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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Case no. S223825
	)
Plaintiff and Respondent,	)
	) 5TH DCA
v.	) No. F067946
	)
DAVID J. VALENCIA,	) Tuolumne Co. Superior Court
	) No. CRF307014
Defendant and Appellant.	)
	)

REQUEST FOR JUDICIAL NOTICE

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to rule 8.252 of the California Rules of Court, and to Evidence Code sections 452 and 451, appellant, through his counsel, requests this court to take judicial notice of the following items (attached to this motion):

1. Paul Elias of the Associate Press, AP Exclusive: New '3 Strikes' law varies by county. 5/4/2013. http://www.mercurynews.com/ci_23172736/ap-exclusive-new-3-strikes-law-varies-by

2. "The Passage and Implementation of the Three Strikes Reform Act of 2102 (Proposition 36)" Federal Sentencing Reporter, Vl. 25, No 4, p. 265.

3. Docket of the following cases:
    a. *People v. Guzman* (S226410);
    b. *People v. Davis* (S225603);
    c. *People v. Crockett* (S225198);
    d. *People v. Rodriguez* (S225047);
    e. *People v. Payne* (S223856);
    f. *People v. Chaney* (S223676);
    g. *People v. Aparicio* (S224317);
    h. *People v. Superior Court* (*Williams*) (S223807); and
    i. *People v. Superior Court* (*Burton*) (S223805).

This request for judicial notice is based on the following points and authorities.

Dated: July 15, 2015

Stephanie L. Gunther,
Attorney for appellant

MEMORANDUM OF POINTS & AUTHORITIES

California Rules of Court, rule 8.252 provides the means for judicial notice on appeal. The rule provides in subdivision (a)(2) that the motion must state:

> (A) Why the matter to be noticed is relevant to the appeal; (B) Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court; and (C) Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal.

(Cal. Rules of Court, rule 8.252(a)(2).)

The matters to be judicially noticed are critical and acceptable items to establish whether or not there was an ambiguity in the law which would support and construction other than the plain meaning interpretation, or if the definition provided by Proposition 47 merely clarified the law in Proposition 36, or constitutes a substantive change. These are the only two issues on appeal.

The AP article reviewed how different counties treated the resentencing petitions differently and the law review article explained what two of the drafters of Proposition 36 and 47 envisioned the dangerousness test would be. Accordingly these two items are relevant to the issue of intent and ambiguity.

The docket of the petitions for review granted in the California Supreme court are relevant to show that there has been several petitions for resentencing denied and in none of them did the trial court or court of appeal require a finding of dangerousness as required under the plain meaning of section 1170.18, subdivision (c) that "as used throughout this Code, "unreasonable risk of danger to public safety" means an

unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." (Pen. Code, § 1170.18, subd. (c).)

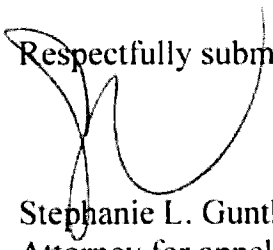
The plain meaning if the statute prevails unless and only unless "the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [citation] We also " 'refer to other indicia of the voters' intent, *particularly* the analyses and arguments contained in the official ballot pamphlet.' [citations.]" (*People v. Osuna* (2014) 225 Cal. App. 4th 1020, 1034, emphasis added.) Although the language is susceptible of only one reasonable interpretation, which is the plain meaning, as will be shown the official ballot material bolsters and supports that plain meaning. " "Extrinsic aids" to statutory construction are sources outside of the statutory text itself. (2A Singer, Statutes and Statutory Construction, (6th ed. 2000) § 48:01, p. 407.)" (*Maclsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal. App. 4th 1076, fn. 5.)

In determing if there in an ambiguity with respect to whether or not an amendment or new law changes or merely clarifies a former law the courts can rely upon extrinsic aids such as newspaper articles or law journals because ambiguity can be identified in an extrinsic source. (See *Coburn v. Sievert* (2005) 133 Cal. App. 4th 1483, 1495.)

These items were not presented in the trial court, but relate to proceedings occurring after the order or judgment that is the subject of the appeal

Dated: July 15, 2015

Respectfully submitted,



Stephanie L. Gunther
Attorney for appellant

ATTACHED IS A COPY OF

Paul Elias of the Associate Press, AP Exclusive: New '3 Strikes' law varies by county. 5/4/2013. http://www.mercurynews.com/ci_23172736/ap-exclusive-new-3-strikes-law-varies-by

AP Exclusive: New '3 Strikes' law varies by county

By PAUL ELIAS Associated Press
Updated: 05/04/2013 10:32:11 AM PDT

MercuryNews.com

AP Exclusive: New '3 Strikes' law varies by county

SAN FRANCISCO—Majorities in every California county voted last fall to scale back the state's Three Strikes law so thousands of inmates serving life sentences for relatively minor third offenses would have the chance to be set free.

Five months later, there is no such unanimity among counties when it comes to carrying out the voters' wishes.

Whether a third-strike felon eventually will gain freedom varies greatly depending on the county that sent him away, according to an Associated Press analysis of California Department of Corrections and Rehabilitation data.

In San Bernardino County, which has the second highest number of eligible inmates, 33 percent of the 291 Three Strikes inmates have been granted release under Proposition 36. But in Los Angeles and San Diego counties, just 6 percent of the nearly 1,300 eligible inmates have had their sentences reduced so far.

Statewide, 16 percent of 2,847 eligible inmates have been resentenced.

Defense attorneys blame prosecutors in some counties for opposing inmate petitions for resentencing even in cases where the prisoner clearly qualifies for early release under the language of Proposition 36. Those oppositions require time-consuming court hearings and written arguments.

"We are frustrated that some DAs are stubbornly refusing to follow the law," said Michael Romano, who authored Proposition 36 and runs the Three Strikes Project at Stanford Law School. The project represents about 20 inmates seeking resentencing.

Prosecutors say a decision to set repeat felons free should not be made in haste.

"These people aren't doing life sentences because they are nice people," said San Diego County Deputy District Attorney Greg Walden, who handles the petitions for his office. "I don't want to make a mistake and then later have to apologize to a family later victimized by one of these people let out."

Proposition 36 was backed by 68 percent of voters. It modified the state's 1996 Three Strikes law that stipulated a life sentence for a third felony conviction even if it was for a low-level offense such as stealing a bicycle.

The percentage of felons sentenced to a third strike has varied by county, in large part because of the different philosophies among local prosecutors. Nevertheless, the Three Strikes law contributed to soaring prison costs and overcrowding that led to federal takeover of the state system.

The nonpartisan Legislative Analyst's Office said Proposition 36 could save the state $70 million to $90 million a year.

Under the new law, inmates file applications for early release in the counties where they committed their last crime. Some are representing themselves, filling out legal forms in pencil, while others are getting help from public defenders, law school students and law firms that have agreed to handle the petitions for free.

Dale Curtis Gaines is an example of those who can benefit from Proposition 36. A two-time convicted burglar, he was destined to spend the rest of his life in prison after he was caught with computer equipment stolen from the American Cancer Society and sentenced in 1998.

His lawyers, who say Gaines is physically and mentally disabled, filed a resentencing application after the initiative passed. He was set free in March from the state's medical prison in Vacaville after the Sonoma County district attorney dropped objections that the 55-year-old remains a threat to society.

Local prosecutors decide how aggressively to oppose the applications for reduced sentences, and judges make their decisions based on a variety of factors, including an inmate's disciplinary record while in prison. Inmates with violent prison records who would otherwise qualify for early release can be kept behind bars if a judge finds they are still a risk to public safety.

The result is an uneven application of the law, as illustrated by two similar counties in the San Joaquin Valley: Stanislaus County has resentenced just two of 50 eligible three-strikers, while Tulare County has resentenced 67 percent of its 42 eligible inmates.

"A lot of these inmates weren't told the whole story," said Los Angeles County Superior Court Judge William Ryan, who is assigned to decide the more than 1,000 petitions filed in that court, where just 62 have been granted resentencing so far. "A lot of inmates thought the prison doors would automatically open. But it's a process, and I want to be very careful."

ATTACHED IS A COPY OF

"The Passage and Implementation of the Three Strikes Reform Act of 2102 (Proposition 36)" Federal Sentencing Reporter, Vl. 25, No 4, p. 265.

The Passage and Implementation of the Three Strikes Reform Act of 2012 (Proposition 36)

DAVID MILLS

Professor of Practice, Stanford Law School*

MICHAEL ROMANO

Director, Stanford Three Strikes Project

I. Introduction

Since 1984, California's Three Strikes sentencing statutes have stood as powerful testament to the political power of measures that eschew individualized assessment of culpability and adopt instead a posture driven by irrational vengeance and abandonment of hope of prisoner rehabilitation. Through the overwhelming passage of Proposition 36, California voters have now enacted some real changes in the Three Strikes law—changes that put some degree of humanity into the recidivist sentencing provision. This advance is of enormous significance to the many thousands of defendants who will be affected. We hope, though, that it is even more significant for what it says about the capacity of reformers across the United States to successfully begin moving back to a rational attitude toward punishment, one that takes the rights of all—including defendants and their families—into account in shaping sentencing policy.

Almost two years ago, we set out to reform and even repeal California's Three Strikes law. We hoped to expose the hidden ugly truth that Three Strikes sentences are disproportionately imposed upon African Americans. Indeed, 45 percent of California's Three Strikes prisoners are African American, whereas 28 percent of the overall prison population is African American, and only 7 percent of California's census population is African American. And, just as disturbingly, 38 percent of Three Strikes inmates are mentally ill or developmentally impaired. We further hoped to point out the irrationality of Three Strikes in an age of overcrowded prisons. Most Three Strikes prisoners in California were well past the age where they would recommit crimes, yet the law required that they remain imprisoned, even at the expense of releasing truly dangerous criminals.

Those were our bold hopes. None of them came true. But we were able to accomplish something. We were able to convince the voters in California that life sentences under the Three Strikes law should only be imposed for serious or violent third strike offenses, or for defendants with extremely violent criminal histories. This is the story of how that happened.

II. Background: 1993–2010

Following the brutal kidnap and murder of Polly Klass in 1993, California became the second state to enact Three Strike sanctions. The idea of a Three Strikes law had been kicking around earlier, motivated by the killing of Kimber Reynolds, whose father, Mike Reynolds, began agitating for the passing of a Three Strikes law in 1992.

When California voters, acting through popular initiative, finally enacted its "Three Strikes And You're Out" statute in 1994, it was the harshest noncapital sentencing law in the county. Not only would someone who committed a third serious or violent offense be sentenced to life in prison (with a minimum of 25 years before parole eligibility and no certainty of parole), but life sentences were also required even when the defendant's third strike was neither serious nor violent. Indeed, because of some quirks in California law, even the simplest misdemeanors—such as drug possession and petty theft—could be charged as third-strike felonies if the defendant had prior strikes. No other state allows minor offenses to result in life in prison.

Following the adoption of the Three Strikes law in 1994, California prosecutors began vigorously charging three strikes in nearly any case where that option was available. Two years later, as result of decisions in *People v. Superior Court (Romero)*[1] and *People v. Williams*,[2] judges were given some limited discretion in connection with sentencing defendants; the judge was allowed to ignore one of the prior strikes (i.e., they were allowed to "strike a strike") if a life sentence in the specific case was "outside the spirit" of the Three Strikes law. But this discretion was very rarely exercised. As a result, of the over 9,000 California prisoners (mostly men) serving life sentences under the Three Strikes law, over 4,000 are serving those sentences based on third strikes that were nonviolent.

Of course, whereas judges had only limited discretion to avoid Three Strikes sentences, prosecutors had absolute power to decide whether to seek a Three Strikes sentence. Over the years, prison overcrowding had the effect of tempering the zealousness of some prosecutors in bringing Three Strikes charges for minor offenses. But many other prosecutors continued to seek life sentences against defendants charged with crimes as petty as shoplifting a pair of work gloves from Home Depot.[3] Thus developed a wild discrepancy among county practices in charging Three Strikes for minor offenses. Some counties, including Kern and Riverside, sought life sentences under Three Strikes in almost every eligible case. Other counties, including Santa Clara, San Francisco, and Los Angeles after Steve Cooley's election as District Attorney in 2000, took

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 DOI: 10.1525/fsr.2013.25.4.265.

a different approach and prosecutors in these counties only sought life sentences when a defendant's third strike was serious or violent.[4]

In 2004, supporters of Three Strikes reform first placed a measure on the ballot providing that a defendant could only be sentenced as a third striker when the third offense constituted a serious or violent felony (as is the case in other states). As Election Day approached, it appeared that this proposition (Prop. 66) was heading to passage. However, a few weeks before the election, supporters of the original, unprecedentedly harsh, Three Strikes law launched a powerful campaign to defeat the proposed changes.

This campaign was funded primarily by billionaire Henry Nicholas, whose sister had been killed by her boyfriend. Nicholas secured the support of then-Governor Schwarzenegger and former Governors Pete Wilson, Gray Davis, and Jerry Brown. Together, they launched an aggressive media campaign, which focused on the prior offenses of few prisoners who would be freed under Prop. 66. Television screens were inundated with frightening images of violent prisoners who, the commercials declared (and not always accurately), would be freed were Prop. 66 enacted.

Meanwhile, just as those supporting the status quo were putting fear in voters' hearts, a separate development was eroding public confidence in the Prop. 66 campaign. The press began reporting that one of prime movers behind Prop. 66 had a son imprisoned under Three Strikes who would benefit from the passage of Three Strikes reform.[5]

On November 4, 2004, Prop. 66 was defeated 53 to 47 percent. Two years later, in 1996, we began what is now known as the Stanford Law School Three Strikes Project. Working with students at Stanford Law School, we represented clients whom we believed were unfairly sentenced under Three Strikes. The claims we pursued for the inmates mostly dealt with issues around their mental incompetence or their inadequate representation by trial counsel in connection with the sentencing process. We received support in many of our claims from the then District Attorney in Los Angeles, Steve Cooley. But it was a slow and ineffective process, with the Project achieving the release of 25 prisoners over five years. It soon became apparent that we needed to revisit the notion of a voter initiative.

In that connection, the NAACP Legal Defense Fund (LDF), under then President/Director-Counsel John Payton, asked if we would consider representing LDF in revisiting Three Strikes reform along the lines of what had been attempted with Prop. 66.

III. Moving Toward Proposition 36

With the lessons of Prop. 66 lurking in the background, we retained a nationally renowned pollster with extensive experience in California politics. We first asked about the feasibility of an effort to repeal the Three Strikes law entirely. He was dubious: "That's the most popular law in the country." And he was right. Our initial polling showed that a large and unshakable majority of California voters strongly supported the Three Strikes law. The Three Strikes brand is as good as Coca-Cola.

We also polled the question of whether voters would be willing to consider amending Three Strikes roughly along the lines suggested previously in Prop. 66. However, with the lessons from the Prop. 66 campaign in mind, we also tested a slightly different reform package. One significant difference in this new proposal was that it excluded certain prisoners from benefiting from the reform, even if their third strike was not serious or violent. Specifically, no person with a *prior* conviction for rape, murder, or child molestation would benefit from the reform, no matter how minor his or her third strike offense. This was intended to preclude the Willie Horton–type ads that had been so effective against Prop. 66. The two of us were by no means happy with this compromise, but we understood that we needed a broad bipartisan coalition of supporters, and that this change might well be vital in securing that support.

We turned to our pollsters to ask whether the differences between Prop. 66 and the new proposal would make a difference, and to our delight, we found that there was quite substantial support for a change in Three Strikes along these lines. We probed further to find out what was behind the support and how deep the support really was for this type of change. To our surprise, the pollsters found that it was not the cost of imprisonment that motivated the support for reform.[6] Rather, fairness seemed to resonate. The polls showed that the voters thought it was simply wrong to impose life sentences when the third strike was not serious. Further, the voters reacted favorably to the notion that the proposed change was in keeping with the original intent of the three strikes law—that is, to keep serious and violent repeat offenders, like murders, rapists, and child molesters, behind bars.

We then set out to draft the language for a new proposition. We worked closely with, and received significant input from, then Los Angeles District Attorney Steven Cooley and his staff. And, of course, we followed the lead of our client, LDF. Our goal was to cut back from the existing Three Strikes law as much as possible, realizing that some significant change was better than none, and that by demanding all we wanted, we risked getting nothing.

The centerpiece of the reform package was to make sure that, under ordinary circumstances, Three Strikes sentences would not be imposed based on nonserious third strikes. But the definition of what would constitute a "nonserious" offense was the subject of heated and difficult discussions, particularly regarding the crime of residential burglary where no one was at home. We had hoped to extend Prop. 36 benefits to defendants convicted of nonviolent, nonconfrontational burglaries, but there was strong contrary feeling, and the polling seemed to support the notion that residential burglary was a serious offense, no matter the circumstances.

Other disagreements arose over exactly which prior crimes would disqualify an inmate from benefiting from the proposed reform. Ultimately, we relied on crime data

provided by the Department of Corrections to isolate truly dangerous offenses, and we agreed on a list of offenses that would ensure that the most dangerous offenders could not benefit from our proposal. Without these compromises, we were quite certain we would lose the support of those in law enforcement who were working with us and, in turn, lose the support of the public. We were able to hold fast, though, on our insistence that the reforms would apply not only to new prosecutions, but also retroactivity to inmates currently serving life sentences for minor crimes (more on this below).

Eventually we were able to agree on language that eliminated the worst parts of the current law: those provisions that called for life sentences when the defendant's commitment offense was classified as not "serious" and not "violent" under California's Penal Code. Any person who had ever committed rape, murder, or child molestation was excluded, no matter how minor his third strike offense.[7] After much back and forth, language was submitted to the Attorney General, and we began the tedious and expensive signature-gathering process (as well as the generally unsuccessful fundraising campaign, which resulted in two funders providing nearly all the funds).

IV. Prop. 36 Campaign

In designing the Prop. 36 campaign, we took as our imperative the need to assure voters that public safety would not be compromised by the proposed changes. We uncovered statewide crime data showing that counties that voluntarily adopted Three Strikes reform prior to Prop. 36—by not pursuing life sentences for nonviolent offenders—actually had lower crime rates than those counties that invoked the Three Strikes law in every eligible case.[8] In addition, data compiled by the Department of Corrections showed that, far from representing some particularly dangerous cadre of criminals, inmates serving sentences under the Three Strikes law were among the least likely to commit new crimes if released, compared to all other inmates in California prisons.[9]

Nonetheless, as two individuals connected to the criminal defense community, we could not be the ones to deliver this message. When it comes to criminal justice policy, voters want to hear from respected law enforcement leaders. So the primary messengers for the campaign were several law enforcement leaders who were willing to help expose the injustices that the Three Strikes law was causing. They included Los Angeles District Attorney Steve Cooley, San Francisco District Attorney and former Police Chief George Gascon, Los Angeles Police Chief Charlie Beck, and his predecessor William Bratton.

Every major newspaper in California eventually endorsed Prop. 36, including those papers that had opposed Prop. 66 eight years earlier. "For too long, California ballot initiatives involving crime and punishment have been driven by scary TV ads and the inaccurate perception that the Golden State is awash in violence," editorialized the famously conservative *San Diego Union-Tribune*. "Now along comes Proposition 36, which would make a smart improvement to 'three strikes.'"[10] We also sought broad bipartisan political support and eventually garnered endorsements from national conservative figures like George Shultz and Grover Norquist, evangelical ministries, and city mayors and council members, in addition to national figures such as Newark (New Jersey) Mayor Cory Booker, Harlem Children Zone founder and President Geoff Canada, Bryan Stevenson of the Equal Justice Initiative, former United States Senator Bill Bradley, among many others. The deans of fourteen of the fifteen law schools throughout the state also endorsed Prop. 36 (and the one abstaining dean decided not to support the campaign based on a broad school policy barring endorsement of any propositions).

The message we fashioned to the voters, based on the polling and our group's collective experience, focused on the twin notions of fairness and returning the Three Strikes law to its original intent without compromising public safety. By the end of Election Day 2012, 69.8 percent of voters approved Prop. 36. A majority of voters in every county in the state supported Prop. 36, even in counties like Modoc, where over 69 percent of the voters cast presidential ballots for Mitt Romney.

We believe that one of the most important lesson of the Prop. 36 campaign is that voters really do want to be fair. Exit polling reported that 72 percent of voters who supported Prop. 36 said they did so because "minor crimes don't deserve life sentences" or "Three Strikes is too harsh." Only 22 percent of voters said they voted for Prop. 36 because it saved money.[11] This is an exciting revelation. It shows that legislators need not be afraid of criminal justice reform that is smart, targeted, and focuses on fundamental fairness. It seems that the times have changed. Criminal justice reform is no longer the third rail of politics.

V. Making History: Retroactive Sentencing Reform

Prop. 36 has been recognized as having rolled back one of the most famous and harshest criminal sentencing laws in the country. Many people, including us, hope the victory will inspire voters and lawmakers elsewhere to support rational reforms of other ineffective criminal laws that unfairly and unnecessarily keep people imprisoned. But the most historic accomplishment of Prop. 36 was that it gives a group of current inmates an opportunity to secure release. Prop. 36 is the first voter initiative since the Civil War, and perhaps the first in U.S. history, that retroactively shortens the sentences of inmates currently in prison.

Part of Prop. 36 is § 1170.126, which provides a new mechanism for inmates who are currently serving life sentences for nonserious, nonviolent crimes to petition for a new shorter sentence. According to the State Department of Corrections, approximately 3,000 inmates are eligible for resentencing under this new provision.

The retroactive application of Prop. 36 is a bit more limited than the prospective effect. In any future case involving the Three Strikes law, Prop. 36 flatly precludes

life terms for most nonserious, nonviolent offenses. For those who have already been sentenced under the Three Strikes law, the entitlement to the benefit of the new law is not automatic. New Penal Code § 1170.126 provides that a court "shall" recall an eligible petitioner's life sentence and impose a new shorter sentence, "unless the court . . . determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety."[12] Although this obviously means that not every inmate will be resentenced, the intent of the Prop. 36 is that inmates will be entitled to new sentences in all but the rarest outlier cases involving true risk to public safety.

California courts have long held that in evaluating risk to public safety, courts must look to "current" risk. For example, in the context of interpreting California's parole regulations, the California Supreme Court has held that a risk analysis cannot rely on the bare fact of the defendant's conviction.[13] By the same token, a court deciding whether an inmate is entitled to resentencing under Prop. 36 may not find that a petitioner is a risk to public safety merely because he was previously sentenced under the Three Strikes law.[14] Prop. 36 specifically instructs courts to make individualized determinations of dangerousness based on the specific facts of the petitioner's case, including his criminal record, record of rehabilitation and discipline in prison, and plans for community reentry if released.[15]

California courts have also interpreted the same language used in the resentencing procedure in the new Penal Code § 1170.126 ("shall . . . unless") to place the burden of proof squarely on the prosecution.[16] When interpreting similar language in other statutes, California courts have held that language that instructs a court that it "shall" act unless certain circumstances exist creates a strong presumption in favor of court action. These courts have held that the presumption is "generally mandatory."[17] Because the language in Prop. 36 is nearly identical to these statutes, courts will generally be required to issue shorter sentences under the resentencing procedure established in Penal Code § 1170.126 unless the prosecution satisfies its burden of proof showing the case presents extraordinary circumstances.

This conclusion is fortified by the white paper that the Judicial Council of California published shortly after the 2012 election. The paper was authored by the Presiding Justice of the Second District Court of Appeal Tricia Bigalow and retired Superior Court Judge Richard Couzens. Judges Bigalow and Couzens explain that Prop. 36 includes "strong" language favoring release and that a court's discretion to deny petitions is "more narrowly proscribed" than other situations.[18]

Despite the clear message of Prop. 36, its implementation in some counties has been slowed by a number of District Attorneys who have declared that any defendant sentenced initially under Three Strikes necessarily represents a current and continuing risk to society and, hence, should not be released.[19] These prosecutors were certainly entitled to oppose Prop. 36 prior to the election. They did—and they lost. They are not entitled at this stage to defy the will of the voters and the language of the law by obstructing timely implementation of Prop. 36.

The dangerousness determination called for under new Penal Code § 1170.126 specifically instructs courts to engage in an individualized assessment of inmates sentenced to life under the Three Strikes law for nonserious, nonviolent crimes. That requires the court to evaluate not only the petitioner's criminal history, but also his or her record of rehabilitation and prison discipline, and any other relevant evidence.[20] Established principles and traditions of prosecutors' legal and ethical responsibilities demand that, before pursuing cases, prosecutors must determine that the positions they are advancing are within the bounds of the law and are just. This, of course, requires that prosecutors themselves engage in individualized review of each case to determine whether to support or oppose new sentencing. No justification exists for reflexively opposing every petition for resentencing; such conduct amounts to nothing more than a refusal to follow the law.

It is clear what the outcome of these required individualized assessments will be. According to data released by the State Department of Corrections, the majority of inmates who qualify for resentencing under Prop. 36 are classified as "low risk" to commit a new crime if released. These classifications are based the California Static Risk Assessment, an evidence-based protocol developed by the Department of Corrections and criminologists at the University of California Irvine. It is the country's most accurate actuarial method of predicting inmate recidivism. These figures show that, on average, Three Strikes inmates who qualify for relief under Prop. 36 are far less likely to commit new crimes than all other categories of inmates scheduled to be released from California prisons this year.[21]

The problem of prosecutorial obstructionism in some counties is not a minor one. Prop. 36 was intended to make it relatively simple for prisoners to petition for resentencing without assistance of counsel. In many counties this has turned out not to be the case, as defiance of the law by some District Attorneys has made the process more contentious and complex than anticipated.

Thankfully, most public defenders throughout the state have been volunteering to represent their former clients and filing Prop. 36 petitions for resentencing on their behalfs. In Los Angeles alone, the offices of the Public Defender and Alternate Public Defender have filed nearly 1,000 petitions for relief in Superior Court. In the counties without public defender offices, the Stanford Three Strikes Project has been working with pro bono counsel and law school students to assure that all Prop. 36–eligible inmates have adequate representation.

The future-dangerousness hearings that have been conducted to date have focused almost exclusively on the petitioner's disciplinary record while incarcerated. This is partially because the language in Prop. 36 provides that prosecutors, defense counsel, and judges should look to a petitioner's record of rehabilitation and prison discipline

in assessing a petitioner's dangerousness.[22] However, the focus on prison discipline problems—which are almost always a consequence of uniquely problematic prison conditions—misconstrues the future dangerousness standard that is at the core of the law.

To be sure, prison records are somewhat probative, but they should very rarely, if ever, be dispositive. Rather, the decision must be based on the individual *today* and whether the person presents a future risk *going forward* if released. This can be a complex determination and requires assessment by the judge (after an initial prosecutorial assessment) with the strong presumption favoring release. It must always be kept in mind that these are all individuals who would not be sentenced today as Three Strikers, given the prospective provisions of Prop. 36. The law does not automatically give prisoners the right to relief, but courts must take into account the anomalous nature of maintaining life sentences because of that historical oddity, and courts must ensure that all but the most extraordinay defendants are afforded the relief that Prop. 36 contemplates.

It is still too early to predict how the new Penal Code sections enacted by Prop. 36 will fair upon appellate scrutiny. So far, only a small handful of Prop. 36 petitions have been adjudicated, and no appeals have yet been heard. As of this writing, according to Department of Corrections records, 241 inmates have been resentenced under new Penal Code § 1170.126. Only two petitions have been denied on findings of continued dangerousness.

VI. Unresolved Questions of Law

A number of legal questions remain unresolved in implementing the initiative. The two most prominent of these issues involve: (1) whether an inmate serving a Three Strikes sentence for being a felon in possession of a firearm is eligible for relief under Prop. 36; and (2) whether Three Strikes defendants whose cases were pending on appeal when the initiative became law must petition for resentencing and go through the dangerousness determination under Penal Code § 1170.126.

The first issue involves new Penal Code § 667(e)(C), which excludes certain inmates from receiving the benefit of Prop. 36 even if their third strike crime is not considered serious or violent. This subsection provides that any defendant who "during the commission of the instant offense used a firearm [or] was armed with a firearm" is excluded from receiving any benefit from Prop. 36. The question is whether this subsection excludes from relief a Three Strikes defendant convicted for being a felon "in possession of a firearm," a violation of Penal Code § 12021(a).

Two Superior Courts have addressed this issue and have come to opposite results. A Superior Court in San Diego County has ruled that a conviction for firearm possession necessarily means that the defendant was "armed" and is therefore excluded from the benefits of Prop. 36. A Superior Court in Kern County came to the opposite conclusion, holding that defendants convicted for possessing a firearm are not excluded and remain eligible for Prop. 36 relief.

This issue is complicated. California courts have long distinguished between "possession" of a firearm and being "armed" with a firearm. These are refined terms of art under California law. "Armed" means possessing a firearm *plus* having it immediately available for offensive or defensive use.[23] Thus a defendant may "possess" a firearm because it is locked in the trunk of his car, or locked in a safe in his basement, but he is not "armed" if the firearm is not immediately available for use. To decide whether someone convicted of firearm possession under Penal Code § 12021 was, in fact, "armed," courts may have to hold evidentiary hearings to decide whether the gun in question was available for use.

The second unresolved legal issue involves defendants who had already been sentenced, but whose cases were pending on appeal as of November 8, 2012 (the date Prop. 36 became law). Criminal defendants are generally entitled to the full benefit of any ameliorative sentencing law passed during pendency of their appeals process.[24] However, the Fourth District Court of Appeal recently ruled that Prop. 36 includes a "saving clause" that overrides this general rule. The court found this saving clause in Prop. 36's language that "[a]ny person serving an indeterminate term of life imprisonment" imposed for a third strike conviction "may file a petition for a recall of sentence." Thus, the court held that inmates who had been sentenced under the old Three Strikes law and whose appeals were pending on the day Prop. 36 was enacted are to be treated as cases governed by Prop. 36's retroactivity provisions, that is, they must petition for discretionary relief under Penal Code § 1170.126.[25]

We believe this decision to be clearly wrong. Prop. 36 contains no "saving clause," and the language to which the court referred says nothing to rebut the general rule that defendants are entitled to the benefit of a new rule if their cases are still on appeal—that is, not yet final. Thus, defendants with appeals pending on the date Prop. 36 was enacted should have their sentences automatically reduced as if they were prosecuted today.[26]

The Fourth District Court's opinion could lead to very problematic results. As discussed above, the discretionary resentencing procedure established by Penal Code § 1170.126 is intended to gauge a petitioner's danger to public safety if released. A defendant whose case is pending on appeal will have many years to serve even if his sentence is reduced under Prop. 36. Yet, by law, petitions for resentencing under Prop. 36 must be filed by November 8, 2014.[27] The Fourth District Court's holding would require defendants with cases pending on appeal to petition immediately for a dangerousness determination, yet the court making that dangerousness determination would be evaluating the petitioner's danger to the community many years before he is released, and well before he can build a record of rehabilitation in prison.[28]

This issue is currently pending before at least one other District Court of Appeal, and may need to be resolved by the California Supreme Court.

VII. Conclusion

Passage of Proposition 36 is proof that the voters of California—and, we believe, elsewhere—are willing to consider rational approaches to criminal justice issues. No longer must legislators be afraid of being called "soft on crime" merely because they call for rational conversation and even embrace rehabilitation as a vital goal of incarceration. It further appears that voters are beginning to recognize that a knee jerk reaction to crime is not the only or even the best reaction.

But what is left unsaid and unaddressed is the failure to recognize the continuing need to address the discriminatory effects of sentencing, and particularly long-term sentencing. There are individuals throughout the country paying some attention to the impact of current sentencing policies on people of color.[29] But there is precious little attention being paid to the impact of our sentencing scheme on people of color who are mentally challenged. We have abandoned much of our traditional support for mental hospitals with the unfortunate consequence that we are now incarcerating, instead of treating, these souls.

Finally, the two of us have come to recognize, through this process, the failure of the State to provide for post-prison help. It is obvious to us how foolish it is to spend so much money on incarceration and then effectively encourage (if not guarantee) significant recidivism by abandoning our responsibility to assist with the reentry of these released prisoners, particularly those who have spent many years in prison. Although some individually funded programs exist, no oversight or standards are imposed on these programs. Many of these organizations are extraordinary, and they have helped thousands (Delancey Street in San Francisco, by way of example). We are in awe of their work and their accomplishments. But the State has the ultimate responsibility here, and we believe that the absence of engaged state involvement in this issue, and the State's failure to provide meaningful public service to these ex-inmates, is both morally wrong and very bad policy. And, yes, costly. As a matter of money and human misery.

Notes

* David Mills was the official Proponent of Prop. 36 and the chairman of the board of "Yes on 36, the Committee for Three Strikes Reform"; he is also Co-Chairman of the NAACP Legal Defense Fund.

1 People v. Superior Court (Romero), 13 Cal. 4th 497 (1996).

2 People v. Williams, 17 Cal. 4th 148 (1998).

3 *See* Jack Leonard, *After 17 years, three-strikes law is still hotly debated*, Los Angeles Times, Sept. 5, 2011.

4 *See, e.g.*, Los Angeles District Attorney Special Directive 00-02, *Three Strikes Policy* (Dec. 19, 2000), *available at* da.co.la.ca.us/3strikes.htm.

5 *See* Megan Garvey, *Big Money Pours in for Three Strikes Ads*, Los Angeles Times, Oct. 28, 2004.

6 This is true, even though the costs resulting from Three Strikes have been significant. *See* California State Auditor Report, *California Department of Corrections and Rehabilitation: Inmates Sentenced Under the Three Strikes Law and a Small Number of Inmates Receiving Specialty Health Care Represent Significant Costs* (May 2010), *available at* http://www.bsa.ca.gov/pdfs/reports/2009-107.2.pdf.

7 *See* Cal. Penal Code § 667(e) and § 1170.12(c) (setting forth exceptions).

8 *Compare* crime rates for Los Angeles and San Francisco counties with crime rates for Riverside and Kern counties *at* Office of the Attorney General of California, Reported Crimes and Crime Rates by County (1999–2009), ag.ca.gov/cjsc/statisticsdatatabs/CrimeCo.php.

9 California Static Risk Assessment data provided to authors by the California Department of Corrections and Rehabilitation.

10 Editorial, *Prop. 36: Yes, Because It Improves "Three Strikes" Law*, San Diego Union-tribune, Oct. 3, 2012.

11 Survey results provided to authors by Californians for Safety and Justice.

12 Cal. Penal Code § 1170.126(f) (providing that the new shorter sentence shall equal double the ordinary punishment for the underlying crime).

13 *See* In re Lawrence, 44 Cal.4th 1181, 1205–1206 (2008) (holding that "the core determination of 'public safety'... involves an assessment of an inmate's *current* dangerousness.... [the standard is] designed to guide an assessment of the inmate's threat to society, *if released*, and hence could not logically relate to anything but the threat *currently* posed by the inmate.")

14 *See* In re Dannenberg, 34 Cal.4th 1061, 1095 n.16 (2005) (In the parole context, assessing an inmate's current dangerousness must include some aggravating facts *"beyond the minimum elements of [the] offense"* for which the prisoner was originally sentenced (emphasis in original).).

15 Cal. Penal Code § 1170.126(g).

16 *See, e.g.*, In re Lawrence, 44 Cal.4th at 1204 (examining the "shall... unless" statutory construction in the context of parole proceedings); People v. Ary, 51 Cal.4th 510, 518 (2011) (examining the "shall... unless" statutory construction in the context of competency hearings).

17 *See* People v. Guinn, 28 Cal. App. 4th 1130, 1141–42 (1994) (holding that "shall... or" statutory construction in the context of imposing life without parole sentences for 16- and 17-year-old offenders creates a "generally mandatory" presumption in favor of the longer prison term).

18 J. Richard Couzens & Tricia A. Bigelow, *The Amendment of the Three Strikes Sentencing Law*, 31–32 (Judicial Council of California, rev. April 2, 2013) *available at* www.courts.ca.gov/20142.htm.

19 Editorial, *One Size Does Not Fit All With Resentencing*, Bakersfield Californian, Nov. 29, 2012 (criticizing the Kern County District Attorney for inadequate individualized review of Prop. 36 petitions).

20 Cal. Penal Code § 1170.126(g).

21 Static Risk Assessment data provided to authors by the California Department of Corrections and Rehabilitation.

22 Cal. Penal Code § 1170.126(g).

23 *See* People v. Bland, 10 Cal.4th 991, 999 (1995) ("A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively."); *see also* California Jury Instructions–Criminal (CALCRIM) 3115, *available at* http://www.courts.ca.gov/966.htm (setting forth the elements of being "armed" with a firearm).

24 *See* In re Estrada, 63 Cal. 2d 740, 744 (1965).

25 People v. Yearwood, __ Cal. App. 4th __ (2013) (2013 WL 323508).

26 *See* Cal. Penal Code § 667(e)(2)(C).

27 Cal. Penal Code § 1170.126(b).

28 *See* Cal. Penal Code § 1170.126(g) (providing that courts should consider, among other things, a petitioner's record of rehabilitation and discipline in prison when evaluating whether the petitioner is a threat to public safety).

29 *See generally*, Michelle Alexander, the New Jim Crow: Mass Incarceration in the Age of Colorblindness, (2010).

Re: *People v. Valencia*
No. S223825
5th DCA No. F067946
Tuolumne County No. CRF30714

ATTORNEY'S CERTIFICATE OF ELECTRONIC & MAIL SERVICE
(Code Civ. Proc., § 1013a (2); Cal. Rules of Court., rules 8.71(f) and 8.77)

I, *STEPHANIE L. GUNTHER*, certify:

I am an active member of the State Bar of California and am not a party to this cause. My electronic service address is *stephanielgunther@gmail.com* and my business address is *841 Mohawk Street, Suite 260, Bakersfield, CA 93309*. On *July 15, 2015*, 11:00 a.m., I transmitted a PDF version of REQUEST FOR JUDICIAL NOTICE by electronic mail to the party(s) identified below using the e-mail service addresses indicated through e-mail:

Attorney General P. O. Box 944255 Sacramento, CA 94244 peter.thompson@doj.ca.gov	

And in a *MAILBOX* regularly maintained by the United States Postal Service at *Bakersfield, CA*, in a sealed envelope with postage fully prepaid, addressed to each the following:

David Valencia, AB9906 Corcoran State Prison P.O. Box 8800 Corcoran, CA 93212	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on *July 15, 2015*, at *Bakersfield*, California.

Stephanie L. Gunther
ATTORNEY DECLARANT,
SBN 233790