencing where, in pertinent part, "the prosecution pleads and proves . . . [that] [d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person. (§ 1170.12(c)(2)(C)(iii).)

This is a relatively clear provision when applied to persons facing the prospective application of the new law. For those defendants, the prosecution must plead and prove the pertinent fact, i.e., arming or use of a firearm or deadly weapon, or intent to inflict GBI. If the pertinent fact is pled and proven, or admitted, the defendant gets a third strike sentence. If it is not, he gets a second strike sentence.

The matter is rather trickier when it comes to the impact of this provision on inmates seeking resentencing under section 1170.126. The pertinent provision of section 1170.126 references this provision by providing, in subdivision (e)(2), that "[a]n inmate is eligible for resentencing if . . . (2) [t]he inmate's current sentence was not imposed for any of the offenses appearing in . . . clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e)(2).)[7]

The controversy involving this provision is threefold.

— First, do the "use" and "arming" exceptions apply only if the defendant is *personally* armed or using, or can they be applied *vicariously* if a coperpetrator uses or is armed with a weapon?

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[7]I will not discuss clauses (i) or (ii) of 1170.12(c)(2)(C). Clause (i) involves a drug quantity enhancement; clause (ii) involves the current offense being any of the offenses for which sex offender registration is required, with certain exceptions to the exception stated. Both appear to be fairly straightforward in application both prospectively and retroactively.

— Second, as it is applied retroactively, does the "pleading and proof" requirement apply, such that a person is only ineligible if the fact of his using or being armed with a deadly weapon, or intending to inflict GBI, was pled and proven in the context of his current offense conviction? And, if we lose this point and the answer to that question is "No," what sort of evidence is admissible to prove facts like "arming," and what standard of proof is required?

— And third, does the "arming" or "personal use" provision apply to weapon possession offenses, or must there be a separate, non-possessory offense to which the arming or personal use is "tethered?

b. **Use and Arming: Personal or Vicarious?** I have not seen this issue arise yet, and I have not briefed it. Judges Couzens and Bigelow devote some attention to it in their treatise on the Amendment of the Three Strikes law. In effect, they present both sides of the issue, but emphasize the generally controlling case law authority which holds that where a statute is silent as to whether a weapon *use* allegation is personal or can apply vicariously based on the conduct of a codefendant, there is a presumption that it must be personal use. (See J. Richard Couzens and Tricia A. Bigelow, "The Amendment of the Three Strikes Sentencing Law (rev. 11-4-2013, hereinafter "Couzens & Bigelow, 'Three Strikes Amendment,'")[8], Part II-C-1-(c), pp. 11-13, citing, e.g., *People v. Gutierrez* (1996) 46 Cal.App.4th 804, 814["an enhancement which neither expressly authorizes vicarious liability nor expressly includes a 'personally' limitation is read to apply only to defendants who personally engage in the proscribed conduct"].)

However, the authors caution that the matter is not so clear as to "arming," where the case law is mixed as to how to interpret an "arming" statute which does not specify whether the arming must be personal or vicarious. (*Ibid*, citing, *In re Christopher R.* (1993) 6 Cal.4th 86 [vicarious arming permitted] and *People v. Reed* (1982) 135 CAl.App.3d 149 [personal

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[8]Found at http://www.courts.ca.gov/documents/Three-Strikes-Amendment-Couzens-Bigelow.pdf, last checked 4-8-2014.

arming required].) While I have not researched this issue with any particular care, it bears noting that if one looks carefully at the unfavorable case law, there is room for argument that under the Reform Act "arming" must be personal too. *Christopher R.* involved statutory language expressly intended to apply to persons armed vicariously, a provision of Welfare and Institutions Code section 707(b) which a crime described as "robbery while armed with a dangerous or deadly weapon," and was silent as to whether the "arming" could be vicarious or had to be personal; the Supreme Court resolved the issue by looking to the parallel language of former section 211a of the Penal Code, which referenced subdivision (a)(1) of section 12022, an arming enhancement statute which expressly included in the definition of "arming" that it was sufficient that "one or more of the principals" in the offense was armed. By contrast, the favorable case, *People v. Reed*, *supra*, 135 Cal.App.3d 149, makes the very fine point, applicable here, that generally speaking, vicarious culpability will not be inferred, but must be expressed, and held that "arming" under former section 12022.3 required personal arming. (*Id*., at pp. 152-153, cited with approval in *People v. Piper* (1986) 42 Cal.3d 471, 477, fn. 5, which disapproves a contrary holding in *People v. Le* (1984) 154 Cal.App.3d 1, 11-12 [which is the other case cited by Couzens and Bigelow!].)

This will hopefully provide you with some ammunition for arguing that both "use" and "arming" as referenced in the exception of clause (iii) of section 1170.12(c)(2)(C) must be *personal* use or *personal* arming.

c. **Pleading and Proof.** Those of you who are either careful readers or familiar with the Reform Act eligibility controversies will have noted in the summary above that (a) there is an express pleading and proof requirement in section 1170.12(c)(2)(C) as applied prospectively to arming, use, or intent to inflict GBI, but that (b) the provisions of 1170.126 which reference section 1170.126(c)(2)(C) describe "offenses appearing in . . . clauses (i) to (iii) . . .", which does not expressly include the "pleading and proof" requirement in paragraph (C). So, the pleading and proof requirement applicable to clauses (i) to (iii) when applied prospectively under section 1170.12(c)(2)(C) does not apply retroactively to use of

or arming with a weapon, or intent to inflict GBI when proof of those facts are at issue in a resentencing petition, right? After all, it's not fair to the poor DA's to make them have prove something when the current offense was prosecuted that they didn't have to prove back then. Right?

Not so fast. At one level, the above argument makes sense in terms of plain statutory language. Thus, the first (for the moment) published case which has addressed this issue could basically brush off the defendant's argument that the language of section 1170.126(e)(1) "incorporates" the pleading and proof requirement of section 1170.12(c)(2)(C), concluding that the pleading and proof requirement only is intended to apply prospectively. (*White*, *supra*, 223 Cal.App.4th at pp. 526-527.)

But *White* is wrong. Why? Because there is a strong implication from other provisions of the Reform Act that the facts at issue must have been pled and proven, and other principles of statutory construction support this conclusion. I have made this argument in some detail in the *Manuel Villa* appeal, and my briefing from this case, which includes a reply brief argument that critiques the holding in *White*, is available upon request. I will summarize the key points below.

i. **The Plain Language of Section 1170.126, subdivision (a).**

Always read the introductory paragraph of any initiative statute. It is not simply "throat clearing" but can provide an extremely good indicator of the drafters'/electorate's intent. Here's what subdivision (a) says:

> The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment [under the Three Strikes law] whose sentence *under this act* would not have been an indeterminate life sentence.

(§ 1170.126, subd. (a), emphasis added.)

What does this mean in plain language? It means that the determination of eligibility for resentencing under section 1170.126 is intended to be based on the *same provisions of the Reform Act* which are applicable to current offenders whose current offenses are

committed after the Reform Act became law. Any fool can see that this must include the "pleading and proof" requirement for the exclusions described in section 1170.12(c)(2)(C) that is now written into the amended Three Strikes law. Thus, any prison inmate serving a 25 to life sentence under the Three Strikes law who, if sentenced today under the Amended Three Strikes law, would not have been subject to a life sentence is, under the plain language of subdivision (a) of section 1170.126, eligible for resentencing. (*Ibid*.) To be ineligible prospectively because of, for example, "arming" with a firearm or deadly weapon, this fact must be pled and proven. Thus, to be ineligible for the retroactive benefits, the same requirement must apply – this fact has to have been pled and proven. Game on.

ii. **Plain Language of 1170.126(e)**. Not persuasive enough? How about these two arguments from the plain language of subdivision (e) of the resentencing statute.

(a) **"any of the *offenses* . . ."**. Subdivision (e) provides, in pertinent part, that "[a]n inmate is eligible for resentencing if . . . (2) [t]he inmate's current sentence was not imposed for any of the *offenses* appearing in . . . clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e)(2), emphasis added.) As the emphasis is intended to suggest, the key word here is "offenses. . . ." Take a look at our clause (iii) of 1170.12(c)(2)(C): it does not really describe one or more "offenses" as that term is plainly understood. Isolating the language to focus only on the "arming" requirement (as I do in the Villa brief), it reads, "[d]uring the commission of the current offense, the defendant was armed . . . with a . . . deadly weapon. . . ."

I argue that this provision can be construed as describing an "offense," as referenced by section 1170.126(e)(2), if, and only if, it is read in connection with the language to which clause (iii) is connected, i.e., the pleading and proof language of section 1170.12(c)(2)(C). Thus, a person is disqualified from resentencing under section 1170.126 if his 25 to life term was imposed for an offense in which "the prosecution has plead[] and prove[n] [that] . . . [d]uring the commission of the current offense, the defendant was armed . . . with a . . . deadly weapon. . . ."

(b) **"current sentence was imposed . . ."** If that argument isn't strong enough for you, I have another one. The triggering language for ineligibility in subdivision (e) of section 1170.12 provides a further indicator of a pleading and proof requirement by requiring that the exception to resentencing eligibility applies only where "the inmate's *current sentence was . . . imposed* for any of the offenses appearing in clauses (i) through (iii) [of section 1170.12(c)(2)(C)]. . . ." (Emphasis added.) How, we must ask, can a *sentence be imposed* for something that was not pled and proven? It can't because it is a fundamental principle of constitutional law that a sentence cannot be imposed for a particular aggravated crime or enhancement unless the facts giving rise to the aggravation or enhancement are pled and proven to a jury beyond a reasonable doubt, or admitted by the defendant. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) If your client's life sentence was imposed for being a felon in possession of a firearm or, as in Mr. Villa's situation, for being an inmate in possession of a deadly weapon, his sentence was not imposed for being "armed with" the firearm or deadly weapon, but merely for the pled and proven fact of possession (combined with the fact he had a felony conviction for a violation of former section 12021, and being a prison inmate in Mr. Villa's case). In either case, the crime can be committed without being "armed" because of the possibility of constructive possession, e.g., the parolee with the gun found in his basement, or the inmate with the stabbing instrument found in his cell when he is out in the yard.

So, in these three different ways, as noted above, pleading and proof of arming or use of a weapon, or intent to inflict GBI, is a prerequisite to ineligibility.

iii. **Pull Out the Accessory Interpretation Tools!** But don't stop there. Argue that insofar as there is a potential ambiguity as to whether the pleading and proof requirement applies, we need to look at a couple of tiebreaking principles of statutory interpretation.

(a) **Avoiding Constitutional/*Apprendi* Problems.** Here's where you pull out the new *Apprendi* trump card, citing the recent U.S. Supreme Court decision in *Descamps v. United States* (2013) 570 U.S. ___ [186 L.Ed2d 438] and the Sixth District's decision

following it in *People v. Wilson* (2013) 219 Cal.App.4th 500. As discussed in *Wilson*, the Supreme Court in *Descamps* "held that a sentencing court's factfinding 'would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction . . .'" and noting further that it was these very concerns, first recognized in *Shepard v. United States* (2005) 544 U.S. 13, which "'counsel against allowing a sentencing court to "make a disputed" determination "about what the defendant and state judge must have understood as the factual basis of the prior plea," . . .'", with the *Wilson* court emphasizing that "in *Descamps*, a majority of the United States Supreme Court held that a sentencing court's finding of priors based on the record of conviction implicates the Sixth Amendment under *Apprendi*." (*Wilson*, *supra*, 219 Cal.App.4th at pp. 514-515, footnotes omitted.)

What does that mean here? It means that judicial factfinding about the nature of the "current" conviction is constitutionally dubious under the same analysis, where the consequence of such factfinding is to render a defendant ineligible for a dramatic sentence reduction to which he would otherwise be entitled to under the Reform Act. Assuming that there is ambiguity as to whether section 1170.126(e)(2) incorporates the pleading and proof requirement of section 1170.12(c)(2)(C), the appellate court should find that it does include such a requirement to avoid the strong constitutional challenge suggested in *Shepard*, *Descamps*, and *Wilson*. (See *People v. Leila*, *supra*, 56 Cal.4th at pp. 506-507.)

Okay, I know, the factfinding here does not, technically speaking, increase the maximum punishment. But one can certainly argue that the due process principles at issue in *Shepard* and *Descamps* apply with equal weight here.[9]

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[9] *Descamps* appears to be a watershed decision, which, in significant part, undercuts the "prior conviction" exception to the *Apprendi* doctrine. While useful as a side-argument in the pleading and proof controversy here, it promises to be far more helpful for cases involving a prosecutor's attempt to establish elements of prior convictions which make them strikes, based on the "record of conviction" a la *People v. Guerrero* (1988) 44 Cal. 3d 343, 355-356 where those "facts" go beyond the elements of the charged and proven crime and enhancements. If *Wilson* is correct about *Descamps*, such factfinding is now prohibited to

(b) **Construing Remedial Statutes to Accomplish Their Purpose.** When interpreting an initiative, you should always seek to harness the language of any preamble to the initiative. And the Reform Act has a good one. Section 1 of the initiative measure, under the heading of "Findings and Declarations," reads as follows:

> The People enact the Three Strikes Reform Act of 2012 to restore the original intent of California's Three Strikes law—imposing life sentences for dangerous criminals like rapists, murderers, and child molesters.
>
> This act will:
>
> (1) Require that murderers, rapists, and child molesters serve their full sentences—they will receive life sentences, even if they are convicted of a new minor third strike crime.
>
> (2) Restore the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime.
>
> (3) Maintain that repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession will receive twice the normal sentence instead of a life sentence.
>
> (4) Save hundreds of millions of taxpayer dollars every year for at least 10 years. The state will no longer pay for housing or long-term health care for elderly, low-risk, non-violent inmates serving life sentences for minor crimes.
>
> (5) Prevent the early release of dangerous criminals who are currently being released early because jails and prisons are overcrowded with low-risk, non-violent inmates serving life sentences for petty crimes.

(Ballot Pamp., Gen. Elec. (Nov. 6, 2012) text of Prop. 36, p. 105.)[10]

Focusing on the purpose of the Reform Act, to assure that the draconian penalty of 25 to life is reserved only for defendants whose "current conviction is for a violent or serious

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establish missing elements – e.g., personal use of a weapon, or infliction of great bodily injury on a nonaccomplice – which would make a prior conviction into a strike. I have sample briefing on this issue in the *Mark Rivera* case which is available.

[10]Found at http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf#nameddest=prop36, last checked 2-7-2014.

crime . . ." (*ibid.*), an interpretation of section 1170.126 which includes the "pleading and proof" requirement for the resentencing exclusions clearly promotes the remedial goals of the initiative. It is axiomatic that exclusion from eligibility for resentencing should only be enforced where the fact which make the offense "serious" enough to warrant exclusion – e.g., being "armed with a deadly weapon" – was pled and proven, i.e., it was serious enough *at the time the crime was prosecuted* to warrant pleading and proof. Post hoc judicial findings of facts which were not deemed important enough to plead and prove are clearly an inadequate basis for "requiring [a] life sentence[] . . . when a defendant's current conviction is not for a violent or serious crime." (*Ibid.*) Likewise, a further purpose of the Reform Act – saving the taxpayers money by cutting the costs of housing and caring for "elderly, low-risk, non-violent inmates serving life sentences for minor crimes . . ." (*ibid.*) – is further served by restricting the determination that a crime is not the sort of "minor crime" which entitles an inmate to resentencing to facts which were pled and proven in the original proceeding.

(c) **The Rule of Lenity.** I know what you are thinking. Whenever we invoke the rule of lenity, our cause is sunk. But you can and should make the argument that even if the "pleading and proof required" argument is a close one, with something to be said on both sides making the strength of each claim in "relative equipoise," we win under the "tie goes to the runner" principle of the rule of lenity. (*In re M.M.*, *supra*, 54 Cal. 4th at p. 545.)

d. **If There Is No Pleading and Proof Requirement, What Standards Apply to "Factfinding" in a 1170.126 Eligibility Determination?** I will only sketch this one out here, as I have not yet briefed the issue.[11] Basically, one should first argue that the standard must be proof beyond a reasonable doubt, based on a jury trial. The best argument for that is the aforementioned *Wilson* decision, which applies a "harmless beyond a reasonable doubt" test for prejudice based on Apprendi error in judicial factfinding. Thus if, based on

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[11]In *Villa*, my only "arming" appeal so far, there is no question that the defendant was "armed" under any standard, as the stabbing instrument was stuffed in his pants.

the record of your client's jury trial, it cannot be said that the failure to submit this issue to the jury at the time of the trial was harmless beyond a reasonable doubt, the evidence is insufficient.

The backup, and the one most likely to be adopted, would be the normal "preponderance" standard for factfinding by a sentencing court, with the specified and well-developed limitations of the *Guerrero* line of cases, which allows only reliable facts that are from the record of conviction, e.g., the elements of the offense, facts proven at a preliminary hearing, established by admissions on the record, etc., and excludes hearsay materials in probation reports. (See *People v. Guerrero*, *supra*, 44 Cal. 3d 343, *People v. Reed* (1996) 13 Cal.4th 217, 224–231, and *People v. Trujillo* (2006) 40 Cal.4th 165.)

The sufficiency of proof in an arming case was well briefed by panel attorney Blair Greenberg in the *Piper* case. Leaving aside the "tethering" sub-issue, which will be discussed below, the wacky facts of the current offense in *Piper* were particularly favorable in terms of whether there was proof that Mr. Piper was "armed with a firearm." The evidence showed that Mr. Piper committed an act of road rage against another driver on the freeway by brandishing a bb-gun replica at the driver of the other car. The actual firearm-handgun was later found by police in the trunk of the car. The "prohibited conduct" which makes a person "armed with a firearm" is either "carrying the firearm or having it available for offense or defensive use . . .", with "availability" defined as "ready access." (*People v. Mendival* (1992) 2 Cal.App.4th 562, cited with approval in *People v. Bland* (1995) 10 Cal.4th 991, 997.) On the facts in the *Piper* case, the defendant was not "armed" because the weapon was, at all times, in the trunk, and thus he did not have "ready access" to it during the road rage incident, or at any time relative to the charges against him.

e. **Requirement of a Non-Possessory "Tethering" Offense.** The next argument we have been advancing posits that the language of the "arming" exception requires that there

be a separate, non-possession offense to which the "arming" is tethered.[12]

The Reform Act requires that a 25 to life sentence still be imposed if "[d]uring the commission of the current offense, the defendant . . . was armed with a . . . deadly weapon. . . ." (§ 1170.12(c)(2)(C)(iii).) The critical passage here is the phrase, "during the commission of the current offense." The argument that this requires a separate, non-possession offense to which the "arming" is tethered has two parts.

First, it is based on the fact that the initiative uses the virtually identical phrase, i.e., arming "during the commission of . . ." an offense – as is employed in several enhancement statutes. (See, e.g., § 12022, subd. (a)(1) [one year enhancement for any person "armed with a firearm in the commission of a felony or attempted felony. . .]; § 12022, subd. (b)(1) [one year enhancement where person "personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony. . ."]; and § 12022.5, subd. (a) [3, 4, or 10 year enhancement for person "who personally uses a firearm in the commission of a felony or attempted felony. . ."].) There is an established principle of statutory construction which requires that "identical language appearing in separate statutory provisions should receive the same interpretation when the statutes cover the same or an analogous subject matter." (*People v. Cornett* (2012) 53 Cal.4th 1261, 1269, fn. 6; see also *Walker v. Superior Court* (1988) 47 Cal.3d 112, 132 [same]; *Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 359.)

So, our argument is that this provision in the Reform Act should be construed in the same manner as the above-described enhancement statutes. Why does that matter? Because in cases like *In re Pritchett* (1994) 26 Cal.App.4th 1754, the court held that the identical language employed in a firearm-use enhancing statute, section 12022.5, required something more than "possessory" use of the weapon, since "possession" is already an element of the charged crime of weapon possession by a felon. Likewise, a year later, the California

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[12]Notably, the opinion in *White*, *supra*, 223 Cal.App.4th 512, mentions the tethering contention in its summary of the defendant's arguments, but then proceeds to ignore it in its discussion.

Supreme Court reached a similar conclusion when interpreting the same phrase in the "arming" enhancement of section 12022, holding that "armed . . . in the commission or attempted commission of a felony . . ." requires that there be a connection between arming with a firearm and a separate underlying "tethering" felony offense. (*People v. Bland*, *supra,* 10 Cal.4th at p. 1002.) "[B]y specifying that the added penalty applies only if the defendant is armed with a firearm 'in the commission' of the felony offense, Section 12022 implicitly requires both that the 'arming' take place *during* the underlying crime and that it have some '*facilitative nexus* to that offense.'" (*Ibid*., emphasis in original.)

One next points out, as all the sample briefing on this subject does, that similar "arming" enhancements have only been upheld where there is a separate underlying "tethered" offense apart from mere possession of the weapon. (See, e.g., *People v. Bland*, *supra*, 10 Cal.4th at pp. 1002-1003 [defendant who possesses guns and drugs for sale in same location is "armed" as to possession offense]; *People v. Pitto* (2008) 43 Cal.4th 228, 238 [defendant "armed" when gun and drugs within arms reach in car]; *People v. Martinez*, *supra,* 150 Cal.App.3d at p. 605 ["armed" during rape where screwdriver left by crime partner at foot of bed was visible]; *People v. Garcia* (1986) 183 Cal.App.3d 335, 350-351 ["armed" during burglary where defendant leaves loaded gun on wall near garage].)

As with the pleading argument, the tethering argument can be bolstered with the purpose of the Reform Act – to impose the extreme punishment of 25 to life on persons with two or more prior strikes only for the most serious crimes (Ballot Pamp., Gen. Elec. (Nov. 6, 2012) text of Prop. 36, p. 105) – which can best be achieved by limiting the exclusion for persons "armed with a deadly weapon in the commission of the current offense" to persons who commit crimes beyond mere possession of the weapon by arming themselves with a dangerous instrumentality during the commission of a separate criminal act. Obviously, it would have been a simple matter for the drafters to have provided that any weapon possession offense disqualified a person for the benefit of the Reform Act, and they most decidedly did not do that. It is absurd to think that the drafters intended the exclusion to apply to possession offenses based on "arming" in a manner that is flatly inconsistent with

accepted usage of the language employed to define the arming exception.

One final point can also be made. There is a much repeated denial order I have seen from Monterey County, which rejects the tethering argument on the grounds that the parallel to other statutes does not apply because those statutes, such as section 12022(a), include a requirement that arming not be an element of the current offense, which is absent from clause (iii) of section 1170.12(c)(2)(C). Respectfully, the court is wrong on this point. Arming is *not* an element of any weapon possession offense, since a person can be guilty of such a crime by being in constructive possession without being armed.

f. **Can Your Client's Current Sentence Have Been Imposed for an Offense, During the Commission of Which He "Intended to Cause Great Bodily Injury . . ."?**

The third disqualifying fact in clause (iii) of section 1170.12(c)(2)(C) is an offense, during the commission of which, the defendant "intended to cause great bodily injury." Now that's a weird one because "intent to inflict great bodily injury" is not really an element of any crimes or enhancements, except perhaps murder, voluntary manslaughter, and mayhem, which are already serious felony crimes which, if the current offense, would already disqualify the defendant.

Applied prospectively, there is no problem. A prosecutor must plead and prove intent to inflict GBI, or secure an admission of this fact, as to a charged crime, e.g., assault by force likely to inflict GBI under section 245(a)(1), and thereby make a defendant ineligible for a second strike sentence. But how can this provision be applied retroactively to make someone ineligible for resentencing?

If you have such a case, you must use the tools discussed above. First, make the "pleading and proof" argument advanced above as to arming. You will surely win if that argument prevails because with rare exceptions (e.g., solicitation of a section 245(a)(1) beating), there will not be a non-serious felony crime which has, as an element, the intent to inflict GBI. Next, argue that proof of "intent to cause GBI" must be proven beyond a reasonable doubt based on the *Apprendi*-*Descamps* argument advanced above, and simply

cannot be found, after the fact, by a judge from the record of conviction. Back that up with a preponderance argument, along the same lines. And good luck. And you can commiserate with panel attorney Courtney Shevelson, whose *Chubbuck* case includes this very issue. I am sure Courtney will share his excellent briefing after he writes it up and files it.

3. **Current Offense Serious Felony Exclusion Issues**. OK, on to the next enormous topic. The resentencing provisions of section 1170.126 provide that an inmate is eligible for resentencing as a second striker if he "is serving an indeterminate term of imprisonment under [the former Three Strikes law] for a conviction of a felony or felonies that are not defined as serious or violent felonies. . . ." under the Three Strikes law. (§ 1170.126, subd. (e)(1).) Most of the time, this is a very straightforward issue. The "current" offense, i.e., the felony crime on which your client's 3rd strike life sentence was imposed is either a serious felony or it isn't. If it is, for example, a robbery, he is sunk. If it is, say, simple possession of drugs or a good old 245(a)(1) committed by force likely to inflict GBI, he will be eligible.

But there are several dodgy issues not capable of simple analysis, in large part because of painfully ambiguous statutory language which the drafters put into the Reform Act. This is some crazy stuff, but these issues turn out to be (a) great brain puzzlers for appellate lawyers and (b) provide some rather subtle and interesting legal arguments as to why your client actually *is* eligible for resentencing.

Here's the ones I have identified so far. As Tom Lehrer said in "the Elements," there may be many others but they haven't been discovered.

a. **But it Wasn't a Serious Felony When He Committed the Current Offense!** This one is a real brain teaser. I have briefed it in the *Tran* case, and all are welcome to view and borrow this briefing. I will summarize it here.

i. **The Problem.** It all really comes about because of Proposition 21, in 2000, yet another of those truly awful criminal justice initiatives which, not so long ago, would pass any time they were put on the ballot. Among its other vindictive provisions, Prop. 21 added a number of new serious felony crimes into the mix, including, inter alia, (1) the dreaded

crime of criminal threats, under section 422, (2) dissuading or threatening a witness under section 136.1, and (3) the gang crime, under section 186.22, subdivision (a), which the California Supreme Court decided also includes any felony with a gang enhancement. (*People v. Briceno* (2004) 34 Cal.4th 451, 456.)

Because of these additions to the roster of serious felony offenses, enacted by initiative six years after the Three Strikes law went into effect, there are persons with life sentences under the Three Strikes law whose "current offense" was not a serious felony when they committed it. Take my client, Mr. Tran, for example. His "current offenses" were two counts of felony drug sales, with gang enhancements. In 1999 when he was convicted after jury trial on these charges, they were most assuredly not serious felonies. Thus he could not have been, and was not, subject to any five year serious felony enhancements under section 667, subdivision (a), and could not have been, even if he was sentenced (as he in fact was) after Prop. 21 passed. Why? Because the good-old Ex Post Facto Clause prevents retroactive increases in punishment for crimes based on the date the crimes were committed. (More on that in a moment.)

So far, so good. But in this situation, is a person like Mr. Tran eligible for resentencing because his crimes were not serious felonies when committed, or ineligible because they are serious felonies now? And where does the Ex Post Facto Clause fit into this picture?

ii. **Plain language of section 1170.126.** This is not going to help us much. It just says that an inmate is eligible for resentencing if "he is serving" a Third Strike life sentence "for a conviction of a felony or felonies that are not defined as serious or violent felonies by subdivision (c) of section 667.5 or subdivision (c) of section 1192.7." (§ 1170.126, subd. (e)(1).) This begs the question of *which version* of section 1192.7 we are talking about, the one in force when appellant's crime was committed, or the one in force at the time the Reform Act was passed in 2012. True, the provision does not spell out that the former version applies by saying, e.g., "were not defined as serious felonies when the crimes were committed . . ."; I mean, *I* would have written it that way. But other than using the present

tense, the provisions gives no meaningful indication that the current version applies.

And arguably, the Ex Post Facto clause does not apply *directly* because we are talking about a provision which reduces an existing punishment, and does so selectively, which probably means that the electorate could have chosen any rational means for distinguishing between the class of persons who will benefit and the class who will not, including *current*, as opposed to past, legal definitions of crimes. However, as will be argued below, the ex post facto argument does come in later as an accessory claim. And there is a better statutory construction argument out there. Ready? Here it is.

iii. **The Not-So-Plain Language of Section 1170.125 and Section 2 of Proposition 184, and the Riddle to Which I Have the Best Answer.**

OK, here is where it gets really confusing and interesting. For there are, in fact, explicit provisions in the various versions of the Three Strikes Law which direct courts in terms of deciding which temporal versions of controlling statutes apply. And solving the riddle created by these three versions (there are actually more, but I will focus on the three that matter) is the key to deciding whether persons like Mr. Tran are eligible for resentencing or not. Although designed to determine which crimes count as "strike" priors, and to be consistent with ex post facto principles, these competing statutes are pretty clearly the determining factor as to which law controls the determination whether the current offense is a serious felony for purposes of resentencing eligibility.

**Version One: Section 2 of Proposition 184**. When the Three Strike initiative was passed, it included section 2, which provided that "[a]ll references to existing statutes are to statutes as they existed on June 30, 1993." (Ballot Pamp., Gen. Elec. (Nov. 8, 1994) text of Prop. 184, § 2, p. 65.) If this version applies to Mr. Tran, we win. Drug sales with a gang enhancement was not a serious felony as of June 30, 1993.

**Version Two, Section 1170.125, as Enacted with Prop. 21 in 2000**. As noted above, Prop. 21 added a bunch of new serious felonies to the strikes law. So the initiative included a provision amending – but not overruling – section 2 or Prop. 184, as follows:

"Notwithstanding Section 2 of Proposition 184, as adopted at the November 8, 1994 General Election, for all offenses committed on or after the effective date of this act, all references to existing statutes in Section 1170.12 are to those statutes as they existed on the effective date of this act, including amendments made to those statutes by this act." (Former § 1170.125, added by initiative measure effective March 8, 2000 (Prop. 21, § 16).) If this version controlled, Mr. Tran would be out of luck. But it clearly does not control, since it only applies "for all offenses committed on or after" the effective date of Prop. 21, March 8, 2000, which leaves Mr. Tran in the clear.

**Version Three, Section 1170.125 as Amended with Prop. 36 in 2012.** Now comes the tricky part. The Reform Act amended section 1170.125 to read as follows:

> Notwithstanding Section 2 of Proposition 184, as adopted at the November 8, 1994, General Election, for all offenses committed on or after November 7, 2012, all references to existing statutes in Sections 1170.12 and *1170.126* are to those sections as they existed November 7, 2012.

(§ 1170.125 (emphasis added), added by initiative measure effective November 7, 2012 (Prop. 36, § 5).)

You see the problem? No, not that I used the word "added" twice in succession, though that was rather clumsy. I mean, the fact that "1170.126" is included. Other than that section showing up, all is well. Amended section 1170.125 only applies to "offenses committed on or after November 7, 2012 . . ." so it can't apply to persons like Mr. Tran, right? Actually, I think the answer is "Yes," but some hoops need to be jumped through to get there, precisely because of the odd inclusion of "section 1170.126" in this statute.

iv. **The Interpretive Puzzle.** What did the drafters mean by including "section 1170.126" in the statute? The plain language of amended section 1170.125 specifies that it only applies for crimes committed on or after its effective date. So section 1170.126 is never going to come into the picture because, by definition, its only purpose is to create a resentencing right for persons sentenced before the operative date of the Reform Act for crimes committed well before that date.

There are three possible explanations. As of this writing, there are no published decisions on this point, but there is, as noted below, a cautiously unfavorable interpretation adopted by Judges Couzens and Bigelow. I think that my explanation, the third one that's coming, is the only one that makes sense in terms of the plain language of *all three* versions set forth above. And if I am right, Mr. Tran and persons in his situation will be found eligible.

**Interpretation No. 1:** Definitions as they existed on November 7, 2012 control all determinations under section 1170.126. This is the interpretation cautiously adopted by Couzens and Bigelow, while recognizing that it is not consistent with the "for offenses committed on or after . . ." language of amended section 1170.125. (Couzens & Bigelow, "Three Strikes Amendment," *supra*, part IV-B-1, 26-27.) In order to reach this conclusion, one has to effectively "read out" the clearly controlling provision which restricts applicability of the entire statute to "offenses committed on or after November 7, 2012." But to do so would violate a fundamental principle of statutory construction, the imperative to give meaning to every provision of a statute, and avoid readings which render certain provisions mere surplusage. (*People v. Cole* (2006) 38 Cal.4th 964, 980-981.) So, this is a troubling interpretation on this ground alone.

**Interpretation No. 2.** The second interpretation, which was my own first blush reaction to this puzzle, is that "section 1170.126" was included in the statute inadvertently, by "draftsman's error," because its inclusion makes no sense precisely because section 1170.126 won't ever involve offenses committed after November of 2012. But this is contrary to the same rule about giving meaning to every provision. And, it's hard to argue with a straight face, since the inclusion of section 1170.126 does not look to be inadvertent.

**Interpretation No. 3.** My own suggested interpretation follows an imperative of statutory construction by seeking to *harmonize* the language of the entirety of amended section 1170.125 with the Reform Act as a whole, viewing it in the backdrop of the two prior versions, i.e., former section 1170.125 and section 2 of Proposition 184. (See, e.g., *Alford v. Superior Court*, *supra*, 29 Cal.4th at p. 1040 [courts should "examine the entire substance

of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts”]

The key provision, which Couzens and Bigelow’s analysis ignores, is the very first phrase, i.e., “Notwithstanding section 2 of Proposition 184 . . . .” What does this mean? It means that section 2 of Proposition 184 still applies *except* where the terms of the statute control. (See *Klajic v. Castaic Lake Water Agency* (2004) 121 Cal.App.4th 5, 13 [distinguishing phrase “notwithstanding any provision of law” which states an intent to override prior law, from “notwithstanding subdivision (a),” which “carves out an exception only to subdivision (a)”].) This means that if the language which follows is not controlling in the particular situation under consideration, “section 2 of Proposition 184” still controls.

Here, this is determinative, and the phrase “Notwithstanding Section 2 of Proposition 184 . . .” was plainly intended to “carve out an exception” to section 2 of Proposition 184. (*Ibid*.) As with any statutory exception, the one created in section 1170.125 is only as broad as the specific language which describes it, and should generally not be read as including a broader exception. (See, e.g., *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424 [under maxim *expressio unius est exclusio alterius*, if an exception is specified in a statute, courts may not imply additional exceptions absent clear legislative intent to the contrary].) In the amended version of section 1170.125, the stated exception to the general applicability of section 2 of Proposition 184 only applies “for all offenses committed on or after November 7, 2012. . . .” (§ 1170.125.) So, it follows that any person, like Mr. Tran, whose crimes were committed *before* November 7, 2012 – and also before the operative date of the first version of section 1170.125 in 2000 – section 2 of Proposition 184 still controls. Which means, Mr. Tran’s “current offense” is not a serious felony.

But this begs the question as to why the drafters of the Reform Act included “section 1170.126” into the language of section 1170.125. Here’s my answer.

*The purpose of inserting the words “section 1170.126” into the current version of section 1170.125 was to, in effect, retrospectively insert “section 1170.126” into the prior versions of the law which describe the controlling dates for definitions of statutes under the*

*Three Strikes law.* This reading is entirely consistent with the way former section 1170.125 had been construed by the courts, and how amended section 1170.125 is plainly intended to apply prospectively with respect to section 1170.12. That is, one must determine whether the controlling language for the definition of "strikes" and/or serious and/or violent felonies is current section 1170.125, or section 2 of Proposition 184, *based on the date of the current offense.* If the "current offense" crimes which led to imposition of life sentences were committed before the enactment of the original version of section 1170.125, March 8, 2000, as in Mr. Tran's case, section 2 of Proposition 184 controls, and the definitions of "serious felony" as of June 30, 1993 would be followed. Presumably, this would also mean that where the "current offense" crimes leading to a third strike life sentence were committed on or after March 8, 2000, the definitions of serious and/or violent felonies as of that date would control under the prior version of section 1170.125.

Ironically, and to our advantage, this analysis is entirely consistent with the way Couzens and Bigelow interpret section 1170.125 as applied *prospectively* to the determination of "strike" priors.

> Courts must be sensitive to the date when the current crime was committed. If the current crime was committed prior to March 8, 2000, strike offenses will be defined by statutes as they existed on June 30, 1993. If the current crime occurred on or after March 8, 2000, but before September 20, 2006, the existence of strikes will be governed by statutes as they existed on March 8, 2000. If the current crime occurred on or after September 20, 2006, but before November 7, 2012, the existence of strikes will be governed by statutes as they existed on September 20, 2006. If the current crime occurred on or after November 7, 2012, the existence of the strikes will be governed by the statutes as they existed on November 7, 2012.

(Couzens & Bigelow, "Three Strikes Amendment", *supra*, part III-B-2 at p. 24.) While not expressly referencing the provisions of section 1170.125 and section 2 of Proposition 184, the above-quoted passage properly explains the inter-relation between these various provisions. Yet, when attempting to divine the drafters' intent in including "section 1170.126" in the language of section 1170.125, Couzens and Bigelow ignore their own

careful and constitutionally mandated analysis.

By contrast to the approach guardedly suggested by Couzens and Bigelow, my proposed interpretation of section 1170.125 as it applies to resentencing eligibility determinations under section 1170.126 reads the most recent amendment to section 1170.125 in the context of this statutory history and scheme, and is thus consistent with the principle of statutory construction which requires courts, when interpreting ambiguous statutory language, to consider "the statutory scheme of which the statute is a part." (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.)

I could go on about this at great length, and do in my brief in Tran. For now, it suffices to say that this argument seems to make the most sense, and has to be urged as the only fair one. Once again, we will reach back into our interpretative bag of tricks and find further support for this interpretation.

(a) **Avoiding Constitutional Problems.** The boogeyman here, as suggested above, is the Ex Post Facto Clause. (U.S. Const., Art. I, § 10, cl. 1, Cal. Const., art. I, § 9.) Without getting into too much painful detail, by excluding defendants like Mr. Tran from the benefits of section 1170.126 because their current offense is a serious felony, when it was not a serious felony when it was committed, the law would "aggravate his crime" and make it "greater than it was when it was committed . . ." which happens to be a precise articulation of the second category of prohibited ex post facto law described in *Calder v. Bull* (1798) 3 U.S. 386, 390.

Although, strictly speaking, reclassifying appellant's current offenses as serious felonies for purposes of the Reform Act resentencing provisions does not directly increase his punishment, it makes him ineligible for a newly enacted benefit by "aggravating the crime," making it a more serious type of crime than it was when committed, with the consequence that he loses the chance to dramatically reduce his punishment. In this sense, such an alteration of the legal consequences of his conviction is closely akin to laws found by the United States Supreme Court as violative of the third *Calder* category of ex post facto

laws by retroactively altering a criminal defendant's entitlement to punishment reduction based on good conduct. (See *Weaver v. Graham* (1981) 450 U.S. 24; *Lynce v. Mathis* (1997) 519 U.S. 433.) The High Court has made it clear that such a change amounts to an *increase* in punishment which, if applied retroactively, violates the Ex Post Facto Clause of the federal constitution. (*Ibid*.) A law reducing such credit entitlements "implicates the *Ex Post Facto* Clause because such credits are one determinant of petitioner's prison term . . . and [the prisoner's] effective sentence is altered once this determinant is changed." (*Lynce*, *supra*, at p. 445.) As plainly expressed by the Supreme Court, "[t]he critical question . . . is whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence." (*Weaver*, *supra*, 450 U.S. at p. 32, fn. 17.)

Clearly, this would be the consequence of retroactively reclassifying appellant's current offense as a serious felony. As explained above, a person like Mr. Tran is now subject to greater punishment – a fifty to life term – than what could have been imposed upon him under post-Reform Act sentencing based on the date of his offense, and he is only in this predicament because of a change of law which occurred after the commission of his crime, a change which aggravated his non-serious felony conviction offenses into serious felonies. Thus, the interpretation advanced by Couzens and Bigelow arguably runs afoul of the ex post facto prohibition by both increasing his punishment under the reasoning of *Weaver*, and by aggravating the nature of his crime, making it "greater than it was, when committed." (*Calder v. Bull*, *supra*, 3 U.S. at p. 390.) By contrast, my proposed interpretation has no such problem, because it employs the definition of "serious felony" which applied at the time Mr. Tran's crime was committed, thus avoiding the constitutional problem.

(b) **The Rule of Lenity.** Not that again. Well, this is a good example of how and when the rule really should be applied. We are dealing with a statutory provision, amended section 1170.125, which really cannot ever be fully interpreted or understood without squaring the circle of some clearly inconsistent language within the statute itself. So, the rule which requires adoption of the interpretation favorable to a defendant applies because, at

worst, the interpretation I advanced and the one cautiously put forward by Couzens and Bigelow stand at "relative equipoise." (*In re M.M.*, *supra*, 54 Cal.4th at p. 545.)

OK, on to the next interpretive puzzle.

b. **Is the Inmate Serving a Life Sentence for a Serious Felony Where the Trial Court, When it Sentenced Him, Struck the Punishment for the Enhancement Allegation Which Made His Crime a Serious Felony?**

This is another issue which is raised in the *Tran* case. Assuming that we lose the "controlling law" argument discussed above, does it matter that when the trial judge sentenced Mr. Tran, he struck the punishment for the gang enhancements?

My answer is yes, it does matter because the effect of this action is that there was not a prison sentence imposed for a serious felony offense, which is what the statutory language of section 1170.126(e)(1) requires. This argument faces an uphill battle precisely because of case law and statutory language from the former Three Strikes law which concludes that what matters, for purposes of defining whether a prior crime is a "strike," is the "conviction" suffered as a result of the jury trial or plea to the charges, and not the "conviction" in the sense of the sentence imposed. (*People v. Laino* (2004) 32 Cal.4th 878, 895-896.)

But this is "apples and oranges." Cases like *Laino* are based on statutory language from the former version of the Three Strikes law which states that "'[t]he determination of whether a prior conviction is a prior felony conviction for purposes of [this section] shall be made upon the date of that prior conviction and is not affected by the sentence imposed . . .' (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1).) Because of that, the meaning of "conviction" in determining whether a prior crime counts as a strike or not must be based on the plea and/or verdict, not the sentence, and any act of say, striking a gang enhancement, would not alter the fact that the crime still counts as a prior strike.

But we are not dealing with that provision here. Case law recognizes that the term "conviction" has a variable meaning which can include, on the one hand, a verdict (or guilty plea), as in cases like *Laino*, or on the other hand, the judgment and sentence eventually

pronounced, which we argue is the case with the resentencing provision. (See *Boyll v. State Personnel Board* (1983) 146 Cal.App.3d 1070, 1073.) Here, we are dealing with a statutory provision which is, in fact, focused *on the sentence actually imposed*. The key phrase from subdivision (e)(1) of section 1170.126 is, "the inmate is serving a [third strike life sentence] for a conviction of a felony . . . not defined as serious. . . ." The focus is on the *sentence* being served; thus, "conviction" refers to the sentence imposed.

From this we can argue that our client, if in this situation, is eligible for resentencing because he is not a person for whom a life sentence was imposed for a serious felony conviction. The act of striking the gang enhancement (or some other enhancement which elevates the crime to the status of serious felony) means he was not given a life sentence for a serious felony "conviction," i.e., the current offense is not a serious felony for purposes of determining eligibility under section 1170.126(e)(1).

c. **The Mixed Sentence: Multiple Third Strike Life Sentences Current Offense Convictions Where One or More Is for a Serious Felony and One or More Is for a Not-Serious Felony.**

The next Big Issue in interpreting the resentencing provisions, on which there is now some very odd unfavorable authority, has to do with persons like my client, Mr. Denize, who is serving a 50 to life sentence under the Three Strikes law where one of his crimes – assault with a deadly weapon, with personal use of a deadly weapon – is for a no-doubt-about-it serious felony, but the other crime on which a life sentence was imposed – grand theft – is for a no-doubt-about-it *non*-serious felony. Obviously, he is not eligible for resentencing as to the serious felony offense. But is he independently eligible for resentencing as to the 25 to life sentence imposed as to the grand theft charge, such that, if resentenced, his punishment would go down from 50 to life (plus change) to 25 to life plus a doubled determinate term on the grand theft offense?

i. ***Martinez***. The first published decision to consider this question, *Martinez*, *supra*, 223 Cal.App.4th 610, concluded that if any one of the defendant's current offenses is a

violent or serious felony, section 1170.126 does not apply to any of his sentence. (*Id*., at p. 620.) The court reaches this conclusion on dubious grounds, which are muddled up with the fact that the current serious felony in Mr. Martinez's case, spousal rape, is among the most serious crimes which are set aside by the drafters of the Reform Act as flatly disqualifying a person for resentencing or the benefits of the Reform Act when it is one of the "strike" priors. (*Id*., at p. 619.) Insofar as the holding in *Martinez* is based on this fact – and it sometimes reads like it is – we can distinguish our clients who, like Mr. Denize, have a current serious felony conviction that is not one of the Really Bad Strikes like rape and murder which are set aside for blanket exclusion.

The *Martinez* court's discussion concedes that this is not a simple question because the language of subdivision (e)(1) of section 1170.126 "does not clearly address" this issue (*id*., at p. 618), leaving it "not entirely clear" as to whether resentencing is precluded based on one serious felony only. (*Id*., at p. 620.) The court's conclusion that a blanket exclusion applies appears to be based on a rather curious pair of interpretive moves. First, *Martinez* suggests that this interpretation was intended because a defendant is required to list all his current third strike convictions in his petition. (*Id*., at 465.) But this requirement makes sense under either interpretation. Additionally, *Martinez* focuses on the "public safety" goals of the Reform Act, citing language in the voter's pamphlet which indicates that truly dangerous criminals will get no benefit from the new law. (*Id*., at p. 618.) But this begs the question as to whether persons with a mixed sentence are "truly dangerous" or not, and, if they were, why the Reform Act allows them, as explained below, to receive a mixed sentence when they are sentenced prospectively under its terms. Plus, where your client's serious felony current conviction, unlike Mr. Martinez's, is not for one of the truly bad offenses, like rape, you can distinguish this part of the *Martinez* analysis. Thus, *Martinez*, on which a review petition is currently pending, is not much of an adversary in terms of making our argument for entitlement to resentencing in the mixed current offense situation.

So, here is my analysis, summarized from my brief in Denize

i. **Plain Language of Subdivision (a) of Section 1170.126.** As with the pleading and proof argument, our argument that persons like Mr. Denize are eligible for partial resentencing begins with careful statutory analysis of the various provisions of the resentencing statute, and proceeds through the usual helpful guides of interpretation. To start with, let's go back to our old friend from pleading and proof, that introductory paragraph to the resentencing statute, which is entirely ignored by the court in *Martinez*. You will recall that it reads as follows:

> Resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment under [the former Three Strikes Law] whose sentence under this Act would not have been an indeterminate life sentence.

(§ 1170.126(a).)

If we take this provision at its word, an inmate in Mr. Denize's situation, with one life term for a current serious felony, and one life term for a current non-serious felony, should be eligible for resentencing as to the current non-serious felony because his sentence under the Three Strikes law, as amended by the Reform Act, would only be for one life term because he could not receive "an indeterminate life term" for his grand theft conviction. There is not much dispute that a person with mixed current offenses, one serious felony, one not-serious felony, sentenced today under the Reform Act would receive only one life sentence. As Couzens and Bigelow put it, with respect to "[s]entencing of mixed counts . . . the traditional 25-to-life sentence may be imposed on the new serious or violent crime . . .", but, "based on the plain language of the statute, any new non-serious and non-violent felony convictions should be sentenced as second strike offenses." (Couzens & Bigelow, "Three Strikes Amendment," *supra*, Part I-B-1, p. 9.)

Because the language of subdivision (a) is written in the *singular* – "serving an indeterminate life term" – the provisions are clearly intended to be applied count-by-count. Thus an inmate like Mr. Denize should be eligible for resentencing as to the grand theft count.

ii. **Plain Language of Subdivision (e)(1) of Section 1170.126**.

> An inmate is eligible for resentencing if: [¶] (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to [the former Three Strikes law] for a conviction of a felony or felonies that are not defined as serious and/or violent felonies. . . .

(§ 1170.126, subd. (e)(1), bracketed phrase added.)

Discussion of this critical paragraph must begin by pointing out that, yet again, the phrase "an indeterminate term" is employed *in the singular*. However, here the drafters make it clear, through the use of the plural alternative, "a felony or felonies," that the sentencing relief applies to *any felony or felonies* on which an indeterminate life sentence was imposed which are not serious and/or violent felonies. Nothing is said or implied about a person who has *even one* serious or violent felony being excluded. If a *single* serious felony current offense disqualified a person for resentencing, there would be no need to say "felony or felonies."

Here we can contrast this language with the expressly stated blanket exclusion of subdivision (e)(3), which provides that an inmate is eligible for resentencing only if "[t]he inmate *has no prior convictions* for any of the offenses appearing in clause (iv). . . ." of 1170.12(c)(2)(C). (§ 1170.126, subd. (e)(3), emphasis added.) The plain language employed in subdivision (e)(3) convincingly indicates that *any* such prior "strike" convictions for the homicide, sex offenses, and other crimes specified in section 1170.12(c)(2)(C)(iv) means that the inmate is flat-out ineligible for resentencing under the Reform Act.

Whereas the drafters of the Reform Act utilized language of *exclusion* in subdivision (e)(3), they employed language of *inclusion* in subdivision (e)(1). The plain significance of this distinction in phrasing must be that the language of subdivision (e)(1) is intended to include, as eligible, any inmate who is serving a third strike life sentence for any current offense not defined as a serious and/or violent felony, even where, as here, he or she is also serving a third strike life sentence for another crime which is a serious and/or violent felony.

In my brief in *Denize*, I pointed out – as I do in several of the briefs construing the confusing language of the Reform Act – just how easy it would have been for the drafters of the Reform Act to have made it clear that an inmate with any Third Strike life term for a current offense serious and/or violent crime is excluded from resentencing for all purposes, coming up with proposed language, as follows:

> An inmate is eligible for resentencing if . . . The inmate is not serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of ~~a~~ any felony or felonies that ~~are not~~ is defined as a serious and/or violent felony ~~felonies~~ by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.[13]

But they didn't write it like that. And while *Martinez* is right that the language they employed is not a paradigm of clarity, the most reasonable construction of its meaning is that where multiple life terms were imposed under the former Three Strikes law, section 1170.126 is intended to apply, and should be construed as applying, based on a count-by-count determination of eligibility for resentencing with respect to an inmate's current sentence.

iii. **"Round Up the Usual Interpretation Guide Suspects. . . ."** Again, we turn to our supplemental interpretation tools to bolster the argument. First, using a clever equal protection claim, measuring the sentence which someone in this situation would receive now under the Reform Act – i.e., 25 to life for the current serious felony plus a doubled determinate term for the not-serious felony – against the interpretation advanced by the *Martinez* court – which would result in retention of the previously imposed 50 to life sentence – the result is a dubious distinction which arguably would violate equal protection. (See, e.g., *People v. Sage* (1980) 26 Cal.3d 498, 506-508 and 509, fn. 7 [applying equal protection principles of *In re Kapperman* (1974) 11 Cal.3d 542 to award conduct credits retroactively].)

Second, looking to the remedial purposes of the Reform Act, as outlined above under

[13] Section 1170.126, subdivision (e)(1), rewritten for purposes of illustration; deletions marked with overstrike, added language with underlining.

the discussion of "pleading and proof," we can principally argue that the split sentence interpretation is entirely consistent with the purpose of reforming the Strikes Law such that "repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession will receive twice the normal sentence instead of a life sentence . . . ." (Ballot Pamp., *supra*, text of Prop. 36, p. 105.) Persons like Mr. Denize, whose non-serious felony current offense was basically for shoplifting at a Home Depot store, fit into this category. He still gets the full term life sentence for the serious felony offense, and thus the amelioration of punishment for the less-serious crime is entirely consistent with both the "protect the public" and "no more overkill for less serious felony offenses" purposes of the Reform Act.

Finally, there is the rule of lenity. Even *Martinez* concedes that the statutory scheme is not very clear. The reviewing court in that case gets out of the "tie goes to the defendant" requirement of that rule only by pointing out that Martinez's current serious felony is for the "truly dangerous" offense of spousal rape. Where, as with Mr. Denize and, hopefully, your client, the current serious felony is not such a crime, then by parity of reasoning, the rule of lenity must apply to this interpretive issue in equipoise.

iv. ***Martinez*** **Twist**. OK, but what if your client's current serious felony *is* for one of the Really Bad Crimes singled out in clause (iv) of section 1170.12(c)(2)(C)? In that case, you will need to point out that there is nothing in the language of either section 1170.12 or section 1170.126 which indicates that this class of crimes matters in terms of *the eligibility determination* except where it is a "prior conviction." (§ 1170.12, subd. (c)(2)(C)(iv) & § 1170.126(e)(3).) Thus, you must insist, the court in *Martinez* was basically making it up as it went along by holding that the fact that a *current* offense is one of these "truly dangerous offenses" has any significance to the eligibility determination under the Reform Act.

4. **Per Se Strike Exclusions.** Speaking of this group of truly horrible offenses singled out for exclusion, the next topic is what you can do in an eligibility case where your client was found ineligible based on a prior disqualifying strike under clause (iv). The

general answer is, "Not much." If, as with one of my first exclusion appeals, your client has prior strikes for forcible rape and lewd acts under section 288(a), there *is* nothing you can do but file a *Wende* brief, which the Court of Appeal will treat as a *Serrano* brief.[14] This at least gives you something to argue about, i.e., that this is an appeal as of right, and *Wende* is the proper procedure.

But I have identified three potential issues which can and probably will arise concerning the per se exclusions under clause (iv).

a. **Homicides**. The "killer" exclusion in subclause (IV) of clause (iv) is for "Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive." Thank goodness they put the commas in the right place here. Pretty clearly, the whole subclause is controlled by the last phrase, "defined in Sections 187 to 191.5, inclusive." This means that voluntary and involuntary manslaughter, which are defined in section 192, are *not* included. There is at least one Santa Clara County case where the trial judge found the inmate ineligible, at least in part, based on a prior strike for voluntary manslaughter. This is clearly error.

However, the inclusion of "191.5" means that persons with prior strikes for vehicular manslaughter in its several versions defined under that provision are not eligible. By contrast, other persons who have a prior strike for a lesser version of vehicular manslaughter under section 192, subdivision (c), are eligible. Go figure.

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[14]In *People v. Serrano* (2012) 211 Cal.App.4th 496, the Sixth District limited the availability of *Wende* review to situations where there is a "first appeal as of right," which means direct review with a federal constitutional right to counsel. In a *Serrano* case, the court does not review the record, but simply gives the defendant a chance to file supplemental brief, then dismisses the appeal or affirms. Arguably, appeal of denial of a section 1170.126 petition is a first appeal of right, with right to counsel, and *Wende* review should prevail. We have not yet litigated this issue because the only Reform Act appeals on which *Wende* briefs were filed have been truly without any arguable merit, where the inmate could not even state a prima facie case for eligibility.

b. **Can a Juvenile "Strike" Be a Disqualifying Prior Under Clause (iv)?**

We all know that juvenile priors can count as "strikes," even though they are not serious felony convictions, under the provisions of section 1170.12(b)(3). But it is less than clear whether an inmate who has a "strike" prior which fits the definition of excluded homicide offenses under clause (iv) of section 1170.12(c)(2)(C) is ineligible if that "strike" is for a juvenile prior. In fact, this very subject came up in an e-mail exchange between Yours Truly and panel attorney Peter Goldscheider. Since, as far as I know, this e-mail exchange represents the only authority on the subject, I will print it in full here, with some editing liberties taken. First, Peter's query:

> Hi Bill, Sorry to send you this on a Sunday – just ignore it until the week starts.
>
> It appears that I have misread Prop 36 all this time. Somehow I read into section 667(e)(2)(C) the requirement that disqualifying priors (in the case I am working on a rape sustained as a juvie) had to be adult priors and not juvenile priors. Upon closer analysis this does not appear supported by 667(f)(1) and other sections.
>
> Have I been off base all this time?
>
> Thanks, Peter G.

Here's my answer:

> Hmmm, I'm not sure Peter. 1170.126 says the inmate "has no prior convictions . . ." for the excluded offenses. A juvenile offense is not a conviction. Plenty of case law on that, including my own *Pacheco* case [*People v. Pacheco* (2012) 194 Cal.App.4th 343] for purposes of the former amendment to 4019 not restricting credits where there is a juvenile adjudication for a serious felony.
>
> Of course, 1170.12 (b) says "A prior juvenile adjudication shall constitute a prior serious and/or violent felony conviction for the purposes of sentence enhancement if . . ." and then specifies circumstances which I presume apply to your client. But that is specified as only applying "for purposes of sentence enhancement," To me, this means it has one and only one application: if you have a prior juvenile adjudication, it counts as a strike for purposes of sentence proceedings.
>
> But – and this is a big butt, as it were – (c)(2)(C)(iv) then says, "(iv) The defendant suffered a prior conviction, as defined in subdivision (b) of this section, for any of the following serious and/or violent felonies. . . ." Does this mean that the

prospective exclusion for eligibility for reduced second strike sentence for third strikes with non-serious current offenses does not apply to persons with juvenile priors that are on the Bad List?, i.e., homicides, sex crimes, etc.? I am not so sure.

It has to come down to the language of (b) and the meaning of "for the purposes of sentence enhancement." I would certainly argue that the eligibility requirement should be strictly construed based on the plain language as applying only to juvenile priors as prior strikes but not as to eligibility for reduced sentence, either prospectively under section 1170.12(c)(2)(C)(iv) or retroactively under 1170.126. Argue that the drafter's know what a "conviction" is, and could have specified this but failed to, ambiguity must be construed in our favor, that the court can still refuse to resentence based on dangerousness, and then talk about all the Supreme Court cases on juveniles and culpability. I would take a look at the former language of the strikes law on juvenile priors and see how it changed with the new law, and go from there. Definitely arguable in my book.

And no bother doing a nice brain teaser with big stakes on a Sunday! More interesting than the basketball game on TV right now.

(It was a really lame early NCAA tournament game.)

c. **The Sex Crime Strike Exclusions and "Attempts."** In yet another bit of rather puzzling drafting, take a look at subclause (I) of section 1170.12(c)(2)(C)(iv), the Reform Act provision which describes the Very Bad Sex Crime priors which, if one of your strike priors, excludes you from any benefits, prospective or retroactive, of the Reform Act. It excludes "a 'sexually violent offense' as defined by subdivision (b) of Section 6600 of the Welfare and Institutions Code."

Dallas Sacher pointed out to me recently that a review of section 6600(b), which contains an exhaustive list of sexual crimes, reveals that it does not include any *attempts* to commit the specified sex crimes. Nor is "attempt" included in the list of sex crimes in subclauses (II) and (III). Thus, if your client has a strike prior or priors for only one or more *attempted* sex crimes, he is, by the plain language of the statute, not ineligible!

If you are fortunate enough to be able to make this argument, be sure to point out, that the drafters knew precisely how to include "attempt" crimes in the exclusions, which they

expressly did in subclause (IV) as to homicide offenses, as noted above.

5. **Appeals of the Hopeless Loser Eligibility Case.** There are a good number of cases where a defendant who is very clearly ineligible under an unambiguous provision of the Reform Act – or at least one where the ambiguities don't matter – is found ineligible, then files a notice of appeal. The case is assigned to you. What can you do?

a. **Look for Something.** First, leave all your preconceived assumptions behind you, review my article, and anything else you can find, to see if there is some aspect of the denial which involves a legal controversy as to eligibility. I admit that in the Tran case, discussed above, I first wrote it off in my head as a *Wende*, and even told the client as much, before I figured out that it arguably mattered that (a) Mr. Tran's current offenses were not serious felonies when they were committed and (b) the court struck the gang enhancement punishments, either of which arguably means he is eligible.

Thus, you should go through all the stated grounds of ineligibility in the sentencing court's order – if there is one – looking carefully at the statutory provisions which are applicable, and see if some kind of eligibility argument can be made. And call me if you have any inkling of a doubt.

b. **Give the Client Something Back.** You may want to urge the client to abandon, based on the hopelessness of the case. Whether you do this or not, you should carefully explain the basis for ineligibility, and why it is unassailable on appeal. And you can try to soften the pain by telling the client that, although the current Reform Act did not help him, there is a good chance that the Electorate is not done reforming the law, and that a future reform may look more like good old Prop. 66, from 2004, which may well have made him eligible for resentencing. In other words, try to give the "left out" inmates something to hope for.

C. **Appeals of "Dangerousness" Denials**

1. **Apology and Introduction.** This was going to be as detailed a discussion as what has come before it. But three things got in the way. First, between my work on real Reform

Act appeals and on other cases, and the detailed drafting of the above section, I ran out of time. Second, while I intended to complete my own work on an important dangerousness denial appeal in the *Charles Airy* case, I was not able to do so. Thus, my points here are largely going to be made with reference to arguments raised by others. And third, the article is already long enough, and I don't want to greatly add to its length and deter you from wanting to wade through it. So, in abbreviated form, here goes.

I will start by suggesting that the terrain of appellate work alters dramatically here. From largely questions of statutory instruction and application to facts, the focus shifts to a particularly hybrid form of fact-finding to establish the fall-back exception to resentencing. As will be explained, there are many very hot and debatable legal issues which will require analysis and decision, with much room for creativity. But ultimately, it's going to turn on some form of evaluation by the reviewing court of the factual basis on which the trial court "in its discretion, determine[d] that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) And we all know what our chances are in an appeal based on sufficiency review. Slim. Worse yet, the phrase "in its discretion" signals an even more deferential standard of review than sufficiency, "abuse of discretion," which typically turns our chances into slim or nun.

The key here will be figuring out ways of framing legal arguments that limit or constrain the exercise of discretion under established and/or contested constitutional and/or case law principles. My thesis, insofar as I have one, having not yet briefed the whole area, is that we can borrow and scrape from favorable case law both as to sufficiency review and abuse of discretion review, using either or both to attack dangerousness findings. Leaving aside for the moment the important questions of what standards apply, the terrain for successful appellate arguments will resemble that of appeal of *Romero* denials. That is, it will be very difficult to win by simply claiming that the determination of dangerousness is one which, under the traditional test for abuse of discretion, no reasonable factfinder could have made. Instead, the best arguments with most chance of success will be to show that this factual determination was undermined by significant errors as to the legal standard,

consideration of improper factors, failure to consider pertinent factors, and other arguments of that ilk.

That said, the first portion of this section of the article will focus on an array of contested legal issues concerning hearings on dangerousness denials. There is a lot of excellent briefing out there on these issues, by Brad O'Connell, Patrick McKenna, and Dallas Sacher, to name a few. Their briefing is available and here I will borrow considerably from their arguments.

The second part of this section will focus on the appellate side of the evaluation of sufficiency of evidence and abuse of discretion. Here, the work will draw considerably from *Romero* appeals and the parallel appellate work of lifer parole habeas litigation, where there is also a presumption in favor of a finding of "suitability" which works in our favor, but one which is layered onto an unfavorable and deferential review standard.

1. **Legal Issues and Standards**

a. **Equal Protection.** One avenue of attack, often raised by diligent trial counsel, is the claim that the entire overlay of "dangerousness" vetoes by trial judges under 1170.126 violates the equal protection clause by discriminating against older offenders based on when they committed their crimes. Briefing from the trial courts is available on this issue.

It has several rather obvious problems. Most notably is the difficulty of showing that the two classes of persons – those charged, convicted, and sentenced after the Reform Act went into effect, and those whose convictions were final when the Reform Act went into effect – are "similarly situated." Equal protection litigation recognizes that legislatures can and do make temporal distinctions, and not every sentence reduction will apply retroactively. (See *People v. Brown*, *supra*, 54 Cal.4th at pp. 328-330.) Prosecutors can and do point to an important distinction, i.e., that charging decisions, plea bargains, and sentence accommodations under the Old Regime of the former Three Strikes law could be made based on the notion that a third strike sentence was the norm, and would likely be imposed. Thus, for example, a person charged with, say, robbery, with two prior strikes, might have been

allowed, where the facts of the robbery were not particularly egregious, to plead down, pursuant to a plea bargain, to a "grand theft person" with the understanding he was still subject to a third strike sentence, albeit with a shorter minimum term. Whereas for the same person charged with robbery with two or more strikes committed *after* the Reform Act, a prosecutor who, as in the first hypothetical, sought a lengthy, third strike term, would not be likely to enter into such a plea bargain. Thus, the best fact patterns in which to make an equal protection argument are going to be those cases that began as, and were resolved as, current offense minor felonies, e.g., drug possession, stolen property possession, petty theft with a prior, grand theft, etc.

Alas, the equal protection claim has probably less chance of prevailing than the *Estrada* claim discussed above. It does have the advantage of federalizing the claim, and perhaps giving someone a chance to prevail in federal court, although such a result would be very unlikely under AEDPA.

b. **The Presumption in Favor of Resentencing and its Implications.** Any discussion of dangerousness denials must begin by recognizing that section 1170.126 creates a presumption in favor of resentencing, and against a finding of dangerousness, providing that "[i]f the petitioner satisfies the [eligibility] criteria in subdivision (e), the petitioner *shall* be resentenced [as a second striker] unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f), emphasis added.)

Similar statutory provisions using the same "shall"/"unless" phrasing have been construed by courts as giving rise to a presumption in favor of the sentence described and subject to the "unless" exception. Case law has consistently construed this formulation as establishing the "shall" option as the "presumptive punishment," "and the court's discretion" to choose the alternative disposition as "concomitantly circumscribed to that extent." (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1142.) Thus, as the courts have construed section 190.5, subdivision (b), "16 or 17 year-olds who commit special circumstance murder

*must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life." (*Guinn*, *supra*, at p. 1141, emphasis in original.) Though the court retains "circumscribed discretion" to select the latter disposition, the "shall"/"or" formulation makes the former sentence – LWOP in the case of § 190.5(b) – "generally mandatory." (*Id*., at p. 1142; accord, e.g., *People v. Murray* (2012) 203 Cal.App.4th 277, 281; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089.)[15]

The *Guinn* statutory analysis, embraced in the cases cited above, applies with even greater clarity here. *Guinn* essentially read the word "unless" into section 190.5, subdivision (b), which was phrased as "or, at the discretion of the court." By contrast, section 1170.126, subdivision (f) explicitly employs the "shall"/"unless" formulation. Moreover, while *Guinn* viewed the court's discretion as "circumscribed," section 190.5, subdivision (b) does not explicitly list any discretionary criteria, such that a sentencing court is free to consider any aggravating and mitigating circumstances listed in the sentencing rules. (*Guinn*, *supra*, 28 Cal.App.4th at p. 1149.)

By favorable contrast, section 1170.126 *explicitly* circumscribes the court's discretion by limiting the ground for denial of a recall petition to a determination that resentencing "would pose an unreasonable risk of danger to public safety" (§ 1170.126, subd. (f)) and listing specific factors "the court may consider" (1170.126, subd. (g)) ("criminal conviction history," "disciplinary record," "record of rehabilitation," etc.).

Thus, it is readily apparent that there is a presumption in favor of resentencing which applies once eligibility is established. This can be used to our advantage in several respects. First, there is the matter of the burden of proof and standard of proof of dangerousness which is required. There are several sub-issues here, and levels of argumentation.

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[15]See also, e.g., *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 238-239 [use of "shall/unless" phrasing in Civ. Code § 1354, subd. (a) creates "statutory presumption of reasonableness"]; *People v. Flores*, *supra,* 30 Cal.4th at p. 1068 ["shall/ unless" language in § 987.2, subd. (g)(2)(B) gives rise to presumption that person sentenced to state prison lacks ability to reimburse defense costs].)

c. **Government's Burden.** Unquestionably, it is the prosecution's burden to prove dangerousness, as the only appellate decision to reach this point, in dicta, has held (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301, fn. 25.) Even if *Kaulick* did not so state, this should flow naturally from the presumptive structure of entitlement to resentencing, and the requirement of an express finding to overcome that presumption.

d. **What Standard of Proof? First Order Argument, By a Jury Beyond a Reasonable Doubt.**

i. **The Legal Argument.** *Kaulick* sets the burden to prove dangerousness at the low-level of "preponderance of the evidence." (*Id*., at pp. 1301-1305.) But the factual finding here is not akin to a "sentencing fact" determination, post-*Cunningham*, in support of a discretionary sentence choice. Instead, the choice here is between the already-imposed life-sentence, and the now presumptively entitled, and dramatically reduced second strike sentence. At this point, the "presumptive sentence" is the determinate term, with fact-finding as to dangerousness required to overcome the presumption and reimpose the exponentially greater life sentence. (See *Cunningham v. California* (2007) 549 U.S. 270, 278.)

In rejecting the *Apprendi-Cunningham* analysis, the court in *Kaulick* concluded that the Supreme Court had rejected the application of the *Apprendi* doctrine to statutes which decrease punishment for a previously final judgment. As Dallas Sacher argues in the *Landry* case, this conclusion is erroneous. *Kaulick* relied on the Supreme Court's decision in *Dillon v. United States*, *supra,* 560 U.S. at p. 817. In *Dillon*, the court considered a statutory amendment that provided district courts with jurisdiction to lower previously imposed sentences based on new guidelines promulgated by the Sentencing Commission. The issue was whether the guidelines were mandatory or discretionary. The defendant contended that the guidelines had to be deemed discretionary since the Supreme Court had previously held that the guidelines used at initial sentencing hearings were discretionary since mandatory guidelines would have fallen afoul of the jury trial right recognized in *Apprendi v. New Jersey*, supra, 530 U.S. 466. The court held that the new guidelines were mandatory since the statutory revision limited "the extent of the reduction authorized" and did not permit the

courts to conduct "plenary resentencing proceedings." (*Id*. at pp. 826-828.)

Significantly, the statutory scheme at issue in *Dillon* did not serve to redefine a normative punishment for the defendant. Rather, the statutory amendment, consistent with prior law, merely provided discretion to the court to lower the sentence. Most importantly, a lesser sentence is allowed "[o]nly if the sentencing court originally imposed a term of imprisonment below the guidelines range . . ." (*Ibid.*)

Section 1170.126 presents an entirely different scheme than the one analyzed in *Dillon* because it creates a *new* statutory presumption for a two strikes sentence. The court must mandatorily impose the two strikes sentence unless a factual finding of dangerousness is made. Given the enactment of this presumption, section 1170.126 necessarily requires a "plenary resentencing" hearing unlike the limited modification hearing analyzed in *Dillon.* Indeed, *Dillon* makes this point crystal clear.

In its dispositive paragraph, the court observed that the statutory amendment at issue did not "serve to increase the prescribed range of punishment . . ." (*Dillon*, *supra*, at p. 828.) Rather, the court was required to take "the original sentence as given" and had no power to find "any facts" that would allow for enhanced punishment. (*Ibid*.)

Here, section 1170.126 manifestly *requires* the court to make a factual finding of dangerousness in order to allow for a life sentence. Since this function is one which is constitutionally within the province of a jury, it follows that the defendant has a right to a jury trial, and that the standard, as with any finding of fact required to increase a presumptive maximum punishment, is beyond a reasonable doubt.

ii. **The Implications of This Standard For Dangerousness Denial Appeals.**

What this legal conclusion means for your client depends on the procedural posture of your case. If, as in Dallas's *Landry* case, and is commonly the case in resentence hearings handled by the Santa Clara Public Defender's Office, there was a demand for a jury trial made and rejected, you can argue, as Dallas did in *Landry*, that the court's refusal to grant a jury trial and use of a lower preponderance standard was legal error, which requires

reversal and remand for a jury trial unless it is harmless beyond a reasonable doubt. That harmless error applies here at all seems counter-intuitive, but appears to be compelled by *Washington v. Recuenco* (2006) 548 U.S. 212, 219-220, which applied *Chapman* harmless error analysis to similar *Apprendi-Blakely* error in the context of sentencing.

That harmless error analysis applies at all is somewhat bad news. But compared to the other standards of review and/or prejudice we are likely to see for dangerousness denials – i.e., sufficiency review or abuse of discretion review and *Watson* prejudice (*People v. Watson* (1956) 46 Cal.2d 818, 836) – the *Chapman* "harmless beyond a reasonable doubt" standard is magnificent! It permits you to make the point, as Dallas did in his *Landry* brief, that since a jury never passed on the factual question of whether appellant presents a danger to public safety, reversal is required "if the defendant contested the omitted element and raised evidence sufficient to support a contrary finding. . . ." (*Neder v. United States* (1999) 527 U.S. 1, 19.) In virtually every case where there is a hearing on dangerousness, the defense will have vigorously contested the proof of the defendant's "current dangerousness," and presented evidence and argument to support this position. Insofar as this evidence rises to the level that any reasonable jury could have reached a contrary finding, the error is not harmless under *Chapman*, *Recuenco*, and *Neder*.

e. **Second-Order Argument: by Preponderance of Evidence, But With Constitutional and Statutorily Mandated Limits on the Exercise of Discretion.**

Try though I did, I could not come up with an alternative theory, other than the *Apprendi-Cunningham* jury trial right, which would required proof of dangerousness beyond a reasonable doubt. The law is too well settled that the due process requirement for proof of "mere sentencing facts" requires only that a judge make these findings by a preponderance of evidence.

i. **Proof of Dangerousness by Preponderance of Evidence. but with Limits on Discretion.**

Even while conceding, arguendo, that a preponderance standard applies, it is critical

to assert several "codicils" to this standard. Although the statute commits the determination of "dangerousness" to the discretion of the trial judge (§ 1170.12, subd. (f)), this is not unbridled discretion, but is circumscribed by several critical factors because of the presumption in favor of resentencing.

(a) **There Must Be Reliable Evidence Showing Current Dangerousness.**

It is well settled that a sentencing court's determination cannot be based on unreliable evidence which lacks a substantial evidentiary basis. A bedrock principle of sentencing law under the Due Process Clause of the federal Constitution, as interpreted by the federal courts, is that sentencing judges, while permitted to exercise wide discretion to consider collateral facts regarding a defendant's wrongful conduct, can do so only when there is a threshold factual showing of reliability beyond the mere fact of allegation. (*Townsend v. Burke* (1948) 334 U.S. 736, 741; *United States v. Tucker* (1972) 404 U.S. 443, 447; *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 91-92; see, e.g., *United States v. Juwa* (2d Cir. 2007) 508 F.3d 694, 700-701, *United States v. Weston* (9th Cir. 1971) 448 F.2d 626, 634; *United States v. Zimmer* (6th Cir. 1994) 14 F.3d 286, 290.)

California law reflects the same principles. A court rule provides that such allegations cannot properly be included in a probation officer's report, and thus, by implication, cannot properly be relied upon by a sentencing judge, "unless supported by facts concerning the arrest or charge." (Cal. Rules of Court, rule 4.411.5(a)(3).) *Romero* jurisprudence further underlines this point. In *People v. Carmony* (2004) 33 Cal.4th 367, 378 the California Supreme Court recognized that an exercise of discretion is improper where it is based on "impermissible factors"; and *People v. Cluff* (2001) 87 Cal.App.4th 991, 998 found an abuse of discretion where a court's decision was based in significant part on unproven allegations with no meaningful evidentiary support.

Thus, in reviewing dangerousness hearings, keep your appellate eyes and ears open for such findings. For example, in one of my cases which involved a denial on dangerousness grounds, the Santa Clara County trial judge appears pretty clearly to be basing

the denial, in considerable part, on assumptions about one of the inmate's prior convictions which, as it turned out, were materially false, concluding that a Texas prior conviction for "indecencies with a child" was akin to a lewd act under section 288(a), when, in fact, the record from that case indicated that it was no more than an "indecent exposure" act.

(b) **As with Similar "Dangerousness" Findings in Parole Denial Hearings, the Sentencing Court Must Articulate a Rational Nexus Between the Basis for its Decision and the Statutory Standard of Current Dangerousness and must Consider All Factors Bearing on Dangerousness.**

The court in *Kaulick* recognized that the dangerousness finding in parole denial hearings and that required under section 1170.126(f) are "somewhat akin." (*Kaulick*, *supra*, at p. 1306, fn. 29.) Indeed we can borrow considerably – but not entirely – from that body of law, best articulated by the Supreme Court's decision in *In re Lawrence* (2008) 44 Cal.4th 1141, which is premised on the notion that in both situations, "the core determination of public safety' under the statute . . . involves an assessment of an inmate's *current dangerousness*." Thus it is not enough for a decision maker to point to some putative aggravating or "unsuitability" factor pertaining to the inmate's commitment offense or history. Instead, a denial of release in the parole situation, and of resentencing under section 1170.126, requires an "articulation" of "reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision — the determination of current dangerousness." (*Lawrence, supra*, 44 Cal.4th at pp. 1210, 1227.)

Thus, the decision by the trial judge to deny resentencing on dangerousness grounds, whether in writing or orally delivered, must be based on stated reasons which demonstrate a nexus between dangerousness factors from the inmate's past history – i.e., the facts and circumstances of his current offense and prior criminal record – and current dangerousness.

(d) **The Imperative to Consider *Favorable* Factors.**

Parole dangerousness denial case law is also helpful in a related sense, allowing us to raise an argument that a court making a resentencing determination under section 1170.126 is obligated to consider, as part of its calculus of current dangerousness, facts

presented to it which have a tendency to show the absence of current dangerousness. (See, e.g., *In re Young* (2012) 204 Cal.App.4th 288, 304-306 ["the Board ignored numerous suitability factors . . . that were directly relevant to an evaluation of his current dangerousness"]; *In re Stoneroad* (2013) 215 Cal.App.4th 596, 625.)

Such favorable factors might include (1) that an inmate, even one with pretty heinous strike crimes in his past, who has not engaged in violent conduct in the recent past, either in his commitment offense or while in prison; (2) that he is aging and infirm, and thus almost by definition unlikely to commit violent crimes if released; or (3) that he has made substantial gains in dealing with substance abuse problems relating to his criminal history.

ii. **The Standard of Review.**

(a) **Substantial Evidence, Not "Some Evidence," Must Support the Court's Decision.**

*Kaulick* seems to suggest that in dangerousness denials under section 1170.126, like parole denials, a finding of current dangerousness "need only be supported by 'some evidence.'" (*Kaulick*, *supra*, 15 Cal.App.4th at p. 1306, fn. 29.) This is pretty clearly wrong. The "some evidence" standard applicable to parole denials arises based on the underlying procedural premise that a court is deferentially reviewing an administrative decision by the executive branch. (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 654-658.) The standard is "extremely deferential, far more so than the substantial evidence standard applied in appellate review of trial court decisions . . ." and only a "modicum of evidence is required." (*In re Davidson* (2012) 207 Cal.App.4th 1215, 1221.)

The discretionary dangerousness denial under section 1170.126 is made by a court based on a sentence-like evidentiary hearing. It is a trial court decision which is subject to the traditional "substantial evidence" analysis. Thus, the conclusion that the defendant is dangerous must be based on evidence that is "reasonable, credible, and of solid value" from which a reasonable trier of fact could have determined, by a preponderance of evidence, that the defendant was currently dangerous and a risk to public safety if released. (See, e.g., *People v. Turner* (2004) 34 Cal.4th 406, 425 [jury determination of defendant's

"competence" based on preponderance standard subject to substantial evidence review].)

(b) **The "*Williams*-in-Reverse" Standard Applies to Review of the Court's Exercise of Discretion.** (OK, I made this point in my previous article, and will only repeat it here, with slight editorial amendation, since the briefing I have seen on this point doesn't go much beyond what I said last time. Here goes.)

The late great Justice Stanley Mosk was almost always our friend when it came to criminal case law. But in *People v. Williams* (1998) 17 Cal.4th 148, which Justice Mosk authored, he put a real whammy on us. *Williams*, as we all know, delimits the exercise of section 1385 discretion in the context of the Three Strikes law, holding that a trial court's decision whether to exercise its discretion under section 1385 in a Strikes case requires the court to give "preponderant weight . . . to factors intrinsic to the [Three Strikes] scheme, such as the nature and circumstances of the defendant's present felonies and prior serous and/or violent felony convictions, and the particulars of his background, character and prospects . . ." (*Williams*, *supra*, 17 Cal.4th at p. 161), and concluding that an exercise of discretion in this context requires a determination that "the defendant may be deemed outside the [Three Strikes law] scheme's spirit, in whole or in part." (*Ibid*.) Under the rubric of *Williams*, we have on countless occasions seen trial judges conclude that they could not exercise discretion in our client's favor because he was just plain *inside* the spirit of the Three Strikes law.

My thesis is that this case is right on point, with the cart now turned in the other direction, as to the court's exercise of discretion to preclude resentencing under section 1170.126(f). The purpose of the Three Strikes Reform Act of 2012 is to "[r]estore the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime. . . ." (Prop. 36, Section 1, "Findings and Declarations" No. (2).) Since the purpose of the new law is to reduce sentences for such persons, and there is a presumption in favor of resentencing under section 1170.126, a trial court's exercise of discretion to veto resentencing based on the defendant's dangerousness "should give preponderant weight" to the purpose of the Three Strikes Reform

Act, i.e., eliminating the injustice of Third Strike sentences of persons who commit minor, nonviolent, non-serious felony offenses. Thus the exercise of such discretion must be narrowly curtailed, a la *Williams*, only to situations where *the defendant can be deemed outside of the scheme of the Three Strikes Reform Act* because he is currently dangerous.

Thus, we can and should take the statutory presumption against a finding of current dangerousness, and carry it over, as Justice Mosk did in his *Williams* opinion, onto the scope of the exercise of discretion, with the concomitant impact on review of such exercises of discretion. What this will precisely look like in practice, I can only guess. But this does seem like a good opportunity for one of those "if it's good for the goose, it's good for the gander" type of arguments.

(c) **"Threat to Public" Calculus Based on Time of Release**. In most cases, the determination of threat to the public will be based on your client's *current* predicament factors, since in most cases a resentencing will mean he is going to be released now or very soon. But there are exceptions. For example, a person with *multiple* current offenses and enhancements that are non-serious – for example, a former client of mine who had around 14 convictions for second degree burglary and a bunch of prison priors – will still have a lengthy determinate term to replace his 200 to life sentence. Or, if we prevail as to the mixed sentence, one current serious felony and one or more non-serious felonies, your client will still have to complete 25 to life *and* the determinate term.

In those cases, the determination of dangerousness will shift in a favorable manner. Although we borrow from the parole context and use the term "current dangerousness" as a shorthand for what is at issue, the statute actually permits the veto of resentencing by the judge where "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) If your client, who is, say, 50 years old today, still has a minimum of 15 more years to serve before he will be paroled, that is a factor that must be considered. I know from the *Romero* context that courts often make the mistaken assumption that risk to the public means the risk if the defendant got out today, and I have argued in *Romero* cases that this is erroneous when the alternative is a lengthy second strike sentence

or a mixed third strike-determinate sentence. The same type of argument can be made here.

Likewise, when, in the mixed case, the resentencing includes at least one 25 to life term, there is the further point that even if resentenced your client will still not get out unless and until a parole board determines he is suitable. So, if you have one of these rare cases, bear this factor in mind when evaluating the sufficiency, under the reverse-*Williams* standard and the other factors discussed above, of the court's stated reasons for denying resentencing.

2. **Putting the Argument Together**. Once you have set forth the applicable legal standards, the next and critical task will be to construct the best fact-based argument as to why the record failed to meaningfully show present dangerousness, how the court relied on speculation and unreasonable inference, and/or failed to articulate a meaningful nexus between past criminality and current dangerousness, how the court ignored favorable factors, and why, under the reverse-Williams standard, no reasonable sentence court could have found, by a preponderance of evidence, that your client fell outside the spirit of the Reform Act.

Hopefully, these will be the very themes that were developed by trial counsel at the dangerousness hearing, and hopefully, there will be records to support these arguments. (More on this in a moment.) I will sketch out some ideas here, but, bear in mind, in this respect, every case is different and every inmate/recidivist offender looking to get resentenced has a very different story to tell, with different weak and strong points.
And please recall my comments which introduced this section, i.e., that this article is already too cumbersome in length and I have not yet briefed any of these cases.

a. **Massaging the "Dangerousness" Factors.**

In every case, the sentencing judge is going to refer to some particular factors which persuaded him or her that your client is presently dangerous. Typically, these will be the strike priors, the current crime, any other history of violent criminal conduct, including domestic violence, and in-prison violence and disciplinary problems. Courts will also focus

on factors similar to those which lead to parole denials, i.e., lack of realistic release plans to avoid recidivism, absence of remorse and understanding of prior criminal conduct, and so on.

i. **The Strikes.** In every case, there will be two or more strike priors you will have to reckon with. Here, it helps, again, to emphasize the basic point that there is a presumption in favor of resentencing and that in every resentencing case under the Reform Act there will be two or more prior serious and/or violent crimes; and since your client did not fall into any of the stated exclusions, he is presumptively not dangerous because of his strikes.

Of course, don't stop there. Focus on the remoteness of the strikes (see § 1170.126, subd. (g)(1)); that your client was at that criminal, violent, near-adolescent age when he committed them; and the fact that his serious crimes were connected with drugs, alcohol, and/or gangs and he has demonstrated that those matters are now behind him. If the strikes were from a single period of aberrant behavior, focus on that factor. (See, e.g., (*People v. Garcia* (1999) 20 Cal.4th 490, 503.)

ii. **Nature of Current Offense.** There will be many cases where the "current crime," i.e., the one on which the life sentence was imposed, will be relatively minor in nature, e.g., drug possession, stolen property, theft offenses, relatively minor domestic violence felonies, auto burglaries, etc. The nature of the current offense really matters a lot for determining dangerousness, especially because that is so much the focus of the purpose of the Reform Act. Insofar as your client's current offense resembles the ones described in the ballot pamphlet and preamble to the Reform Act, heavy emphasis must be laid on this fact. It also helps to bear in mind the Eighth and Fourteenth Amendment principle that your client was really punished for the current crime, with his violent recidivism only a (very large) sentencing factor. (See, e.g., *Banyard v. Duncan* (C.D. Cal. 2004) 342 F.Supp.2d 865, 874-875.)

iii. **Prison Conduct, Lack of Violence, Reduction of Violence, and/or Reasonable Explanations for Prison Violence; Minimal Relevance of Not-Violent Prison Regulation Violations.**

Hopefully, trial counsel, and prison experts called as witnesses at the resentencing hearings will take the lead on this. If, as with many third strikers locked up for current not-very-serious offenses, your client has little or no violent conduct or rules violation, and a relatively favorable prison classification score, your arguments will emphasize this highly favorable factor. (See § 1170.126, subd. (g)(2); see also, e.g., *In re Nguyen* (2011) 195 Cal.App.4th 1020, 1035-1036 [reversing gubernatorial veto of parole in part because "record clearly demonstrates the changes Nguyen made in the more than 18 years since he was delivered to the state prison system . . . including 18 years without any misstep, the lack of any mental health issue, his sincere remorse and "well developed" insight into the factors [leading to life crime], and his exemplary efforts at self-improvement in all areas, including domestic violence, anger management, and self-awareness . . ." as "render[ing] nugatory the circumstances of the underlying offense for purposes of determining Nguyen's current dangerousness"].) Insofar as your client looks like Mr. Nguyen, considerable emphasis should be laid on these factors.

If your client did commit some in-prison violations, including ones involving violence, you will do the best you can to minimize these factors. If the actions did not involve violence against others, that factor should be emphasized, since the standard is "unreasonable risk of danger to the public," not of your client becoming a nuisance. If prison violence happened, there will hopefully be a record made in the trial court emphasizing that this(a) was early in his long prison stay, (b) involved mutual combat where your client had to stand up for himself to be given respect in the prison setting and/or (c) did not result in criminal or serious disciplinary consequences.

Meanwhile, all the favorable prison information – schooling, work history, self-help, drug and alcohol treatment, etc., needs to be recognized. One problem is that CDCR doesn't always provide a good record of these in resentencing hearings, but hopefully, counsel will

have dealt with that in the trial court.

iii. **Age and Physical Infirmities of Client as Indicator of Lack of Risk.**

This is a rather obvious pair of factors that will come into play in many, if not most, resentencing hearings. If your client is older and has illnesses and/or physical disabilities, emphasize the extent to which this reduces his dangerousness. Aging lifers with minor current crimes are, as it were, the poster boys for the Reform Act, as evidenced by the language employed by the drafters in the "Findings and Declarations" of the Reform Act, which provides that the Act will "(4) Save hundreds of millions of taxpayer dollars every year for at least 10 years [because] [t]he state will no longer pay for housing or long-term health care for elderly, low-risk, non-violent inmates serving life sentences for minor crimes." (Ballot Pamp., Gen. Elec. (Nov. 6, 2012) text of Prop. 36, p. 105.) This factor is also recognized in both *Romero* and lifer parole case law as favorable. (See, e.g., *Garcia, supra*, 20 Cal.4th at p. 500 [lengthy sentence and advanced age of defendant on release "diminishe[s] significantly" his prospects for reoffending]; see (Cal. Code Regs., tit. 15, § 2402(d)(7) [favorable factor where advanced age reduces the likelihood of recidivism].)

b. **Undermining the Factual Bases for the Court's Stated Dangerousness Inferences.**

A big reason why decisions like parole suitability, *Romero*, and dangerousness under the Reform Act resentencing provisions are committed to the discretion of a trial judge is because of the inherently subjective, prognosticating element to any such findings. This is often where we get shot down on abuse of discretion review, which is generally left alone so long as the inference process and conclusions are ones that any reasonable trier of fact could have reached.

Thus, it is all the more imperative to attack any of these types of conclusions when they are based on speculative inferences and/or misstatements of the record. Two examples from my Airy case, which I should be briefing instead of writing this article, will illustrate this point. In one part of the court's dangerousness ruling, the trial judge pointed to the fact

that the inmate, whose criminal history had always been connected to drug abuse, had been given prescription morphine in prison as part of his treatment for cancer and chronic pain. From this fact, and disregarding the fact that in 13 years of incarceration he had no reports of drug or alcohol use, and had attended AA and NA, the court concluded that he would reoffend when released in order to get more drugs. Frankly, I had trouble following the reasoning process of this conclusion. But however you reason it, the conclusion is based on sheer speculation. And it is well settled, for purposes of sufficiency review, that "speculation is not evidence, less still substantial evidence." (*People v. Berryman* (1993) 6 Cal. 4th 1048, 1081.)

In a second example, noted above , the court was very concerned about defendant's non-strike prior offense from 1979 for "indecencies with a child under 17," which the court, having made a cursory review of the statute at issue, Texas Penal Code section 21.11, concluded was the substantial equivalent of a violation of section 288(a), which, the court ad libbed, should have disqualified him from resentencing. As counsel attempted to point out, to no avail, this was flatly wrong. The statute at issue defines two separate crimes, one that is akin to a lewd act under section 288(a), but the other which is pretty much the crime of indecent exposure involving a minor victim. The records of conviction, as it turns out, establish that it was the latter crime that the defendant pled guilty to, and not the 288(a)-like version. Leaving aside for the moment the age of this prior, and the fact that in the ensuing 40 plus years, he had no similar crimes, the court made an inference that was based on a patently false assumption, which undermines this aspect of the court's finding of dangerousness.

### D. **Nuts and Bolts of Prop. 36 Appeals**

Just a few random thoughts here, mainly three things: working with trial counsel, making sure you have the record you need and want, and remembering the possibility of IAC habeas, the latter of which, would appear to run contrary to the first, but such is our lot.

1. **Working with trial counsel**. There's a very dedicated cadre of public defenders handling most of the Prop 36 appeals. Particularly in dangerousness denials, counsel will likely have put forward the best possible legal arguments, records and arguments to support the argument that the client does not fall outside the spirit of the Reform Act, and is entitled to be resentenced. It's not quite the same with eligibility denials, where counsel sometimes is not aware of the some of the trickier arguments described above to get around one of the exclusions from eligibility. (And sometimes, as noted above, counsel will never have been appointed.)

The point here is to work with counsel in developing the best approach to attacking the trial court's ruling. Use what counsel has provided you, but don't stop there, weaving the fact based arguments with the trickier legal ones noted above to best serve the client.

2. **Judicial Notice and Obtaining the Complete Record You Need.**

The typical eligibility appeal will come to you with a record about the width of two silver dollars. You never saw a silver dollar? OK, about an I-Phone's thickness, how's that? Typically, it contains the petition filed by your client pro per or the public defender, any opposition, and the denial order. Sometimes, that's all you need to make the requisite legal arguments.

But I have found it useful in virtually every eligibility appeal to get a copy of the record on appeal from your client's original third strike conviction, review it, and prepare a motion asking the Court of Appeal to take judicial notice of this record. So far, I have done this in all my eligibility cases, and the Court has granted the motions. This permits you to cite the record from a jury trial as to contested factual issues, such as whether your client was really "armed" when he committed this crime. It also makes some of the procedural history much easier to establish, e.g., in my *Tran* case, where one of my arguments is premised on the trial court's action in the original case of striking the gang enhancement. You can also used the unpublished (or published) Court of Appeal opinion, which is part of the record of conviction, to establish matters necessary for arguments presented.

You may be wondering how to get a copy of the record on appeal. The client may have retained it, in which case, you should obtain it from him, promising to copy and/or scan it and return it. If, as is often the case, he has lost the record or had it taken away once his conviction was final, you will have to attempt to obtain a record from another source. There are only two: the AG's office, and the Court of Appeal. So far, I have had good luck getting the folks at the very friendly clerk's office at the Court of Appeal to obtain their copy of the record of the original appeal from storage, scan it, and transmit it to me via e-mail attachments. It is trickier if the record is lengthy, but somehow we have pulled it off. Be courteous and appreciative in these dealings. It makes sense for the Court to do this because (a) you are going to ask for judicial notice of the record so the court will need it anyway, and (b) they are courteous and helpful by nature. If you want help facilitating this process, call me by all means. The other route is to get the record from the AG's office, which keeps records archived as well. I have not had to do this in a Prop 36 case, but in other cases when there has been a need, the AG's office has been accommodating. There may be cases where, for tactical reasons, you *don't* want to take judicial notice of the original appeal or where there simply *was* no original appeal. Thus tactics may alter.

In dangerousness denial cases, your record will be a bit bigger, typically with motions and attachments filed for the hearing by both sides, and reporter's transcripts of the contested hearing or hearings. What I have also found is that there will be materials missing from the record, particularly where counsel presents them to the court at the hearing or after any pleadings are filed. In those cases, you will want to either augment the record to include these materials, which you can obtain from trial counsel, or, as a last resort, do a motion to settle the record. The easiest way goes like this: get a copy of the missing documents from trial counsel, together with a declaration from counsel saying that these are the documents referred to in the record; file a motion to augment with a copy of the documents and trial counsel's declaration attached. This is legally correct because these are documents that were "lodged with the court" under Rule 8.155(a), and thus subject to augmentation. The court will typically grant these where there is no opposition. This saves the time and bother of doing a motion

to settle the record.

#### 4. **IAC and Habeas**

There are two species of IAC which may arise in a Reform Act appeal. The first is the most obvious, IAC by trial counsel in connection with the section 1170.126 petition and proceedings. The second, less obvious, and less likely of success, is a kind of rehash IAC stemming from the original conviction and Third Strike sentence. I will say just a bit about each of these.

##### a. **Attacking IAC by Trial Counsel at the Resentence Hearing.**

Remember about a hundred pages or so back I wrote about whether there was a right to counsel at eligibility and dangerousness hearings? Here's where it matters. One has no right to effective assistance of counsel under the Sixth Amendment unless there is a Sixth Amendment right to counsel, which means that where there is not a federal constitutional right to counsel, there is no IAC argument under *Strickland v. Washington* (1984) 466 U.S. 668. (See *Pennsylvania v. Finley* (1987) 481 U. S. 551, 555.) Thus, the prerequisite to any IAC claim involving Reform Act proceedings is an argument that your client had a federal constitutional right to counsel at the eligibility and/or dangerousness hearings and determinations.

Why and when would you raise IAC? Most of the time, any legal argument about eligibility can be made even if counsel did not advance the argument in the trial court, as this will typically involve a pure question of law. But there are exceptions. For example, the eligibility determination may turn on a mixed fact-law question, e.g., was your client actually "armed" as that term is defined, when he committed his current offense. In those situations, if counsel did not put forth the necessary evidence from the record of conviction, and you cannot bring these facts in by means of judicial notice, you will need to put the evidence before the court by means of an IAC habeas petition for failure to perfect the record.

More commonly, the IAC arguments will arise, if they do at all, in the context of the dangerousness hearing, which is more akin to a typical sentencing hearing, and subject to the

type of error or omission by counsel that occurs at such hearings. The one example I have come across was mentioned earlier, having to do with a Texas prior conviction which the court believed was akin to a section 288(a) violation, when, in fact, the records from Texas, which trial counsel had in her possession, showed it was really no more than the lesser version of the Texas crime, akin to indecent exposure. Counsel made this argument to the court, but failed to present the records to the court. In order to best raise the argument that the court was essentially dead wrong in characterizing the crime as a 288(a) that should have required blanket ineligibility, I have to put these records before the court by means of an IAC habeas petition, alleging that effective counsel would have responded to the court's comments by introducing these records.

Thus, IAC arguments via habeas can be made to fill in the blanks of the record. This might be favorable prison records about drug or alcohol treatment that counsel failed to obtain and/or present, or any other important mitigating facts which could have been, but were not presented.

b. **Going After IAC or Other Challenges re: Original Conviction**

Speaking of hopeless pipe dreams, sometimes you will discover something in the course of your work on the case, particularly in the review of the record on appeal from the original "current" offense, which jumps out at you. For example, you may notice that trial counsel in that case had the client admit a prior strike which may not have been provable as a strike. This has happened in at least two of the cases I have handled so far, one involving a Texas robbery prior, which may or may not have been provable as a strike (see *People v. Avery* (2002) 27 Cal.4th 49), and the other involving that common situation, where the strike was for an undesignated violation of section 245(a)(1), which, depending on what was in the record of conviction, may or may not have been a strike. (See *People v. Delgado* (2008) 43 Cal.4th 1059, 1065.)

There may be other kinds of potential IAC claims that you see, for example, concerning the original sentencing hearing in which *Romero* was denied. I describe some of these in my

prior article, e.g., failure to present available mitigating evidence or object to the court's consideration of improper evidence or factors.

Of course, there are substantial hurdles to bringing any such IAC claim well after the finality of your client's original conviction. First and foremost, there is a problem of timeliness, with a well settled rule that a defendant is supposed to bring any habeas claims in a timely manner, and that unreasonably delayed and/or successive habeas petitions are grounds for summary denial. (See, e.g., *In re Robbins* (1998)18 Cal.4th 779, 780 [unreasonable delay] and *id.*, at p. 781 [successive petitions].)

Can we get around this formidable hurdle? Maybe. If this is an arguably meritorious claim of IAC, and one of which your client was truly unaware, it is worth the effort to raise such a habeas petition. You may have to go after both original trial counsel, to show IAC, and appointed counsel in the appeal of the original conviction, to explain the delay, and the likelihood of success may be small. But bear in mind that this is likely your client's very last shot at attacking his conviction and third strike sentence, and there is no downside to vigorously asserting what appears to be a meritorious argument, even so late in the game.

## CONCLUSION

Having written a much longer article than I intended, there is little to say in conclusion other than to hope that this summary of Reform Act issues will be helpful to those of you who take on these difficult and important cases. I am available to consult with you about any and all of the issues and problems discussed herein, as well as the ones I have not seen or thought about yet.