

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, _____

LUIS DANIEL BALTAZAR,

Petitioner

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For a Writ of Certiorari to the California Court of
Appeal, Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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Question Presented For Review

Can a prior juvenile adjudication of a criminal offense, in which the juvenile was not afforded the right to a jury trial, constitutionally be used to later enhance the sentence for an adult offense in light of this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d (2004), and *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007)?

Parties to the Proceeding

The parties to the proceedings in the California Court of Appeal and California Supreme Court were the State of California and petitioner Luis Daniel Baltazar. There were no parties to the proceeding other than those named in the caption of the case.

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- B. Order of the California Supreme Court granting review and ordering briefing deferred pending disposition of a related issue in *People v. Nguyen* (S154847).
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- E. Order of the California Supreme Court denying review.
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Rule 131.1 3

No. _____

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LUIS DANIEL BALTAZAR,

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v.

THE STATE OF CALIFORNIA,

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On Petition For a Writ of Certiorari to the California Court of
Appeal, Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

The petitioner, Luis Daniel Baltazar, respectfully petitions this
Court for a Writ of Certiorari to review the judgment and opinion of
the California Court of Appeal filed on October 13, 2009.

Opinions and Orders Below

The original opinion of the California Court of Appeal reversing petitioner's sentence was filed on May 5, 2008 in California Court of Appeal Case No. D050137, and is attached hereto as Appendix A.

The California Supreme Court's one-page order granting review and ordering further action deferred pending consideration and disposition of a related issue in *People v. Nguyen*, S154847, was filed on July 16, 2008 in California Supreme Court Case No. S164248, and is attached hereto as Appendix B.

The California Supreme Court's one-page order transferring the matter to the originating Court of Appeal with directions to vacate its decision and reconsider the cause in light of *People v. Nguyen* (2009) 46 Cal.4th 1007 was filed on September 9, 2009, and is attached hereto as Appendix C.

The subsequent opinion of the California Court of Appeal affirming the sentence after transfer from the California Supreme Court was filed on October 13, 2009, and is attached hereto as Appendix D.

The California Supreme Court's one-page order denying review was filed on December 17, 2009 in California Supreme Court Case No. S177883, and is attached hereto as Appendix E.

Jurisdiction

The decision of the California Court of Appeal sought to be reviewed was filed on October 13, 2009. The California Supreme Court denied discretionary review on December 17, 2009. This petition is filed within 90 days of that date pursuant to the Rules of the United States Supreme Court, Rule 13.1. This Court has jurisdiction to review under 28 U.S.C. section 1257(a).

Constitutional and Statutory Provisions Involved

A. Federal Constitutional Provisions

The Sixth Amendment of the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"

The Fourteenth Amendment provides: “No State shall . . . deprive any person of life, liberty, or property, without due process of law”

B. State Statutory Provisions

California Penal Code sections 667, subdivisions (b)-(i), and 1170.12, subdivisions (a)-(d), which are commonly and collectively referred to herein as California’s “Three Strikes” law. (See Appendix F.)

Statement of the Case

Petitioner was convicted of second-degree murder and his sentence for that offense was doubled under California’s Three Strikes law (Cal. Pen. Code §§ 667, subds. (b)-(i), 1170.12, subds. (b)-(i)) based upon a prior juvenile adjudication. (Appendix A pp. 1-2.)

On direct appeal, petitioner contended that his juvenile adjudication cannot constitutionally enhance his sentence under California’s Three Strikes law in light of *Apprendi* and its progeny because he was not entitled to a jury trial in his juvenile proceeding. Petitioner maintained that as previously held in *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), use of juvenile, non-jury, prior

adjudications as strikes under California's Three Strikes Law violates the federal constitutional right to a jury trial (U.S. Const., Amends. VI, XIV). (Appendix A pp. 2-9.)

Petitioner further maintained that as held in *Tighe*, 266 F.3d, at 1193-1194, the fact of a prior conviction exception to the general rule recognized in *Apprendi*, which was based on this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 239-247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), does not apply to prior convictions which did not themselves afford the constitutional right to a jury trial in the first instance. (Appendix A pp. 4-9.)

Finally, petitioner pointed out that the current validity of the *Almendarez-Torres* rule regarding prior convictions is itself constitutionally suspect because there is reason to believe that it may well be overruled by this Court when a case arises presenting the question of its continuing validity in light of the dissenting opinion of Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg in *Almandarez-Torres*, and the concurring opinion of Justice Thomas in *Apprendi*, in which each of the above five Justices expressed serious doubt regarding the continuing validity of *Almendarez-Torres* (see

Almendarez-Torres, 523 U.S., at 260 (Scalia, J., dissenting; *Apprendi*, 530 U.S., at 520-521, Thomas, J., concurring). (See Appendix A p. 6, fn. 4.)

The California Court of Appeal agreed with petitioner and held that the use of a prior juvenile adjudication conducted without a right to a jury trial violates the Sixth Amendment right to a jury trial under *Apprendi*. (Appendix A pp. 4-9.) Although not a basis for its decision, the California Court of Appeal further noted that there is reason to believe the United States Supreme Court may rescind the *Almendarez-Torres* exception. (Appendix A p. 6, p. 6 fn. 4.)

The State of California sought discretionary review in the California Supreme Court, and the California Supreme Court granted review and ordered briefing deferred pending disposition of a related issue in *People v. Nguyen*, S154847. (Appendix B.)

Following its decision in *People v. Nguyen* (20009) 46 Cal.4th 1007 holding that prior juvenile adjudications may constitutionally be used to enhance a sentence despite the lack of a right to a jury trial in the juvenile proceeding, the California Supreme Court ordered the case transferred to the Court of Appeal with directions

to vacate its prior decision and reconsider in light of *People v. Nguyen* (2009) 46 Cal.4th 1007. (Appendix C.)

The California Court of Appeal thereafter issued a second opinion affirming petitioner's sentence under the compulsion of *People v. Nguyen* (2009) 46 Cal.4th 1007. (Appendix D pp. 2-5.)

The California Supreme Court then denied a petition for review to exhaust state remedies filed by petitioner. (Appendix E.)

Reasons for Granting the Writ

This Court Should Allow The Writ In Order To Decide This Important Question Of Constitutional Law, To Resolve The Conflict In The Federal Circuit Courts of Appeals On This Issue, And To Determine The Continuing Validity Of *Almandarez-Torres*

As noted, in *Tighe*, 266 F.3d, pp. 1191-1195, the Ninth Circuit Court of Appeals determined eight years ago, based on this Court's decision in *Apprendi*, and prior to this Court's decisions in both *Blakely* and *Cunningham* in which this Court reaffirmed the importance of the right to a jury trial for purposes of imposing increased punishment, that the Sixth Amendment right to a jury trial upon facts that increase a sentence for an offense beyond the statutory maximum precludes the use of a prior juvenile

adjudication where there was no right to a jury trial in that juvenile proceeding. The Ninth Circuit held that “*Apprendi*’s narrow ‘prior conviction’ exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt.” (*Id.*, at 1194.)

In reaching this conclusion, the Ninth Circuit noted that in the term following *Almendarez-Torres*, this Court, in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), considered the *Almendarez-Torres*’ holding and explained why the fact of prior convictions was constitutionally distinct from other sentence enhancing facts. (See *Tighe*, at p. 1193.)

In *Jones*, this Court stated: “One basis for that constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . *a prior conviction must itself have been established through procedures satisfying a fair notice, reasonable doubt and jury trial guarantees.*” (*Jones v. United States*, at 249, emphasis added here and in *Tighe*.) As stated in *Tighe*, “Thus, *Jones*’ recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the

concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt and the right to a jury trial." (*Tighe*, at 1193.)

Tighe went on to note that one year after *Jones*, in *Apprendi*, this Court further elaborated on the importance of such procedural protections being inherent in prior convictions used as sentencing factors to increase statutory penalties. (*Tighe*, at p. 1193.) *Tighe* stated: "The Court [in *Apprendi*] explained that 'the certainty that procedural safeguards attached to the "'fact'" of prior convictions was crucial to *Almendarez-Torres*' constitutional holding regarding prior convictions as sentencing factors. The Court [in *Apprendi*] identified the right to a jury trial as one of the requisite procedural safeguards to which it referred: 'There is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove beyond a reasonable doubt, and allowing the judge to find the required fact under a

lesser standard of proof.’ The Court’s continued acceptance of *Almendarez-Torres*’ holding regarding prior convictions, then was premised on sentence-enhancing prior convictions being the product of proceedings that afford crucial procedural protections - - particularly the right to a jury trial and proof beyond a under reasonable doubt.” (*Tighe*, pp. 1193-1194, internal citations to *Apprendi* omitted.)

Petitioner urges that the reasoning of both *Tighe* and the California Court of Appeal’s original opinion was sound. Moreover, the continuing validity of the *Tighe* decision was recently reaffirmed by the Ninth Circuit Court of Appeals in *Butler v. Curry*, 528 F.3d 624, 644-645 (2008).

On the other hand, the California Supreme Court in *Nguyen* held that because there is no federal constitutional right to a jury trial for juvenile offenses, there is no federal constitutional violation to using such prior findings to increase the sentence for an adult offense. (*People v. Nguyen* (2009) 46 Cal.4th 1007 .) The Third, Eighth, and Eleventh Circuit Courts of Appeals have reached similar conclusions and held that such prior juvenile adjudications can

constitutionally be used to increase a sentence, and do qualify within the prior conviction exception, despite the fact that the prior conviction itself was not subject to a jury trial. (*United States v. Burge*, 407 F.3d 1183, 1190 (11th Cir. 2005); *United States v. Jones*, 332 F.3d 688, 696 (3rd Cir. 2003); *United States v. Smalley*, 294 F.3d 1030, 1032 (8th Cir. 2002).)

In light of the above, petitioner urges that this writ should be allowed so that this Court can decide the very important question of law of whether juvenile adjudications in which there is no right to a jury trial fall within *Apprendi's* prior conviction exception to the Sixth Amendment right to a jury trial for sentence enhancements, and so that this Court can resolve the current conflict between the various federal Circuit Courts of Appeals on this issue.

In addition, allowance of the writ appears appropriate so that this Court can determine the current validity of the *Almendarez-Torres* prior conviction exception to the constitutional right to a jury trial in the first instance.

As noted, three of the current five Justices who considered the issue in *Almendarez-Torres* (Justices Scalia, Stevens, and Ginsburg)

endorsed a view that there is “serious doubt” that a defendant’s sentencing exposure may constitutionally be increased on the basis of an allegation of a prior conviction if that allegation is not found true by a jury beyond a reasonable doubt. (*Almendarez-Torres*, 523 U.S., at 260 (Scalia, J., dissenting.)) In *Apprendi*, Justice Thomas revealed that he now believes that the Constitution requires jury determination of prior conviction allegations. (*Apprendi*, 530 U.S., at 520-521, Thomas, J., concurring.)

Thus, four of the six current Supreme Court Justices who have expressed an opinion on the issue and would be called upon to decide the continuing validity of *Almendarez-Torres* now appear to consider it at least doubtful that any prior conviction may constitutionally be excluded from the requirement of jury determination. (See also *Shepard v. United States* (2005) 544 U.S. 13, 27 [*“Almendarez-Torres ... has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided”*] (conc. opn. of Thomas, J.).)

For all of the above reasons, petitioner respectfully requests
the writ be allowed.

Dated: _____

Respectfully submitted,

Eric R. Larson
Attorney for Petitioner

Appendix A

Appendix B

Appendix C

Appendix D

Appendix E

Appendix F

Penal Code §§ 667 and 1170.12

§ 667.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (A) The suspension of imposition of judgment or sentence.
 - (B) The stay of execution of sentence.
 - (C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.
 - (D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.
- (2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.
- (3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:
- (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.
 - (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.
 - (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.
 - (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.
- (e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:
- (1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.
 - (2) (A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

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

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

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

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

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

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

(g) Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (f).

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

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

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

§ 1170.12.

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

- (1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.
- (2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.
- (3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.
- (4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.
- (5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.
- (6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.
- (7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

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

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:

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

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

(B) The stay of execution of sentence.

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

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

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

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

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and (B) The prior offense is (i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or (ii) listed in this subdivision as a felony, and (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

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

(2) (A) If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of (i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or (ii) twenty-five years or (iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d) (1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

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

(e) Prior felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (d).