POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of Criminal Law Approved for Credit Toward California Criminal Law Specialization: C437 -- The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider.

Week Of	Topic	Guest	General
Aug. 21, 2017	**Access to juvenile records sealed under W&I § 786;** **Two CA Supreme Court cases on sentencing under Prop 36 (*Peo. v. Valencia and Peo v. Estrada*)**	**Eddie Vieira-Ducey** **Santa Clara County DDA Jeff Rubin**	30 min

- **The P&A discusses this question: Can prosecutors access juvenile delinquency files, sealed pursuant to the mandatory authority of Welfare and Institutions Code section 786, for use in a criminal trial?**

- **This P&A discusses two recent CA Supreme Court cases on Prop 36**

S.V. v. Superior Court (2017) 13 Cal.App.5th 1174

Are juvenile delinquency case files, sealed pursuant to the mandatory requirements of Welfare and Institutions Code section 786, accessible to the defense and the prosecutor for use in a criminal trial? This appellate court says no.

I. Facts and Procedural Background

1. Police made contact with S.V., a minor, and the defendant during a traffic stop. A statement by the minor during this traffic stop resulted in a records request made by the defendant which is at issue in this appeal. In September 2015, the district attorney filed a felony complaint charging the defendant with the pimping, pandering, and human trafficking of S.V., a minor over 16 years of age.

2. The district attorney also filed a juvenile petition charging S.V. with the misdemeanor offense of making false statements to a police officer. The prosecutor said his purpose in charging S.V. was to bring her back to the county so that she could be protected.

3. The juvenile court placed S.V. on an informal program of supervision and assigned her to a specialized court dealing with child exploitation. Six months later, the court dismissed the petition under Welfare and Institutions Code section 782 and ordered that S.V.'s records be sealed pursuant to section 786...

4. In August 2016, the defendant filed a request for disclosure of information from S.V.'s juvenile delinquency files. He requested information regarding petitions filed against S.V. and their status or disposition. S.V. received notice and filed an objection to the release of information from her juvenile case file. She argued that the records had been ordered sealed and there was no applicable exception allowing for their release.

5. At the hearing conducted by the juvenile court, the defense attorney argued that during the course of the police officer's contact with the minor, she gave the officer a statement that was ultimately determined to be false, and this information was contained in the defendant's police report. The defense attorney argued that he needed to investigate all potential defenses, including the witness credibility. He requested petitions filed against S.V. and any statements contained within the file concerning incidents with the defendant, the procedural history and how the matter was handled.

6. The prosecutor joined the defendant's request and indicated that he intended to call S.V. as a witness at the defendant's upcoming trial.

7. The juvenile court ruled that it was obliged to review the files for exculpatory information bearing on S.V.'s truthfulness. The court ordered disclosure of the delinquency file after "appropriate redaction" and with a protective order. However, the juvenile court applied procedures for release of a minor's confidential file, not a sealed file.

8. S.V. filed a petition for writ of mandate in the court of appeal to stop the release of information from her sealed file. The court of appeal stayed the release of information and ordered the juvenile court to set aside and vacate its order, or alternatively, to show why a peremptory writ of mandate should not issue. The juvenile court did not comply. The defendant filed a response. The district attorney advised the court that "the People take no position on the petition for writ of mandate."

9. The Court of Appeal granted the minors petition and ordered the court not to release any information from the minor's sealed file.

II. Court of Appeal Analysis

As the Court of Appeal described the issue in this case as one of statutory interpretation: "Under what circumstances can a juvenile court release a minor's sealed juvenile delinquency records?"

A. Confidential Records

1. The Court of Appeal started first with confidential delinquency records. The Legislature has provided that "juvenile court records, in general, should be confidential." (§ 827, subd. (b)(1).) While most court records are available and open to the public for inspection, there are strong public policy reasons for keeping the records of juvenile proceedings confidential. A minor's "juvenile case file" generally contains all the various documents that are relevant in a juvenile case, including police and

probation records.

2. By statute, a minor's confidential juvenile case file may routinely be accessed by certain designated parties such as "court personnel," a "district attorney," and a "minor's parent or guardian." (§ 827, subd. (a)(1).)

3. The Legislature has also created a procedure allowing third parties to gain access to a minor's confidential juvenile case file upon the filing of a petition with proper notice. "If petitioner shows good cause, the court may set a hearing." (Cal. Rules of Court, rule 5.552(e)(2).) The California Rules of Court provide that "in determining whether to authorize inspection or release of juvenile case files . . . the court must balance the interests of the child and other parties to the juvenile court proceedings, the interests of the petitioner, and the interests of the public." If a court "determines that all or a portion of the juvenile case file may be disclosed, the court must make appropriate orders . . . "The court may issue protective orders to accompany authorized disclosure, discovery, or access" (Cal. Rules of Court, rule 5.552(e)(8).)

4. Here, the juvenile court erroneously applied the procedures applicable to confidential records to the defendant's request for access to S.V.'s sealed juvenile delinquency file. As the Court of Appeal explains below, the procedures are very different once a minor's confidential file has been *sealed*.

B. Sealed Records

1. The purpose of sealing juvenile records it to protect minors form future prejudice resulting from those records. The juvenile delinquency system is not primarily concerned with punishing juvenile offenders; rather, it is concerned with rehabilitating them.

2. There are two provisions of law allowing for the sealing of a minor's juvenile delinquency file. The first one is long-standing and *discretionary.* When a minor has been declared a ward of the court, five years or more after jurisdiction has terminated, or any time after the minor has reached 18 years of age, the court "may" order the minor's records sealed upon a request by the minor or the probation department under Welfare and Institution Code section 781.

3. <u>However</u>, there is now a more recent provision that applies when a juvenile court dismisses a minor's petition due to the satisfactory completion of an informal program of supervision, informal probation, or "a term of probation for any offense." Since 2015, when a juvenile court dismisses a minor's petition in these circumstances, Welfare and Institutions Code section 786 applies. This statute provides for *mandatory* sealing of the records.

[Note: Here are some additional comments from the P&A author about section 786: On January 1, 2015, section 786 became the new operative statute with respect to sealed juvenile records where the defendant successfully completes probation. Subsequently, the statute was substantially amended. The version of the statutes effective in 2017, states in part: "If a person who has been alleged or found to be a ward of the juvenile court satisfactorily completes (1) an informal program of supervision

pursuant to Section 654.2, (2) probation under section 725 or a term of probation for any offense, the petition shall be dismissed. The court shall order sealed all records pertaining to the *dismissed petition* in the custody of the juvenile court, and in the custody of law enforcement agencies, the probation department, or the Department of Justice." (§ 786(a), emphasis added.)

While the juvenile court must issue an order sealing the records pertaining to the dismissed petition, the sealing is automatic under section 786, so long as the juvenile completed probation for a non-section 707(b) offense.

With regard to section 707(b) offenses, section 786, subdivision (d) states: "A court shall not seal a record or dismiss a petition pursuant to this section if the petition was sustained based on the commission of an offense listed in subdivision (b) of section 707 that was committed when the individual was 14 years of age or older unless the finding on that offense was dismissed or was reduced to a lesser offense that is not listed in subdivision (b) of section 707."

Additionally, section 786 now provides for the sealing of any *prior* petitions that meet the sealing requirement. Section 786, subd. (e)(1) states: "The court may, in making its order to seal the record and dismiss the instant petition pursuant to this section, include an order to seal a record relating to, or to dismiss, any prior petition or petitions that have been filed or sustained against the individual and that appear to the satisfaction of the court to meet the sealing and dismissal criteria otherwise described in this section."]

4. When a juvenile court seals a minor's records under a discretionary order, "the proceedings in the case shall be deemed never to have occurred, and the person may properly reply accordingly to any inquiry about the events, the records of which are ordered sealed." (§ 781, subd. (a)(1)(A).)

5. Similarly, when a court seals a minor's records under a mandatory order, "the arrest and other proceedings in the case shall be deemed not to have occurred and the person who was the subject of the petition may reply accordingly to an inquiry by employers, educational institutions, or other persons or entities regarding the arrest and proceedings in the case." (§ 786, subd. (b), italics added.)

6. Who can access the sealed records? Under a discretionary sealing order, "the records shall not be open to inspection" (§ 781, subd. (a)(1)(A)(4)), subject to two exceptions: 1) when there is a showing of good cause for their admission in a defamation action; and 2) when the information has already been provided to the Department of Motor Vehicles, that agency can disclose information to authorized insurers for limited purposes of determining insurance eligibility and determining insurance rates. (§ 781, subds. (b) & (c

7. Section 786, subdivision (f)(a) provides that, under a mandatory sealing order, there are eight *exceptions* that permit inspection. In relevant part, the statute reads: "A record that has been ordered sealed by the court under this section may be accessed, inspected, or utilized" only under designated circumstances: These are found in section 786, subdivision (f)(1), A through H, summarized as follows:

(A) By the prosecuting attorney, the probation department, or the court for the limited purpose of determining whether the minor is eligible and suitable for deferred entry of judgment . . . or is ineligible for a program of [informal] supervision . . . .

(B) By the court for the limited purpose of verifying the prior jurisdictional status of a ward who is petitioning the court to resume its jurisdiction . . . .

(C) If a new petition has been filed against the minor for a felony offense, by the probation department for the limited purpose of identifying the minor's previous court-ordered programs or placements . . .

(D) Upon a subsequent adjudication of a minor whose record has been sealed under this section and a finding that the minor is a [ward of court] based on the commission of a felony offense . . . .

(E) Upon the prosecuting attorney's motion . . . to initiate court proceedings to determine the minor's fitness to be dealt with under the juvenile court law . . . .

(F) By the person whose record has been sealed . . . to permit inspection of the records.

(G) By the probation department of any county to access the records for the limited purpose of meeting federal [regulatory] compliance.

(H) The child welfare agency of a county responsible for the supervision and placement of a minor or nonminor dependent may access a record that has been ordered sealed by the court under this section for the limited purpose of determining an appropriate placement or service . . . ." (§ 786, subd. (f)(1)(A)-(H).)

8. The juvenile court sealed S.V.'s records as it was required to do following the dismissal of her petition, after her period of informal supervision. Thus Welfare and Institutions Code section 786 was the applicable provision regarding disclosure of her files.

9. The defendant sought to inspect and release portions of S.V.'s sealed court records so he could use those records for purposes of his criminal trial. But, as the Court of Appeal explained, within section 786 there are only eight specific exceptions in which the Legislature has provided that previously sealed juvenile records may be "accessed, inspected, or utilized." The defendant's request did not fall into any one of those exceptions. *Significantly for prosecutors, the Court of Appeal said, "[T]o the extent that the district attorney joined in the request, neither does the district attorney's request" fall into one of the eight exceptions*.

10. The Court of Appeal stated, "The Legislature's exceptions are narrow and unambiguous; nowhere in the statutory scheme can we discern an intent to expand or broaden those limited exceptions for any other purposes." The Court of Appeal reiterated that there is no exception under

Welfare and Institutions Code section 786 that allows the defendant access to S.V.'s sealed delinquency records.

11. The defendant argued that a criminal defendant's constitutional right to confront and cross-examine the witnesses against him outweighs a person's interest in having his or her sealed juvenile court records remain confidential. But the Court of Appeal stated: "It is up to the Legislature to determine if, and under what circumstances, a criminal defendant may have access to the minor's sealed juvenile court records for purposes of a criminal trial. And, it would, of course, be up to the Legislature to adopt or amend whatever statutes it deems necessary to achieve its intended purposes."

C. Effect on a Defendant's Right to a Fair Trial

1. The Court of Appeal further addressed the defendant's concern that inability to access S.V.'s juvenile delinquency case files would deny him a fair trial. The Court of Appeal stated: "We anticipate that the trial court will make whatever rulings may be necessary to ensure [the defendant's] right to a fair trial".

2. The court noted that the prosecutor has discovery obligations under Penal Code section 1054 as well obligations under *Brady*, and a criminal defendant has the constitutional right to confront and cross-examine prosecution witnesses at trial. But the Court of Appeal said it could not "speculate" as to how the defendant's inability to access S.V.'s sealed juvenile delinquency file may affect either his statutory or constitutional discovery rights in his upcoming trial. The court also said that the defendant's right to confront and cross-examine S.V. at trial is also a speculative matter in advance of a trial that has yet to begin.

3. The Court of Appeal stated that the trial court may need to make whatever evidentiary rules are necessary to protect the defendant's constitutional rights. It said: "As a result, the prosecution may face some obstacles in proving its case; but given the nature of the charges, [the defendant] may face some evidentiary challenges as well: 'Evidence of sexual history or history of any commercial sexual act of a victim of human trafficking . . . is inadmissible to attack the credibility or impeach the character of the victim in any civil or criminal proceeding.' (Evid. Code, § 1161, subd. (b).)"

4. The Court concluded by emphasizing that the statutory language of Welfare and Institutions Code section 786 controls: "There is simply no statutory exception that allows a juvenile court to release a minor's delinquency file to a third party criminal defendant after that confidential record has been sealed."

The Implications for Prosecutors Seeking Juvenile Records Sealed Under Section 786

1. As noted in the discussion above *in S.V. v. Superior Court*, the prosecutor joined in the defendant's request of the juvenile court for access to the minor's juvenile delinquency case file. Once the minor filed a petition for writ of mandate in the Court of Appeal to stop the release, the district attorney advised the Court of Appeal that it was not taking a position on the minor's petition. Only the

defendant filed a return to the minor's petition.

2. Nevertheless, the Court of Appeal addressed the prosecution by noting that defendant's request for the sealed juvenile records does not fall into any of the eight exceptions in Welfare and Institutions Code section 786, subd. (f)(1) (A)-(H) for accessing the records, "and to the extent that the district attorney joined in the request, neither does the district attorney's request."

3. In S.V., the prosecutor was joining in the defendant's request for the *victim*'s files. But what about a scenario in which the prosecution seeks the juvenile records of a prosecution or defense witness, for example. If the files were sealed under the authority of section 786, there is no exception allowing the prosecutor access to those records.

4. Section 786 is not retroactive, however. (See *In re Y.A.* (2016) 246 Cal.App.4th 523, 528.) Before January 2015, only the discretionary statute, section 781, was in effect.

People v. Valencia **(2017) 3 Cal.5th 347**

Does the phrase "unreasonable risk of danger to public safety" in Proposition 36 have the same meaning as it does in Proposition 47? In a 4-3 decision, the California Supreme Court majority said no.

1. 2012, California voters enacted Proposition 36, the Three Strikes Reform Act. With some exceptions, Proposition 36 modified California's "Three Strikes" law to reduce the punishment imposed when a defendant's third felony conviction is not serious or violent. (Pen. Code § 667, subd. (e)(2)(C).) (*Id*. at p. 350.)

2. It also enacted a procedure applicable to inmates sentenced under the former Three Strikes law whose third strike was neither serious nor violent, permitting them to petition for resentencing in accordance with Proposition 36's new sentencing provisions. (§ 1170.126, subd. (e).) (*Ibid*.)

3. The resentencing provisions provide, however, that an inmate will be denied resentencing if "the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) Proposition 36 did not define the phrase "unreasonable risk of danger to public safety." (*Ibid*.)

4. Two years later, in November 2014, California voters approved Proposition 47, the Safe Neighborhoods and Schools Act, Proposition 47. Proposition 47 reduced certain drug-related and theft-related offenses that previously were felonies or wobblers to misdemeanors. (§ 1170.18.) (*Id*. at p. 351.)

5. In contrast to Proposition 36, however, Proposition 47 restricted the discretion to make that

sentencing reduction by defining the phrase "unreasonable risk of danger to public safety." (§ 1170.18, subd. (c).) Proposition 47 states: "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" section 667, subdivision (e)(2)(C)(iv). (§ 1170.18, subd. (c).) This cited subdivision of section 667 identifies eight types of particularly serious or violent felonies, referred to as "super strikes." (*Ibid*.)

6. In concluding that Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply to resentencing proceedings under the Three Strikes Reform, the Supreme Court majority relied on the following considerations ,which are stated generally for this P&A summary.

7. Proposition 47 states that its definition of "unreasonable risk of danger to public safety" is effective "as used throughout this Code." Since Proposition 36 also requires the court to assess whether the petitioner's resentencing would pose "an unreasonable risk of danger to public safety," did Proposition 47 *amend* the resentencing criteria for eligible third strike offenders under the previously enacted measure, Proposition 36? The majority noted that such an amendment would be more favorable to three strike inmates and result in the release of more recidivist serious and/or violent offenders than had been originally contemplated under Proposition 36. (*Id*. at pp. 355-356.)

8. The Supreme Court majority undertook an analysis the provision of Proposition 47 as a whole. The court concluded that the phrase "as used throughout this Code" was ambiguous. The court said to construe the phrase "unreasonable risk of danger to public safety" so expansively as to permit the resentencing of three strike offenders "would be inconsistent with Proposition 47's uncodified findings, declarations, purpose and intent." The primary focus of Proposition 47 was reducing the punishment for a specifically designated category of low-level felonies from felony to misdemeanors. Extending Proposition 47's definition of "unreasonable risk of danger to public safety" would conflict with Proposition 47's stated purpose (as contained in the Voter Guide) to "ensure that people convicted of murder, rape, and child molestation will not benefit from this act." Because of the ambiguous statutory language, the Supreme Court majority proceeded with its analysis by examining outside evidence, including voters materials, in order to ascertain voters' intent in approving Proposition 47. (*Id*. at pp. 360-364.)

9. The majority concluded the voter materials accompanying the text of Proposition 47 did not support the conclusion that Proposition 47's definition of dangerousness was intended to amend and narrow the resentencing criteria for third strike offenders under Proposition 36. Nothing in the voter materials suggested that Proposition 47 would alter resentencing criteria under Proposition 36. The voter information material made no reference to three strike inmates. Additionally, the Legislative Analyst made no reference to Proposition 36, and arguments in favor of and opposed to Proposition 47 did not mention Proposition 36. (*Id*. at pp. 365-367.)

10. Proposition 47, despite creating detailed procedures for the resentencing of low-level felons to misdemeanants, provided no similar procedural guidance for the resentencing of three strike inmates under its definition of "unreasonable risk of danger to public safety." If Proposition 47 was viewed as amending Proposition 36, serious procedural questions would arise that Proposition 47 did not address, and without procedures for revised three strikes resentencing, Proposition 47 gave no notice

to voters of a potential change in Proposition 36. (*Id*. at pp. 367-372.) .

11. The majority noted the presumption that voters, in adopting an initiative, do so while being aware of other existing laws at the time the initiative was enacted. But it was not reasonable to apply that presumption here when text of Proposition 47 and its voter materials made no reference whatsoever to any effect on Proposition 36. (*Id*. at p. 372.)

12. The majority concluded its analysis with these comments: "The parties agree that the application of Proposition 47's definition of an 'unreasonable risk of danger to public safety' to the resentencing proceedings of three strike inmates would ease the burden for recidivist serious or violent offenders to have their life sentences vacated, and render them more likely to be released. If Proposition 47 had truly intended to amend the Three Strikes Reform Act in order to allow additional three strike inmates, who by definition, have records for multiple serious or violent felonies to be resentenced, one would expect its drafters to have mentioned or referred to such a purpose and intention in the measure's preamble. They did not."

"Moreover, such an amendment necessarily would suggest disfavor with the broad discretion that Proposition 36, two years earlier, had given resentencing courts to determine which offenders are too dangerous to the public to be eligible for resentencing. If Proposition 47 actually intended to curtail this discretion, just two years after Proposition 36 went into effect, and confine trial courts to consider only whether the resentencing of a recidivist serious or violent offender posed a danger of committing one of eight categories of super strike offenses, one would expect to see some mention of the Three Strikes Law, the Three Strikes Reform Act, three strike inmates, life sentences, or why the resentencing discretion required reform in the text of the initiative. But there is none."

"Instead, Proposition 47 explicitly assured voters that the sentences of persons convicted of dangerous crimes and various sex crimes would not change."

"In describing to voters Proposition 47's title and summary, the Attorney General failed to note or identify any effect the measure might have in facilitating the release of serious or violent recidivist felons. In describing to voters Proposition 47's effect on public safety, the criminal justice system, and fiscal policy, the Legislative Analyst also failed to note or identify any effect the measure might have in facilitating the release of serious or violent recidivist felons. . . . We cannot infer the realization of voter intent where here was nothing to enlighten it in the first instance." (*Id*. at pp. 373-375.)

13. Therefore, the Supreme Court majority concluded that Proposition 47's definition of "unreasonable risk of danger to public safety" is applicable only to resentencing procedures authorized under Proposition 47. (*Id*. at p. 377.)

People v. Estrada (2017) __ Cal.5th __ [2017 WL 3122636]

May a trial court deny resentencing under Proposition 36 (Three Strikes Reform Act) on the basis of facts underlying counts that were previously dismissed? The Supreme Court says yes, but only if those facts *also* underlie a count to which the defendant pled guilty.

A. Background

1. In 1996, Estrada pled guilty to one count of grand theft from a person under Penal Code section 487. Under a plea agreement, the prosecution dismissed a firearm use allegation (former § 12022.5 (a) and a robbery count based on the same incident that led to the conviction. Estrada admitted to two prior strike convictions, and the trial court sentenced him to an indeterminate term of 25 years to life.

2. Sixteen years later, the electorate approved Proposition 36, the Three Strikes Reform Act. The Act amended the Penal Code to permit recall of sentence for some inmates sentenced for third strike offenses that were neither serious nor violent felonies. Estrada petitioned to recall his sentence. The trial court denied the petition on the basis of its factual finding that he was armed with a firearm during the commission of his 1996 theft offense. This finding renders a petitioner ineligible for resentencing under Proposition 36. (See §§ 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).)

3. In making this finding, the trial court reviewed the transcript of the 1996 preliminary hearing held before Estrada pled guilty. During that preliminary hearing, a Radio Shack employee testified Estrada entered the store and pulled out a small handgun. The employee also testified that Estrada demanded the money in the register. Upon receiving the money, Estrada ordered the employee to the store's back room, and then left the store.

4. Based on this testimony, the trial court denied resentencing, concluding that it was "more likely than not" that Estrada was armed during the commission of the offense.

5. Estrada appealed, arguing that the trial court could not rely on the firearm use allegation or robbery count because they were dismissed as part of the plea. The Court of Appeal affirmed the denial of his resentencing petition, and the Supreme Court granted review.

B. Analysis

1. Following the enactment of Proposition 36, defendants are now subject to a lesser sentence when they have two or more prior strikes and are convicted of a felony that is neither serious nor violent, *unless an exception applies*. One such exception is if, "[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, subd. (c)(2)(C)(iii).)

2. In Estrada's case, because he was already sentenced under the pre-reform version of the Three Strikes law, he would be eligible for resentencing if his current sentence was not imposed for a violent or serious felony, and he did not use a firearm or was armed with a firearm during the commission of the offense.

3. Estrada pled guilty to grand theft from the person. By pleading guilty, he admitted to "feloniously stealing the personal property of another, from the person of another." The Supreme Court points out that "whatever else Estrada's admission of guilt established, however, it did not by itself establish that Estrada was 'armed with a firearm or deadly weapon.' " Instead, the trial court made that determination after considering the preliminary hearing transcript, which included testimony connected to the firearm allegation and robbery count that were dismissed as part of the plea.

4. So the Supreme Court said it had to resolve this question: whether a court may rely on facts connected to dismissed counts to find that a defendant was armed with/used a firearm and thus ineligible for recall of his sentence under Proposition 36.

5. Estrada argued that the court may only consider facts encompassed by the guilty plea (or a verdict.) The Attorney General, by contrast, argued that a court may base its finding of ineligibility on *any* facts contained in the record of conviction. The Supreme Court said the factors explained below cut against Estrada's restrictive inquiry.

6. The Supreme Court notes that there are three categories of offenses that make an inmate ineligible for resentencing. Two of the categories reference statutes defining specific criminal offenses or allegations. (§ 1170.12, subd. (c)(2)(C)(i)-(ii).) But the third category – using a firearm or armed with a firearm – is different. (§ 1170.12, subd. (c)(2)(C)(iii).) It references not statutes, but general terms describing *how* a criminal offense may be committed.

7. This subdivision has only one express requirement – that the arming or use must occur *during* the commission of the offense. There must be a temporal connection between the arming or use and the inmate's offense of conviction. The Supreme Court says it follows that a court should be permitted to review relevant portions of the record to determine whether that requirement is satisfied.

8. The Supreme Court here stated: "We see no indication in the Voter Information Guide that the Act was designed to equate the 'violent felons' category solely with those convicted of inherently violent offenses. To the contrary — we think it more faithful to Proposition 36's crucial distinction to interpret its conception of violent offenders as including not only those inmates convicted of inherently violent offenses but also those who committed nonviolent offenses in a violent manner."

9. Having decided that a trial court may consider at least some facts not encompassed by the relevant judgment when determining whether a third strike offender is ineligible for resentencing under section 1170.12, subd. (c)(2)(C)(iii) [arming or use], the Supreme Court said it next had to decide if it could consider facts connected to a *dismissed* count.

10. Estrada argued that basing ineligibility on facts underlying dismissed counts violates due process by denying him the benefit of his plea agreement. The Supreme Court disagreed: "By entering into a plea agreement that resulted in the dismissal of the robbery count and firearm use allegation, Estrada did not bargain for immunity from all consequences associated with the facts underlying those counts. What he bargained for instead was dismissal of the counts themselves. Considering facts connected to a dismissed count therefore does not rewrite the plea agreement, unless the agreement evinces some preclusion of the court's discretion to consider such facts."

11. The Supreme Court reached this conclusion: "Accordingly, a court determining whether a third strike offender is ineligible for resentencing under section 1170.12, subdivision (c)(2)(C)(iii) may consider facts connected to dismissed counts, but only if those facts also underlie a count to which the defendant pleaded guilty. That last qualifier is as crucial as any aspect of the rule: evidence of arming on which a court relies to deny recall of sentence must, of course, demonstrate that the inmate was armed *"[d]uring the commission of the current offense*." (§ 1170.12, subd. (c)(2)(C)(iii), italics added.) By its own terms, this eligibility criterion plainly applies only to the offense or offenses that form the basis of the sentence sought to be recalled. (*Ibid.) . . .* What this necessarily implies is that a finding of ineligibility pursuant to section 1170.12, subdivision (c)(2)(C)(iii) cannot be made on the basis of conduct that occurred other than during the offense of conviction."

12. Applying this analysis to Estrada's facts, the Supreme Court found no error in the trial court's determination that Estrada was armed with a firearm during the commission of his "grand theft from a person" offense.

13. The Supreme Court's conclusory paragraph: "To find that an inmate was armed with a firearm during the commission of the inmate's third strike offense, a court reviewing a Proposition 36 recall petition may rely on facts underlying those counts that were dismissed pursuant to the inmate's plea agreement – so long as those facts establish the defendant was armed during his offense of conviction."

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to P&A author Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

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