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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent. v. **DARREN D. SASSER,** Defendant and Appellant.	No. _____ First District Court of Appeal No. A136655 Alameda County Superior Court No. 156534

PETITION FOR REVIEW

Petition for Review of the Decision of the First District Court of Appeal
Division Five, Affirming Petitioner's Conviction

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By appointment of the Court of Appeal
under the First District Appellate
Project's independent case system

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner, Darren D. Sasser, hereby respectfully requests review pursuant to California Rules of Court, rules 8.500 and 8.516, following the decision of the First District Court of Appeal, Division Five, filed February 11, 2014,[1] affirming his convictions for kidnaping and sexual offenses and sentence to 495 years to life under the Habitual Offender Act, the One-Strike Law, and the Three Strikes law. (§§667(a)(1), 667.6, 667.61, 667.71, 1170.12.).[2]

A petition for rehearing was not filed. The decision was certified for partial publication. (Cal. Rules of Court, rule 8.1105(b) and 8.1110.)

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[1]Decision of the First District Court of Appeal, Division Five, filed February 11, 2014 is attached hereto as Appendix A; said decision referred to as "Slip opn.," herein.

[2]Further statutory references are to the Penal Code unless otherwise stated.

QUESTIONS PRESENTED FOR REVIEW

(1) This court in *People v. Tassel* (1984) 36 Cal.3d 77, 90, overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401, held that prior serious felony conviction was a status-type enhancement and only applied once to an aggregate determinate term. Where a criminal defendant has suffered a prior serious felony conviction (Pen. Code, §667, subd. (a)(1)), does the Three Strike Law (Pen. Code, §§667, subd. (e), 1170.12, subd. (c)(1)) require imposition of the 5-year term for the prior serious felony enhancement on each consecutively imposed determinate term?

(2) May a trial court impose a greater term of imprisonment after appellate remand of an unauthorized sentence where the trial court's original sentence was within the allowable range provided by statutes, but in error because of the method of calculation?

NECESSITY FOR REVIEW

The instant Court of Appeal Opinion presents for this court's review an issue reserved by this court in *People v. Williams* (2004) 34 Cal.4th 397, 402 ("*Williams*"), whether the Three Strikes law requires a 5-year prior serious felony enhancement be imposed on each consecutively imposed determinate term, as opposed to being imposed once per aggregate determinate term. Thirty years ago this court in *People v. Tassel* (1984) 36 Cal.3d 77, 90 ("*Tassel*"), overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401, held that prior serious felony conviction was a status-type enhancement and only applied once to a determinate term imposed pursuant to Section 1170.1. Construing the Determinate Sentencing Law, *Tassel* observed that there were two kinds of enhancements: those that related to personal history of the defendant and those that related to the acts constituting the offense, "(1) those which go to the nature of the offender; and (2) those which go to the nature of the offense." (*Tassel*, at p. 90.)

More recently *Williams, supra*, distinguished *Tassel's* general rule that status-type enhancements are added only once to defendant's aggregate determinate sentence, noting that in Three-Strikes cases the statute mandates full and consecutive application of the 5-year enhancement to life terms. *Williams* limited *Tassel* to determinate sentences: "Section 1170.1, however, applies only to *determinate* sentences. It does not apply to multiple indeterminate sentences imposed under the Three Strikes law." (*Williams, supra,* 34 Cal.4th at p. 402 (italics in original).) Even still, this court in *Williams* chose not to extend its ruling to the determinate terms of second strike cases sentenced under the Three Strikes law because that issue was not before it. *Williams* phrased its rule as applicable to third-strike

sentences: "Accordingly, we conclude that, under the Three Strikes law, section 667(a) enhancements are to be applied individually to each count of a third strike sentence." (*Id.*, at p. .) *Williams* did not overrule *Tassel.* Rather *Williams* limited *Tassel* to determinate sentences.

After the decision in *Williams,* the Fourth District Court of Appeal, Division One, ruled that a second-strike sentence under the Three Strikes law required a 5-year term for a prior serious felony conviction be imposed on both an indeterminate life term imposed for torture and an accompanying determinate term imposed for an assault. (*People v. Misa* (2006) 140 Cal.App.4th 805.) The Fourth District acknowledged that its analysis was not compelled by the ruling in *Williams,* but stated that *Williams'* reasoning allowed for such a result, "Because he was not subjected to multiple indeterminate sentences pursuant to the Three Strikes law as was the defendant in *Williams,* the California Supreme Court's analysis in that case is not directly dispositive of the issue before us. However, we conclude that a similar analysis is applicable here." (*Id.*, at pp. 811-812.) Thus, *Misa* further limited *Tassel,* a step that this court in *Williams* was not yet willing to do.

The instant decision of the First District Court of Appeal takes the next step, imposing a 5-year prior serious felony enhancement on multiple consecutively imposed determinate terms, "we hold that a prior serious felony enhancement must be applied to each term imposed under the Three Strikes law, whether for a second strike offense or a third strike offense." (Slip opn., p. 1.) In so doing the Court of Appeal appears to have interpreted the Three Strikes Law to *mandate* imposition of 5-year serious felony conviction enhancements on each consecutively imposed determinate term. The decision of the Court of Appeal thus eliminates the

distinction between the crime-related and defendant-related types of enhancements (see *Tassel, supra*), a distinction which pre-dated the Three Strikes Law, and reinterprets the Determinate Sentencing Law in a manner not intended by either legislative or initiative process. Review is necessary to settle important questions of law and secure uniformity of opinion. (Cal. Rules of Court, rule 8.516; and further discussed in the accompanying Memorandum in Support of Review, Section I, *infra.*)

Also presented for this court's review is whether a sentencing court upon remand for imposing a sentence that was within the range of punishments provided by statute but was calculated in a manner not authorized by statute, such as imposing one-third terms on consecutive life sentences, may impose a greater term after appeal. A punishment imposing a greater sentence upon remand implicates double jeopardy, due process, and has a chilling effect on a criminal defendant's right to appeal. (Cal. Const., art. I, §15, United States Const., 5th Amendment [due process]; *People v. Hanson* (2000) 23 Cal.4th 355; *People v. Collins* (1978) 21 Cal.3d 208.) The 495-year to life term imposed after remand was the maximum authorized by the Habitual Offender Act (§667.71), but was not the minimum authorized sentence.[3] Under the Habitual Offender Act the court has discretion to impose concurrent or consecutive sentences, but imposition of such terms is not mandatory. (§667.71(b), §669; *People v. Murphy* (2001) 25 Cal.4th 136, 151.) The increase in the minimum term prior to parole eligibility from 458 to 495 years was not required in order to

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[3]Contrast the alternative sentencing scheme provided by the One-Strike Law, which as of 2006 requires mandatory consecutive sentencing, former subdivision (g) of §667.61, now subdivision (h). The 229-year to life sentence under the One-Strike was stayed in the instant case because it provided for a lesser term of imprisonment.

conform the sentence to the minimum required by the statutory sentencing schemes. This issue is available for this court's review and, though not included in the published portion of the court of appeal opinion, must in any event be preserved for further federal review. (28 U.S.C. §2254(b); *Rose v. Lundy* (1982) 455 U.S. 504, further discussed in Section II, *infra.*)

STATEMENT OF THE CASE

Petitioner was convicted by jury of a series of forcible sexual offenses against Jane Doe 1 on November 9, 2005 and a series of offenses against Jane Doe 2 on November 17, 2005 (§§261(a)(2), 286(c)(2), 288a(c)(2)), along with a prior conviction that qualified as a serious felony (§667(a)(1)), a "strike" under this state's Three Strikes law (§1170.12(c)(1), §667(e)(1)), and qualified the forcible sexual offenses for life terms under the Habitual Offender Act. (§667.71) (CT 2-3.) Petitioner was originally sentenced on January 15, 2010 to eleven consecutive life terms under the Habitual Offender Act (§667.71) with a minimum of 458 years, with an identical term stayed under the One-Strike Law (§667.61).[4] (CT 15-16.)

Appeal from these proceedings resulted in an unpublished decision by the First District Court of Appeal, Division 5, No. A127431 reversing

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[4]Consecutive twenty-five to life terms on Counts 2, 5, 7, 8, 10, 11, and 15 (§667.61, §667.71, §667.6(d)) were doubled to terms of fifty to life as a second strike under the Three Strikes Law (§667(e)), and to each was added a 5-year enhancement for the serious felony prior (§667(a)(1)). Consecutive eight year, four month to life terms on Counts 6, 13, 16, and 17 (§667.6(c)) were doubled to sixteen years, eight months to life (§667(e)), and to each was added a one year, eight month enhancement for the same serious felony prior (§667(a)(1)). (CT14-16.)

two counts (Counts 11 and 17) for instructional error,[5] reversing the sentence for failure to apply the then-applicable "spatial proximity" test for consecutive sentencing under the One-Strike Law (*Jones*-type[6] error) and for imposition of an unauthorized sentence in the form of minimum-parole-eligibility terms reduced to one-third of mandatory period on several, but not all, of the consecutively imposed counts.

On remittitur in superior court the two counts reversed for instructional error (Counts 11 and 17) were dismissed and petitioner was resentenced to 495 years to life under the Habitual Offender Act; a 229-year-to-life sentence under the One-Strike Law was stayed. (CT 28-31.) As to the Habitual Offender Act, for each of the sexual offenses the court imposed identical consecutive life terms calculated as follows: a 25-to-life term under the Habitual Offender Act (§667.71) doubled to 50 to life under the Three Strikes Law (§667(e)(1)) plus five years for the serious-felony prior (§667(a)(1)) for a total of 55 years to life for each sexual offense. The court imposed this term on Counts 2, 5, 6, 7, 8, 10, 13, 15, and 16, for a total of 495 to life. (CT 28-29, 32-33 [Abstract].) As to the One-Strike Law, the court imposed 55 years to life on both Counts 2 and 10, then added

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[5]Reversal of convictions on these counts was required due to the failure to instruct *sua sponte* on lesser included offenses. Lesser included instruction was required on attempted sodomy because there was "substantial evidence that the offenses ... were attempted, not completed sodomies." (Slip opn., p. 25.)

[6]Subdivision (g) of section 667.61 was revised effective September 20, 2006 and replaced with subdivision (i), which mandated consecutive sentencing in crimes involving separate victims, or the same victim on separate occasions as determined by Section 667.6(d), superseding this court's decision in *People v. Jones* (2001) 25 Cal.4th 98, 107. The amendment occurred after the offenses were committed but before the trial and sentencing in the instant case. The trial court applied the newer subdivision and thus failed to incorporate the *Jones* "spatial proximity" test at the initial sentencing, leading to error calculating mandatory consecutive life sentences under the One-Strike Law.

identical consecutive 17-year terms[7] for each of the seven remaining sexual offenses, for a total of 229 years to life. (CT 30-31.) The seventeen year term was calculated as the midterm of six years for each of the forcible sexual offenses (§§288a(c)(2), 286(c)(2), 261(a)(2)) doubled pursuant to Three Strikes plus five years for the serious felony prior (§667(a)). The 229 year to life term was stayed. (CT 31; see Section 667.61(g).)

Petitioner timely filed notice of appeal from the resentencing (CT 37-38), resulting in the opinion subject of the instant petition for review.

STATEMENT OF FACTS

This statement of facts is abbreviated because the instant petition presents questions concerning sentence and resentencing.

On the morning of November 9, 2005, a man that Jane Doe 1 later identified as petitioner posed as a Comcast repairman and forced his way into her apartment. (CT 2-3.) He took her to the bedroom at knife-point. (CT 3.) Once in the bedroom an act of forced oral copulation ensued. (CT 3.) After the oral copulation, Doe 1 was moved to the living room where another series of forcible rapes and one sodomy occurred. (CT 3.) DNA evidence recovered from Doe 1 produced the same profile as petitioner's, which an expert opined occurred in one in 113 billion profiles. (CT 3-4.)

During the evening of November 17, 2005 Jane Doe 2 went to the area of 20th Avenue and East 23rd Street to buy rock cocaine, "To purchase

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[7]The trial court in passing sentence occasionally called the 17-year term both "an aggregate term of 17 years to life" (RT 12:5, 12:9 [Count 6 & 7] and a determinate-type sentence, an "aggregate term of Count 5 of 17 years." (RT 11:25-28 [Count 5]; see also RT 12:13 [Count 8], RT 13:7-20 [Counts 13 & 15].) Yet, it does not appear that the sentencing court was attempting on remand to impose 17-year to life terms. (CT 28-31; and see Slip Opn., p. 6 [treating the 17-year terms as determinate].)

crack." (CT 3-4.) Petitioner approached, got in the van and supplied crack cocaine in exchange for money. (CT 3-4.) After the exchange petitioner asked Doe 2 for a ride to 2600 Wallace Street. (CT 4.) Upon arrival at Wallace Street, things changed. Petitioner locked the doors and demanded oral copulation. (CT 4.) While petitioner was preparing for these sexual acts Doe 2 testified that she saw a gun hit the floor, from "out his back." (CT 4.) Fearing for her safety, Doe 2 performed oral copulation on petitioner as he sat in the front passenger seat. (CT 4.) Doe 2 was pushed into the back row of seats and petitioner forced Doe 2 into acts of rape, attempted rape, and oral copulation. (CT 4.) Petitioner took Doe's van and drove to a second location with Doe 2 still in the back seat. (CT 4.) While at the second location, "a secluded construction area," forced acts of oral copulation, rape, and attempted sodomy recurred. (CT 4.) DNA recovered from Doe 2 produced the same profile as petitioner's, which occurred one in 113 billion profiles. (CT 4-5.)

Petitioner's First Appeal - No. A127431

Petitioner's first appeal resulted in remand. Two of the sodomy convictions were reversed due to instructional error and resentencing was required due the imposition of life terms with minimum-mandatory-parole-eligibility-terms reduced to one-third the statutory term for consecutive life terms on Counts 6, 13, 16 and 17 and error in imposing a sentencing law enacted after the date of the offense. (Cf. subdivision (i), section §667.61, discussed fn. 6, *supra.*) As to the "*Jones*" error the Court of Appeal stated:

> We agree with the parties that the case must be remanded so that the court can make a determination under *Jones*[] whether any of the offenses were committed against the same victim on a single occasion.

(Opinion, pp. 29-30, citing *People v. Jones* (2001) 25 Cal.4th 98, 107 (*Jones*).) The unpublished opinion also noted that the reduction to one-third the minimum mandatory parole-eligibility terms on the life sentences and the commensurate one-third reductions of the five-year serious felony enhancements attached to those reduced counts produced unauthorized terms. The trial court had imposed life sentences of 18 years, 4 months to life on 6, 13, 16 and 17. (CT 15.) The trial court had calculated same-occasion terms as 8 years, 4 months to life (one-third the term of 25 years to life), doubled to 16 years, 8 months by the Three Strikes law, plus one year eight months (one-third the term of 5-years) for the serious felony prior. (CT 15.) The Court of Appeal agreed with the Attorney General that "the matter must be remanded to correct the unauthorized sentence terms imposed on counts 6, 13, 16 and 17." (CT 17-18.)

Further, and of particular relevance to the instant petition for review, when the trial court reduced the minimum mandatory parole eligibility term for the same-occasion offenses to one-third it also reduced the attendant 5-year recidivist clauses to one-third. The Court of Appeal's first Opinion noted that the imposition of one-third terms for prior serious felony offenses was unauthorized by statute and noted this court's decision in *People v. Williams* (2004) 34 Cal.4th 397 which ruled that the 5-year serious felony priors must be imposed on each consecutive intedeterminate sentence imposed under the Three Strikes law. (*Ibid.*) As to the 5-year priors, "the court lacked discretion to impose less than the full five-year enhancement." (Slip opn., p. 33.) The matter was remanded for resentencing. (*Ibid.*)

Proceedings on Remand

Remittitur issued December 7, 2011. On July 27, 2012 the matter came on for resentencing. (CT 27-31, 35.) On motion of the District Attorney, Counts 11 and 17 were dismissed.[8] (CT 28-31.) The court then proceeded to sentencing under both the Habitual Offender Act (§667.71) and the One-Strike law (§667.61) as of 2005 (*People v. Jones, supra*, 25 Cal.4th 98). (RT 6-14.) As to the Habitual Offender Act the court imposed identical consecutive life terms for each of the sexual offenses calculated as a 25-to-life term under the Habitual Offender Act (§667.71) doubled to 50 to life under the Three Strikes Law (§667(e)(1)) plus five years for the serious-felony prior (§667(a)(1)) for a total of 55 years to life for each sexual offense. The court imposed this term on Counts 2, 5, 6, 7, 8, 10, 13, 15, and 16, for a total of 495 to life. (CT 28-29, 32-33 [Abstract].) As to the One-Strike Law, the court imposed 55 years to life on both Counts 2 and 10, then added identical consecutive 17-year terms for each of the seven remaining sexual offenses, for a total of 229 years to life. (CT 30-31.) The seventeen year term was calculated as the midterm of six years for each of the forcible sexual offenses (§§288a(c)(2), 286(c)(2), 261(a)(2)) doubled pursuant to Three Strikes plus five years for the serious felony prior (§667(a)). The 229 year to life term was stayed. (CT 31; see Section 667.61(g).)

Thus, after remand the abstract of judgment recorded a 495 year to life sentence. (CT 32-34.)

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[8]The dismissal of one of the unauthorized terms, Count 17, left three unauthorized terms, Counts 6, 13, and 16, to be corrected on remand.

MEMORANDUM IN SUPPORT OF REVIEW

I. THIS COURT SHOULD NOT ABANDON THE DISTINCTION BETWEEN OFFENSE-RELATED AND OFFENDER-RELATED ENHANCEMENTS IN CALCULATING DETERMINATE TERMS

Several of the determinate terms in the instant case are enhanced by five years for the same prior conviction. (§667(a).) Although this issue only applies to the stayed portion of petitioner's sentence, the 25-to-life One-Strike term, it presents an issue reserved by this court in *People v. Williams* (2004) 34 Cal.4th 397, 402 ("*Williams*"). *People v. Tassel* (1984) 36 Cal.3d 77, 90 ("*Tassel*"), overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401, held that prior serious felony conviction was a status-type enhancement and only applied once to a determinate term imposed pursuant to Section 1170.1. Construing the Determinate Sentencing Law, *Tassel* observed that there were two kinds of enhancements: those that related to personal history of the defendant and those that related to the acts constituting the offense. The court described the "two kinds of enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense. Enhancements for prior convictions – authorized by sections 667.5, 667.6 and 12022.1 – are of the first sort. The second kind of enhancements – those which arise from the circumstances of the crime – are typified by sections 12022.5 and 12022 was a firearm used or was great bodily injury inflicted? Enhancements of the second kind enhance the several counts; those of the first kind, by contrast, have nothing to do with particular counts but, since

they are related to the offender, are added only once as a step in arriving at the aggregate sentence." (*Tassel, supra*, at p. 90.)

Proceedings in the Instant Case

After remand, addressing the One-Strike alternative sentencing scheme, the trial court converted several indeterminate terms to determinate terms. The trial court added 5-year recidivist enhancements to each of the determinate terms in addition to the 5-year determinate term imposed on the indeterminate term. On appeal of the resentencing petitioner noted that the imposition of the 5-year recidivist enhancements on the stayed portion of petitioner's sentence raised an issue reserved by this court in *People v. Williams* (2004) 34 Cal.4th 397, 402 ("*Williams*"). (See *People v. Tassel* (1984) 36 Cal.3d 77 [distinguishing status- and offense-related enhancements]; *People v. Misa* (2006) 140 Cal.App.4th 805 [extending reasoning of *Williams* to impose 5-year enhancements to second strike sentence].)

At issue in the instant case are 5-year serious felony prior conviction enhancements appended to same-victim-same-occasion forcible sexual offenses qualifying for punishment under subdivision (c) of section 667.6. Subdivision (c) of section 667.6 authorizes a court to impose full and consecutive terms for qualifying sexual offenses:

> (c) In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e). If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any

> other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.
>
> (§667.6(c).)

The issue arises whether determinate terms are transformed into an alternative sentencing scheme that allows, or requires, imposition of 5-year enhancements on each term imposed.

Some vagueness may ensue due to reference to sentencing under Section 1170.1. Determinate terms imposed under both Section 1170 and 667.6 are discussed by subdivision (h) of section1170.1. Subdivision (h) is meant to ensure that section 1170.1 is not mistaken as a limit on the number of enhancements otherwise lawfully imposed. Subdivision (h) discusses imposition of enhancements on terms imposed under 667.6:

> (h) For any violation of an offense specified in Section 667.6, the number of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are pursuant to this section, Section 667.6, or some other provision of law. Each of the enhancements shall be a full and separately served term.
>
> (§1170.1(h).)

Subdivision (h) clarifies that Section 1170.1 does not limit the number of enhancements that may otherwise be lawfully imposed. On the other hand, subdivision (h) does not require that same-victim-different-occasion sexual offenses (§667.6(c)) be consecutively imposed. This court faced the same issue in *Tassel*, construing then subdivision (I) of section 667.6, and ruled that subdivision was not intended to direct imposition of recidivist

enhancements:

> The obvious purpose of subdivision (i) is to nullify certain limitations set forth in other parts of section 1170.1 regarding the number and length of enhancements that may be added to particular counts. It is not intended to affect the method by which enhancements for prior convictions are imposed.
>
> (*Tassel, supra*, at p. 90.)

Subdivision (h) of Section 1170.1 does not settle the recidivist enhancement issue.[9]

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[9]The Court of Appeal Opinion's concluding footnote referencing subdivision (h) of Section 1170.1 as a potential additional grounds for imposing multiple recidivist enhancements (slip opn., p. 12, fn. 5) also conflicts with *Tassel*. The §1170(h) argument (formerly subdivision (i), which has again been changed back to subdivision (h)) was presented and squarely rejected by *Tassel*:

> The trial court justified its double use of the same prior convictions for enhancement by relying on section 1170.1, subdivision (i) (formerly subd. (h)).[] Subdivision (i), which applies only to forcible sex offenses, provides: "For any violation of subdivision (2) or (3) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, or sodomy or oral copulation by force, violence, duress, menace or threat of great bodily harm as provided in Section 286 or 288a, the number of enhancements which may be imposed shall not be limited, regardless of whether such enhancements are pursuant to this or some other section of law. Each of such enhancements shall be a full and separately served enhancement and shall not be merged with any term or with any other enhancement." (Italics added.)
>
> Petitioner contends the trial court read subdivision (i) of section 1170.1 too broadly in finding that it ordained using the same prior convictions twice to enhance one aggregate sentence. We agree. The obvious purpose of subdivision (i) is to nullify certain limitations set forth in other parts of section 1170.1 regarding the number and length of enhancements that may be added to particular counts. It is not intended to affect the method by which enhancements for prior convictions are imposed.
>
> (*Tassel, supra*, p. 90 [footnote omitted].)

There was good reason this court's opinion in *Williams* did not extend its ruling to second-strike sentencings. Determinate terms have historically been calculated under the guidelines endorsed by *Tassel*: recidivist enhancements are imposed once per a defendant's status at a sentencing. Offense-related enhancements are imposed once per each of a defendant's criminal offenses. The Three-Strikes Law describes the punishments to be imposed for so-called second- and third-strike convictions. Notably, persons convicted of second- and third- strikes are subjected to distinct, and different, sentencing schemes. A person suffering a conviction with a single, qualifying serious or violent felony offense has the term lawfully imposed by other sentencing provisions doubled. A person suffering a conviction with two qualifying serious or violent felony offenses is subjected to an alternative sentencing scheme: life with a minimum mandatory term otherwise calculated under the Three-Strikes law itself. Subdivision (c) of Section 1170.12 describes the punishment to be imposed where one strike has been pleaded and proved:

> (1) If a defendant has one prior serious and/or violent felony conviction as defined in subdivision (b) 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.
>
> (§1170.12(c)(1).)

Subdivision (c)(1) doubles a term ***imposed by another statute***. It doubles a determinate term imposed by another sentencing scheme, "the determinate term ... shall be twice the term otherwise provided ... ." (§1170.12(c)(1).) In contrast, subdivision (c)(2) provides an alternative sentencing scheme where a defendant has suffered at least two prior strikes:

> (2) (A) Except as provided in subparagraph (C), if a

> defendant has two or more prior serious and/or violent felony convictions, as defined in 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 greatest of ... .
>
> (§1170.12(c)(2).)

Under subdivision (c)(2), a life term is imposed ***instead*** of a determinate term. A third strike does not include the calculation of a determinate term and thus does not unsettle precedent regarding attachment of recidivist enhancements to an aggregate term.

Opinion of the Court of Appeal

The opinion of the Court of Appeal holds that 5-year prior serious felony enhancements must be imposed for each term imposed pursuant to subdivision (c) of section 667.6.

> If the term was imposed under the Three Strikes law, either for a second strike offense or for a third strike offense, the enhancement must be applied.
>
> (Slip opn., p. 12.)

Petitioner, based upon *Tassel*, had argued that only one recidivist enhancement should be applied to the combined determinate term, "Sasser argues that only one recidivism enhancement may be imposed on the entire determinate term portion of his sentence (along with an enhancement for each of the indeterminate terms)." (Slip opn., p. 11.) The Court of Appeal considered petitioner's argument, but limited *Tassel* to determinate terms imposed under Section 1170.1:

> In *People v. Tassell* (1984) 36 Cal.3d 77 (Tassell), on which Sasser relies, the court considered whether an enhancement

> for a prior serious felony conviction (§ 667, subd. (a)) could be applied to each of several determinate terms imposed pursuant to section 1170.1.
>
> (Slip opn., p. 11.)

The Court of Appeal then distinguished determinate terms imposed under the Three Strikes Law from determinate terms otherwise imposed under Section 1170.1,

> Unlike the defendant in Tassell, Sasser was not sentenced under section 1170.1, but under the Three Strikes law, which permits multiple enhancements. (See Williams, supra, 34 Cal.4th at p. 402; Misa, supra, 140 Cal.App.4th at p. 847.) Accordingly, the court did not err in imposing a recidivist enhancement as to each of Sasser's seven second-strike determinate terms.
>
> (Slip opn., p. 11.)

Yet, the language of the Court of Appeal opinion then goes beyond terms imposed pursuant to subdivision (c) of section 667.6 and appears to apply its reasoning to all terms imposed in second-strike sentencings under the Three Strikes law:

> In sum, deciding whether a recidivism enhancement should be applied to each count or only once to the aggregate sentence, the key distinction is not whether the term for the count is determinate or indeterminate, but whether it was imposed pursuant to section 1170.1 or pursuant to the Three Strikes law. If the term was imposed under the Three Strikes law, either for a second strike offense or for a third strike offense, the enhancement must be applied.
>
> (Slip opn., p. 12.)

The premise of the Court of Appeal's ruling is that there are different types of determinate terms: a determinate term imposed under the Three Strikes Law "is fundamentally different than a determinate term imposed under section 1170.1." (Slip opn., p. 11.) Whether or not the branching of the

sentencing statutes has created a new category of determinate terms, especially one which mandates imposition of consecutive 5-year recidivist terms for a prior serious felony conviction, is a fundamental change in established sentencing law and merits review.

Necessity for Review

Williams, supra, distinguished *Tassel's* general rule that status-type enhancements are only added once to defendant's sentence, noting that in Three-Strikes cases the statute mandates full and consecutive application of the 5-year enhancement to life terms. *Williams* limited *Tassel* to determinate sentences: "Section 1170.1, however, applies only to *determinate* sentences. It does not apply to multiple indeterminate sentences imposed under the Three Strikes law." (*Williams, supra,* 34 Cal.4th at p. 402 (italics in original).) Even still, this court in *Williams* chose not to extend its ruling to the determinate terms of second strike cases sentenced under the Three Strikes law because that issue was not before it. *Williams* phrased its rule as applicable to third-strike sentences: "Accordingly, we conclude that, under the Three Strikes law, section 667(a) enhancements are to be applied individually to each count of a third strike sentence." (*Id.*, at p. .) *Williams* did not overrule *Tassel.* Rather *Williams* limited *Tassel* to determinate sentences.

Since *Williams,* the Fourth District Court of Appeal, Division One, issued an opinion holding that a second-strike sentence must include a 5-year term for a single prior serious felony conviction on each determinate term imposed under the Three Strikes law. (*People v. Misa* (2006) 140 Cal.App.4th 805 [a five-year term is mandatory under Three Strikes law, but is ***not*** required for separate determinate terms].) Six foot, three inch,

300-pound Vince V. Misa assaulted and tortured someone that he believed had stolen from him. Misa cracked his victim's skull with a golf club, then kept the victim in garage such that the victim continued to suffer from the exposure of his brain tissue and intra-cranial hemorrhaging. (*Id.*, at pp. 807-808.) Misa was convicted of the crimes of torture (§206) and aggravated assault (§245(a)(1)) with a strike prior. He was sentenced to an indeterminate term for torture plus a determinate term for the assault, and to each was added a 5-year term because the prior was a serious felony (§667(a)(a)). (*Id.*, at p. 808.) On appeal Misa's sentence was affirmed, the Fourth District reasoning that *Williams*' analysis of the Three Strikes law should extend to a determinate second strike term as well as the indeterminate third strike term in that case. The Fourth District acknowledged that its analysis was not compelled by the ruling in *Williams*, but decided that *Williams* reasoning would allow for such a result, "Because he was not subjected to multiple indeterminate sentences pursuant to the Three Strikes law as was the defendant in *Williams,* the California Supreme Court's analysis in that case is not directly dispositive of the issue before us. However, we conclude that a similar analysis is applicable here." (*Id.*, at pp. 811-812.) Thus, *Misa* appears to have further limited *Tassel*, a step that this court in *Williams* was not yet willing to do.

The instant opinion takes recidivist enhancements one step further, ruling that the Three Strikes Law compels multiple 5-year enhancements where an offender suffers a second strike. The ruling conflicts with *Tassel.* David Tassel was sentenced to consecutive determinate terms under subdivision (c) of Section 667.6. "He was sentenced to the upper term of eight years for rape (count II) and — pursuant to the special sentencing provisions of section 667.6, subdivision (c) for forcible sex offenses — to a fully consecutive upper term of eight years for oral copulation (count III).

Enhancements for prior convictions were added to the terms of both counts II and III — one year to each for a prior Florida statutory rape conviction (§ 667.5, subd. (b)) and five years to each for a prior California rape conviction (§ 667.6, subd. (a))." (*Id.*, at p. 89.) This court reasoned that there were two types of enhancements, those that went to the nature of the offender, and those which went to the nature of the offense, and that "using the same prior convictions twice to enhance one aggregate sentence" was not required nor intended by sentencing law in calculating an aggregate term. (*Id.*, 90.) The distinction was well-reasoned and its application should not be abandoned.

II. THE 495-YEAR TO LIFE SENTENCE IMPOSED AFTER REMAND WAS NOT MANDATORY, THE COURT HAD DISCRETION TO IMPOSE LESS, AND ITS IMPOSITION VIOLATED CONSTITUTIONAL PROVISIONS AGAINST IMPOSING A GREATER SENTENCE ON REMAND

On resentencing after remittitur the trial court imposed full and consecutive sentences despite discretion to impose a sentence within the limits of the original 458 year to life term. (Counts 6, 13 and 16, discussed further herein.) In so doing the trial court erred. A trial court may not impose a greater sentence on remand after a successful appeal. (California Constitution, article I, section 15, *People v. Henderson* (1963) 60 Cal.2d 482, 495; *People v. Collins* (1978) 21 Cal.3d 208, 216 (*Collins*).) At the first sentencing hearing the trial court appeared to have exercised its discretion to impose less than full-and-consecutive terms under the Habitual Offender Act (§667.71) for those offense which the trial court termed "same time frame offenses," imposing terms of 1/3-the-midterm-to-life. In contrast, at the sentencing after remand the court abandoned the distinction previously made between the same-occasion and different-occasion sexual offenses and imposed all life terms full and consecutive under the Habitual Offender Act.

Opinion of the Court of Appeal

The Court of Appeal considered petitioner's argument, but ruled that because one-third-the midterm sentences were unauthorized a larger sentence was permitted on remand:

> When a defendant successfully appeals a criminal conviction, California's constitutional prohibition against double jeopardy

> generally precludes the imposition of more severe punishment on resentencing. (Cal. Const., art. I, § 15; People v. Hanson (2000) 23 Cal.4th 355, 363-366; People v. Henderson (1963) 60 Cal.2d 482, 495-497.) As Sasser acknowledges, however, no such limitation applies where the original sentence imposed by the trial court was not authorized by law. [Citations.]
>
> In our prior opinion, we expressly ruled that the sentence as to counts 6, 13, 16, and 17 was unauthorized by law: based on this court's decision in Williams, section 1170.1 did not authorize the imposition of one-third-the-midterm sentences for Sasser's offenses, and section 667, subdivision (a) did not authorize the imposition of one-third of the enhancement term for his serious felony prior. Accordingly, the court's imposition of a sentence on remand that is more severe than the original sentence did not violate Sasser's double jeopardy rights.
>
> (Slip opn., pp. 7-8.)

The Court of Appeal was unmoved by petitioner's argument that it was the manner of calculation, and not the length of the term, that was unlawful. The Court of Appeal ruled that the original sentence was unauthorized, thus allowing the court on remand to impose a sentence in excess of the original:

> Sasser asserts that the court therefore could have lawfully imposed some concurrent or lesser sentence on counts 6, 13, and 16, such that the aggregate sentence would not exceed the 458-years-four- months-to-life sentence that was originally imposed. (For example, if the court had imposed sentence on counts 6, 13, and 16 to run concurrently, the total sentence would have been just 330 years to life.) Because the court did not do so, Sasser contends the court violated his right against double jeopardy.
>
> Sasser's argument is meritless. Because the original sentence was unauthorized, the court on remand was not required to impose less than full consecutive sentences on counts 6, 13, and 16. As explained ante, there was no double jeopardy requirement to do so.
>
> (Slip opn., p. 9.)

Thus the issue is presented, whether remand of a sentence calculated in a manner not authorized by statute allows the sentencing court to impose a sentence in excess of the original whether or not a sentence in excess of the original was required by statute.

Proceedings in the Instant Case

At the initial sentencing, the trial court distinguished the life terms imposed in Counts 6, 13, 16 and 17 from other life terms. The terms imposed were more than required by the Habitual Offender Act, but less than the maximum full and consecutive term authorized. The trial court found that Count 6 was committed in the "same time frame" as Count 5 [Jane Doe 1 counts], and therefore imposed a term of one-third the midterm of "18 years, 8 months, to life." (RT 812.) As described by the Court of Appeal in its ruling on petitioner's first appeal:

> On count 6 (rape), the court exercised its discretion under Jessica's law (§ 667.6, subd. (c)) "not [to] impose a full consecutive term," finding that the offense was committed "within the same time-frame" and the same location. It therefore imposed a consecutive term of 18 years four months to life: eight years four months to life (one-third the midterm) under the HSOL, doubled under the TSL, plus one year eight months (one-third the midterm) for the serious felony prior. The court utilized the same calculation to impose an additional consecutive term of 18 years four months to life under the OSL.
>
> (CT 15.)

The court made similar findings as to Counts 11 and Count 13 [Jane Doe 2, prior to Embarcadero], and Counts 15, 16 and 17 [Jane Doe 2, after drive to Embarcadero], reducing Count 13, 16 and 17 to one-third the midterm under the same formula as Count 6. (RT 816:11-817:8, 817-819.)

> On count 13 (rape), the court exercised its discretion under Jessica's law (§ 667.6, subd. (c)) to impose less than a full term after finding that the count 13 offense and the count 11 offense were a "single transaction." As in count 6, it imposed an additional consecutive term of 18 years four months to life under the HSOL and a consecutive term of 18 years four months to life under the OSL.
>
> ...
>
> On count 16 (rape), the court found the offense was committed within the same time-frame and location as the count 15 offense and, therefore, as in count 6, exercised its discretion pursuant to Jessica's law (§ 667.6, subd. (c)), to impose a consecutive term of 18 years four months to life under the HSOL and an additional consecutive term of 18 years four months to life under the OSL.
>
> On count 17 (sodomy), the court found the offense was committed within the same time-frame and location as the count 15 and count 16 offenses and, therefore, as in count 6, exercised its discretion pursuant to Jessica's law (§ 667.6, subd. (c)), to impose a consecutive term of 18 years four months to life under the HSOL and an additional consecutive term of 18 years four months to life under the OSL.

(CT 15-16.)

Imposition of the erroneous one-third the minimum mandatory term sentences was, apparently, pursuant to the trial court's finding that the reduced counts were committed in the "same time frame." (RT 812.) The phrase "same time frame" indicated that the trial court made findings that Counts 11 and 13 occurred during the same episode and that Counts 15, 16 and 17 occurred during the same episode and thus not necessarily meriting full and consecutive sentencing.

In contrast, at the sentencing after remittitur, the trial court overlooked its prior finding that the listed counts occurred in the "same time frame," and imposed full and consecutive life terms on each surviving

count.[10] The court described the terms imposed as "55 years to life" under the Habitual Offender Act and "17 years" under the One-Strike law. The increase of three of the terms imposed under the Habitual Offender Act to full-and-consecutive terms must be reversed because the cumulative punishment does, indeed, violate the prohibition against an increased sentence on remand. (CT 28-29 [Counts 6, 13 and 16].)

Necessity for Review

"When a defendant successfully appeals a criminal conviction, California's constitutional prohibition against double jeopardy precludes the imposition of more severe punishment on resentencing." (Cal. Const., art. I, §15; *People v. Hanson* (2000) 23 Cal.4th 355 [increase in restitution fine stricken], citing *People v. Henderson* (1963) 60 Cal.2d 482, 495-497 [death penalty imposed after successful appeal of life sentence].) However, as with all rules, there are exceptions. The main exception being where the trial court imposed as punishment a sentence not authorized be law. In *People v. Serrato* (1973) 9 Cal.3d 753 (*Serrato*), overruled on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1, this court established an exception to this general rule and held that the trial court may impose a more severe sentence on remand after an appeal if the original sentence was unauthorized by law or illegal. When the original sentence is "an unauthorized sentence," it "is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement." (*Serrato*, at p.

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[10]Count 17 [one of the two sodomy counts reversed for instructional error] having been dismissed on motion of the District Attorney after remittitur, a consecutive term was not pronounced.

764.) An unauthorized sentence may be set aside judicially and a proper sentence may be imposed by the court even if the second sentence is more severe than the original unauthorized sentence.

Yet, lest the exception swallow the rule, "unauthorized" sentences must be distinguished from simply "erroneous" sentences. To determine whether defendants may be given greater sentences after appeals relating to sentencing error, appellate courts distinguish illegal sentences from sentences that are erroneous for some other reason. (*People v. Brown* (1987) 193 Cal.App.3d 957, 961 (*Brown*).) For example, "where the sentence imposed is not authorized by the statutes governing sentencing, the sentence is illegal and no bar to subsequent imposition of a greater sentence." (*Id.,* at pp. 961-962, citing *Price, supra*, 184 Cal.App.3d at p. 1409 [failure to impose enhancement under § 12022.3]; *People v. Allen* (1985) 165 Cal.App.3d 616, 630-631 [imposition of consecutive sentence in violation of § 669]; and other cases.) "On the other hand, where a sentence is authorized by statute but the court errs in the manner of sentencing, for example, by failing to state reasons for sentencing choices, the resulting sentence is erroneous but not illegal and is a bar to subsequent imposition of a greater sentence." (*Brown, supra*, at p. 962.)

"Unauthorized" is not so broad a category as to encompass all erroneously imposed sentences. Rather, an unauthorized sentence is one that has been pronounced in excess of the court's jurisdiction or in violation of law. "[A] sentence is generally `unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) The *Serrato* court provided three examples of unauthorized sentences from the case law, including (1) where the trial court imposed a concurrent sentence where the statute required a consecutive sentence; (2) where the trial court granted probation in a

murder case; and (3) where the trial court imposed a jail sentence when the statute prescribed a prison sentence. (*Serrato, supra*, 9 Cal.3d at pp. 764-765, citing *In re Sandel* (1966) 64 Cal.2d 412, *People v. Orrante* (1962) 201 Cal.App.2d 553 (superseded by statute on another ground as stated in *People v. Bailey* (1996) 45 Cal.App.4th 926, 930), and *People v. Massengale* (1970) 10 Cal.App.3d 689.)

In contrast, the original term imposed in the instant case was well within the lawful range allowed by the Habitual Offender Act. Rather, the error was in calculating the reduced terms as such as reducing the minimum mandatory term to one-third as opposed either running the term concurrent or selecting a lawful determinate term. (§§667.6(c), 1170.1; and see Cal. Rules of Court, rule 4.426 discussed *infra*.) The original sentence imposed in the instant case, 458 years-to-life, with various life terms run consecutive and concurrent, was one in which the sentence was "authorized by statute but the court err[ed] in the manner of sentencing." (*Brown,* supra, at p. 962.)

CONCLUSION

For offenders facing a third strike, the Three Strikes law presents an alternative sentencing scheme which imposes an indeterminate life term instead of a determinate prison sentence. On the other hand, for second strike offenders the Three Strikes law leaves in place the determinate term but dramatically increases the calculation of the offender's determinate term. Viewed through the lens of the Three Strike law, a determinate term is significantly more punitive. However, it is not necessary to further increase the punitive effect by interpreting the Three Strikes law as altering the manner in which recidivist-type enhancements are applied to aggregate determinate terms. Such interpretation was probably not intended by the electorate, nor contemplated by the legislature, would dramatically increase the maximum penalty faced by second-strike offenders and the increased terms of imprisonment would result in unintended fiscal consequences.

For the foregoing reasons, petitioner respectfully requests that this court grant review or such other and further relief as this court deems appropriate.

Respectfully Submitted,

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Attorney for Petitioner

APPENDIX

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Opinion of the Court of Appeal
First District, Division Five
Filed February 11, 2014

Filed 2/11/14

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **DARREN DERAE SASSER,** **Defendant and Appellant.**	**A136655** **(Alameda County Super. Ct. No. C156534)**

Darren Derae Sasser (Sasser) appeals from a sentence imposed after we remanded the matter to the trial court for resentencing. He contends: (1) his new sentence of 495 years to life violates his right against double jeopardy, because the sentence is more severe than his original sentence of 458 years four months to life; and (2) the court erred in imposing a prior serious felony enhancement (Pen. Code, § 667, subd. (a)(1)) to multiple determinate terms imposed pursuant to the "Three Strikes" law (Pen. Code, §§ 667, subd. (e), 1170.12, subd. (c)(1)), as part of his stayed sentence under the "One Strike" law (Pen. Code, § 667.61).[1]

We will affirm. In the unpublished portion of our opinion, we conclude there was no double jeopardy violation. In the published portion of the opinion, we hold that a prior serious felony enhancement must be applied to each term imposed under the Three Strikes law, whether for a second strike offense or a third strike offense.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part II.A.

1 All statutory references are to the Penal Code.

I. FACTS AND PROCEDURAL HISTORY

A comprehensive summary of the underlying facts is set forth in our prior unpublished opinion in *People v. Sasser* (July 27, 2011, A127431 [2011 WL 3198786]). We need not repeat the summary here, in light of the limited issues raised in this appeal. Instead, we focus on the jury's verdict, Sasser's initial sentence, our remand for resentencing, and Sasser's new sentence on remand.

A. Jury Verdict

In October 2009, a jury convicted Sasser of 11 sexual offenses perpetrated against Jane Doe 1 (JD1) on November 9, 2005, and Jane Doe 2 (JD2) on November 17, 2005. As to JD1, Sasser was found guilty of one count of oral copulation (§ 288a, subd. (c)(2)), one count of sodomy (§ 286, subd. (c)(2)), and three counts of forcible rape (§ 261, subd. (a)(2)). As to JD2, he was found guilty of two counts of oral copulation (§ 288a, subd. (c)(2)), two counts of sodomy (§ 286, subd. (c)(2)), and two counts of forcible rape (§ 261, subd. (a)(2)). Collectively, he sustained convictions for three counts of oral copulation (count 2 as to JD1, counts 10 & 15 as to JD2); three counts of sodomy (count 5 as to JD1, counts 11 & 17 as to JD2); and five counts of forcible rape (counts 6, 7, & 8 as to JD1, counts 13 & 16 as to JD2).

The jury also found true numerous allegations for sentencing purposes, including special circumstance allegations under Jessica's Law (§ 667.6, subd. (d)) — that certain offenses involved the same victim on separate occasions — as well as multiple victim special circumstance allegations for life sentences under the One Strike law (§ 667.61, subd. (c)).

In addition, Sasser admitted a prior conviction for a lewd act on a child (§ 288, subd. (a)), which constituted a predicate for life terms under the habitual sexual offender law (§ 667.71), constituted a strike under the Three Strikes law, and qualified as a serious felony prior for sentence enhancement purposes (§ 667, subd. (a)(1)). He also admitted a prior prison term for the violent felony of assault with a deadly weapon (§ 245, subd. (a)(2)) for purposes of a sentence enhancement (§ 667.5).

B. Initial Sentence

In January 2010, Sasser was sentenced to consecutive life terms for each of his 11 convictions, with a minimum of 458 years four months. In other words, he received an indeterminate term of 458 years four months to life.

In reaching this sentence, the court chose an indeterminate term of 25 years to life under the habitual sexual offender law as the base term on counts 2, 5, 7, 8, 10, 11, and 15. (§ 667.61, 667.71, 667.6, subd. (d).) The court doubled each of these terms to 50-years-to-life as a second strike under the Three Strikes law, and then added to each term a five year enhancement for the serious felony prior pursuant to section 667, subdivision (a)(1). The court found each of these offenses to constitute a separate act, and imposed these terms consecutively.

The court also imposed eight year four month to life terms (one-third the midterm) under the habitual sexual offender law on counts 6, 13, 16, and 17, exercising its discretion under Jessica's Law not to impose *full* consecutive terms for these offenses because they were committed within the same time frame and same location (§ 667.6, subd. (c)). The court doubled each of these terms to 16 years eight months to life as a second strike under the Three Strikes law, and then enhanced each term by one year eight months (one-third the enhancement term) for the serious felony prior (§ 667, subd. (a)(1)).

In addition, the court imposed but stayed sentence under the One Strike law. In so doing, the court imposed all terms consecutively, without making a specific finding as to whether any of the offenses occurred on a "single occasion" under *People v. Jones* (2001) 25 Cal.4th 98, 107 (*Jones*).

C. Prior Appeal and Remand

In the ensuing appeal, we reversed the sodomy convictions under counts 11 and 17 due to instructional error.

We also concluded that the court imposed an unauthorized sentence with respect to counts 6, 13, 16, and 17, by imposing terms of just eight years four months to life, rather than 25 years to life, and recidivist enhancements of just one year eight months,

rather than five years. We stated: "The People argue the matter must be remanded to correct the unauthorized sentence terms imposed on counts 6, 13, 16, and 17. They assert that although the court properly sentenced those counts *consecutively* it was required to impose *full-term* consecutive sentences. Thus, they argue the court's exercise of discretion reducing to one-third the indeterminate life terms and the prior serious felony enhancement terms (§ 667, subd. (a)) was unauthorized. We agree." (Fn. omitted.)

More specifically, we explained why the trial court was not authorized to impose eight year four month to life terms, rather than 25 year to life terms, on these counts. Relying on *People v. Williams* (2004) 34 Cal.4th 397 (*Williams*), the People had argued "that in imposing less than full life terms on counts 6, 13, 16, and 17, the court erroneously applied determinate sentencing principles to an indeterminate term. *Williams* held, 'Section 1170.1 [requiring subordinate offenses to be punished by one-third the midterm] applies only to *determinate* sentences. It does not apply to multiple indeterminate sentences imposed under the Three Strikes law.' (*Williams*, at p. 402.) 'Multiple indeterminate terms sentenced consecutively are *fully* consecutive to each other. Any applicable conduct and status enhancements as to each count are *fully* consecutive to each other and are *fully* consecutive to the base term. (*People v. Felix* (2000) 22 Cal.4th 651.)' [Citation.] Thus, the court erred in imposing less than full indeterminate life terms on counts 6, 13, 16, and 17."

We also explained why the trial court was not authorized to reduce the recidivist enhancement from five years to one year eight months on these counts: "In addition, the People correctly assert that the trial court erred in imposing less than the full five year prior felony status enhancement (§ 667, subd. (a)) on counts 6, 13, 16, and 17. [¶] Section 667, subdivision (a) provides in part: '(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.' [¶] Where a defendant has prior serious felony convictions, the court is required to impose a five-year section 667, subdivision (a) enhancement on each count for which it imposes a [Three Strikes law] sentence. (*Williams, supra*, 34 Cal.4th at pp. 403-405; [citation].) Thus, the court lacked discretion to impose less than the full five-year enhancement on counts 6, 13, 16, and 17." (Fn. omitted.)

In another portion of our opinion, we agreed with the parties that the court erred in imposing mandatory consecutive life sentences under the One Strike law, instead of applying the spatial proximity test relevant at the time of his offenses under *Jones*, *supra*, 25 Cal.4th at page 107.[2]

In addition, we rejected Sasser's request for the matter to be remanded on the ground the trial court had been unaware of its discretion under the habitual sexual offender law not to impose consecutive life sentences for crimes involving the same victim on separate occasions. Among other things, we noted that the trial court had found counts 6, 13, 16, and 17 involved the same victim on the same occasion and exercised its discretion under Jessica's Law (§ 667.6, subd. (c)) to sentence consecutively; there was no reason to believe the court would exercise its discretion differently under the habitual sexual offender law.

Accordingly, we remanded the matter "for resentencing consistent with the views expressed in [our] opinion." Specifically, we remanded solely for the trial court "to correct the *unauthorized* sentence terms imposed on counts 6, 13, 16, and 17" and to "make a determination under *Jones* whether any of the offenses were committed against the same victim on a single occasion." (Italics added, fn. omitted.)

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2 Section 667.61 has been amended to adopt the "separate occasions" language of Jessica's Law and eliminate the "single occasion" language that was the focus of the court's opinion in *Jones*. (See *Jones, supra,* 25 Cal.4th at pp. 105-107.)

D. Trial Court Proceedings on Remand

Sasser was resentenced in July 2012. On respondent's motion, counts 11 and 17 (relating to the convictions we overturned) were dismissed, and the court imposed sentence on the remaining nine counts.

The court imposed a 25 years to life term for each of the offenses (i.e., this time as to counts 6, 7, 13, and 16; as well as to counts 2, 5, 8, 10, and 15, as previously imposed) pursuant to the habitual sexual offender law. The court doubled each of these term to 50 years to life pursuant to the Three Strikes law (§ 667, subd. (e)(1)), and added to each term five years for the serious felony prior (§ 667, subd. (a)(1)), for a total of 55 years to life for each offense. The result was an aggregate sentence of 495 years to life, rather than the 458 years four months to life originally imposed.

As to the sentence under the One Strike law (§ 667.61), the court determined that the offenses against the individual victims were committed on a "single occasion" under *Jones,* but the court nonetheless exercised its discretion to sentence the charges consecutively. By imposing 55 years to life on count 2 and count 10 (25 years to life, doubled pursuant to the Three Strikes law, plus five years for the serious felony prior), adding 17-year terms on each of the other seven counts (midterm of six years, doubled pursuant to the Three Strikes law, plus five years for the serious felony prior), and running the terms consecutively, the court imposed a total sentence of 229 years to life. The court stayed this sentence in light of the longer sentence imposed under the habitual sexual offender law.

This appeal followed.

II. DISCUSSION

We address Sasser's contentions in turn.

A. Double Jeopardy*

Sasser contends his right against double jeopardy was violated because the trial court imposed a sentence on remand that was greater than his original sentence. We disagree.[3]

When a defendant successfully appeals a criminal conviction, California's constitutional prohibition against double jeopardy generally precludes the imposition of more severe punishment on resentencing. (Cal. Const., art. I, § 15; *People v. Hanson* (2000) 23 Cal.4th 355, 363-366; *People v. Henderson* (1963) 60 Cal.2d 482, 495-497.) As Sasser acknowledges, however, no such limitation applies where the original sentence imposed by the trial court was not authorized by law. (*People v. Serrato* (1973) 9 Cal.3d 753, 764-765, overruled on another ground in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Rodriguez* (2012) 207 Cal.App.4th 204, 212 ["[w]e may set aside an unauthorized sentence so a proper sentence may be imposed, even if the new sentence is harsher"]; *People v. Neely* (2009) 176 Cal.App.4th 787, 799-800.)

In our prior opinion, we expressly ruled that the sentence as to counts 6, 13, 16, and 17 was unauthorized by law: based on our Supreme Court's decision in *Williams*, section 1170.1 did not authorize the imposition of one-third-the-midterm sentences for Sasser's offenses, and section 667, subdivision (a) did not authorize the imposition of one-third of the enhancement term for his serious felony prior. Accordingly, the court's

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* See footnote, *ante*, page 1.

[3] Sasser's attorney did not object to the sentence on the specific ground that his sentence was increased in violation of his right against double jeopardy. A double jeopardy claim may be forfeited by a failure to assert it in the trial court. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1201.) Sasser argues, to the extent counsel did not adequately preserve the issue for appeal, he was deprived of effective assistance of counsel. We will proceed to review the merits, since we would have to do so even if the challenge was forfeited in order to resolve the ineffective assistance claim. (See *ibid.*, cited in *People v. Williams* (1999) 21 Cal.4th 335, 343; see also *People v. Daniels* (2012) 208 Cal.App.4th 29, 31.)

imposition of a sentence on remand that is more severe than the original sentence did not violate Sasser's double jeopardy rights.

Sasser contends that the original reduced terms on counts 6, 13, 16, and 17 could have been accomplished under the habitual sexual offender law by a means *other* than section 1170.1, and therefore (1) the original sentence was not really unauthorized, but just erroneous, and (2) the court on remand should not have imposed full consecutive 25-year-to-life sentences. His arguments have no merit.

1. The Original Sentence Was Unauthorized, Not Merely Erroneous

Sasser asserts that the court could have lawfully imposed the reduced terms for counts 6, 13, 16, and 17 by exercising its discretion under the habitual sexual offender law to impose less than full consecutive sentences, rather than by erroneously using section 1170.1. The court's error, Sasser thus urges, was "in calculating the reduced terms as [one-third]-the-midterm-to-life as opposed to selecting a lawful determinate term." Because the length of the original term was within the permissible scope of the habitual sexual offender law, Sasser contends, the original sentence was " 'authorized by statute but the court err[ed] in the manner of sentencing.' "

Sasser's reliance on *People v. Brown* (1987) 193 Cal.App.3d 957 (*Brown*) in this regard is misplaced. In *Brown*, the court concluded that imposing a full two year enhancement in violation of a statutory limitation *did* constitute an unauthorized sentence and therefore did *not* bar imposition of a greater sentence on remand. (*Id.* at p. 963.) In dictum, the court stated that an example of an error "in the manner of sentencing" was a court's failure to state reasons for its sentencing choices. (*Id.* at p. 962.) But that is not what occurred here. Here, the court imposed a sentence that was ostensibly predicated on section 1170.1 (imposing one-third the midterm) and impermissibly applied determinate sentencing principles to indeterminate sentences. Indeed, Sasser does not explain how the court could have reached the exact aggregate term of 458 years four months under any circumstance in this case, *without* relying on section 1170.1. (See *People v. Scott* (1994) 9 Cal.4th 331, 354 ["a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case," as "where the court

violates mandatory provisions governing the length of confinement"].) In any event, we expressly ruled in our prior opinion that the sentence was unauthorized, and our determination became final in the case. The double jeopardy limitations on resentencing did not apply to Sasser's sentence on remand.

2. The Sentence on Remand Was Not Erroneous

Sasser similarly argues, although the trial court was required on remand to change the sentences on counts 6, 13, and 16 from the "erroneous [one-third]-the-midterm-to-life sentences" (imposed under section 1170.1) to lawful sentences, it could have exercised its discretion under the habitual sexual offender law to impose a sentence that was still less than the full consecutive sentence, on some basis *other than* section 1170.1. (See *People v. Murphy* (2001) 25 Cal.4th 136, 151 [court has discretion under habitual sexual offender law not to impose full, separate and consecutive sentences on offenses involving the same victim on the same occasion]; § 667.6, subd. (c).) Sasser asserts that the court therefore could have lawfully imposed some concurrent or lesser sentence on counts 6, 13, and 16, such that the aggregate sentence would not exceed the 458-years-four-months-to-life sentence that was originally imposed. (For example, if the court had imposed sentence on counts 6, 13, and 16 to run concurrently, the total sentence would have been just 330 years to life.) Because the court did not do so, Sasser contends the court violated his right against double jeopardy.

Sasser's argument is meritless. Because the original sentence was unauthorized, the court on remand was not required to impose less than full consecutive sentences on counts 6, 13, and 16. As explained *ante*, there was no double jeopardy requirement to do so. And to the extent Sasser argues that the court should have nonetheless showed leniency with respect to these counts because they were for offenses committed on the same occasion as other offenses, he fails to establish any abuse of discretion. In short, Sasser has not demonstrated any sentencing error.

B. Imposition of Multiple Enhancements for Sasser's Prior Serious Felony

On remand, regarding the sentence calculated under the One Strike law, the court imposed a number of five-year enhancements for Sasser's prior serious felony

conviction (§ 667, subd. (a)): an enhancement to each of the indeterminate terms on counts 2 and 10, plus an enhancement to each of the determinate terms on the seven other counts. Sasser argues that only *one* recidivism enhancement may be imposed on the entire determinate term portion of his sentence (along with an enhancement for each of the indeterminate terms). Again, we must disagree.

1. Law

In *People v. Tassell* (1984) 36 Cal.3d 77 (*Tassell*), on which Sasser relies, the court considered whether an enhancement for a prior serious felony conviction (§ 667, subd. (a)) could be applied to each of several *determinate terms* imposed pursuant to *section 1170.1.* The court ruled that, although enhancements that relate to the acts constituting the offense (e.g., use of a firearm) can be added to each applicable count, enhancements that relate to the defendant's status or personal history (e.g. prior convictions under § 667.5 or 667.6) can be applied only once, to the aggregate sentence. (*Tassell*, at p. 90.) Therefore, as a status type of enhancement, an enhancement for a prior serious felony conviction can be applied only once, to the aggregate sentence, when the aggregate sentence is comprised of determinate terms imposed pursuant to *section 1170.1.* In the matter before us, however, Sasser was sentenced under the Three Strikes law, not section 1170.1.

Our Supreme Court in *Williams, supra,* 34 Cal.4th 397, thereafter considered whether an enhancement for a prior serious felony conviction (§ 667, subd. (a)) could be imposed on each of several *third strike indeterminate sentences* imposed under the *Three Strikes law*. The court distinguished *Tassell*, because *Tassell* involved determinate terms governed by section 1170.1: "Section 1170.1, however, applies only to *determinate* sentences. It does not apply to multiple indeterminate sentences imposed under the Three Strikes law." (*Williams*, at p. 402.) The *Williams* court concluded: "The Three Strikes law, unlike section 1170.1, does not draw upon any distinction between status enhancements, based on the defendant's record, and enhancements based on the circumstances of the current offenses, and the Three Strikes law generally discloses an intent to use the fact of recidivism to separately increase the sentence imposed for each

new offense. Accordingly, we conclude that, under the Three Strikes law, section 667[, subd.] (a) enhancements are to be applied individually to each count of a *third strike* sentence." (*Williams*, at pp. 404-405, italics added.) Sasser, however, received *second* strike sentences.

The court in *People v. Misa* (2006) 140 Cal.App.4th 837 (*Misa*) later considered whether an enhancement for a prior serious felony conviction (§ 667, subd. (a)) could be imposed on both a *second strike determinate sentence* imposed under the *Three Strikes law* and an indeterminate sentence. The court acknowledged that *Williams* addressed third strike indeterminate sentences rather than a second strike determinate sentence, but concluded that "a similar analysis is applicable" in light of the policy objectives of the Three Strikes law. (*Misa,* at p. 846.)

2. Analysis

Unlike the defendant in *Tassell*, Sasser was not sentenced under section 1170.1, but under the Three Strikes law, which permits multiple enhancements. (See *Williams, supra,* 34 Cal.4th at p. 402; *Misa, supra,* 140 Cal.App.4th at p. 847.) Accordingly, the court did not err in imposing a recidivist enhancement as to each of Sasser's seven second-strike determinate terms.

Sasser urges that neither *Williams* nor *Misa* applies to this case: *Williams* did not address a *second* strike determinative sentence under the Three Strikes law, and *Misa* did not address a situation where, as here, there was *more than one* second strike determinate sentence under the Three Strikes law. He even interprets *Misa* as imposing a single five-year enhancement on the entire determinate *portion* of Misa's sentence (which happened to consist of just one determinate term), as opposed to a five-year enhancement for each determinate term (no matter how many there are).

Sasser's argument is unpersuasive. The point underlying *Williams* and *Misa* is that the imposition of a sentence under the authority of the Three Strikes law — whether as a determinate term for a second strike or an indeterminate term for a third strike — means the term is fundamentally different than a determinate term imposed under section 1170.1. Given the clear policy and intent behind the Three Strikes law — to increase

punishment for prior felony convictions — the fact that the sentence is governed by the Three Strikes law means that a recidivism enhancement under section 667, subdivision (a)(1) may be imposed on *each* count. (*Williams*, *supra*, 34 Cal.4th at p. 404; *Misa*, *supra*, 140 Cal.App.4th at pp. 846-847.)[4]

In sum, deciding whether a recidivism enhancement should be applied to each count or only once to the aggregate sentence, the key distinction is not whether the term for the count is determinate or indeterminate, but whether it was imposed pursuant to section 1170.1 or pursuant to the Three Strikes law. If the term was imposed under the Three Strikes law, either for a second strike offense or for a third strike offense, the enhancement must be applied.[5]

III. DISPOSITION

The sentencing order is affirmed.

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[4] For example, *Williams* instructs us: "Under [the Three Strikes law], the status or nature of the offender as a person previously convicted of serious felony offenses does not result merely in a single additional term of imprisonment for each prior conviction added on to the overall sentence that would otherwise be imposed for all of the new offenses. Instead, the Three Strikes law uses a defendant's status as a recidivist to *separately* increase the punishment for *each* new felony conviction. For a defendant with a single qualifying prior conviction, the sentence for each new offense is double what it otherwise would be. [Citations.]" (*Williams*, *supra*, 34 Cal.4th at p. 404, fn. omitted.) The court therefore recognized that the purpose of the Three Strikes law is manifested in its provisions for second strike sentences as well as its provisions for third strike sentences.

[5] Alternatively, respondent argues, even if section 1170.1 applied to Sasser's second strike determinative sentences, section 1170.1 expressly permits imposition of multiple enhancements to sex offenses. (See § 1170.1, subd. (h), added by Stats. 2000, ch. 689, § 1, p. 4557.) Subdivision (h) of section 1170.1 reads: "For any violation of an offense specified in Section 667.6, the number of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are pursuant to this section, Section 667.6, or some other provision of law. Each of the enhancements shall be a full and separately served term." Here, all nine of Sasser's offenses are listed in section 667.6, subdivision (e). Sasser counters that the absence of a limit on the number of enhancements is different than *mandating* imposition of the enhancements. In light of our conclusion that the Three Strikes law applies so as to permit an enhancement as to each count, we need not and do not address this issue.

NEEDHAM, J.

We concur.

SIMONS, Acting P.J.

BRUINIERS, J.

(A136655)

Superior Court of Alameda County, No. C156534, C. Don Clay, Judge.

Dirck Newbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Assistant Attorney General, Catherine A. Rivlin and Gregg E. Zywicke, Deputy Attorneys General, for Plaintiff and Respondent.

CERTIFICATE OF SERVICE BY MAIL

I declare under penalty of perjury that I am a citizen of the United States over eighteen years of age, not a party to the above action or proceeding and that my business address is Post Office Box 5575, Berkeley, California 94705 and that I served a copy of the attached

PETITION FOR REVIEW

By placing said copy in a sealed envelope addressed as follows:

California Attorney General
455 Golden Gate Blvd., Suite 11000
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Alameda County District Attorney
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Corcoran, CA 93212

Alameda County Superior Court
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First District Court of Appeal, Division Five, 350 McAllister St., S.F., CA (hand delivered)

with postage thereon fully prepaid and thereafter deposited in the United States Mail at Alameda County, California, that there is delivery service or regular communication by United States mail and the place so addressed, and that the date of deposit in the mail is the date of execution of this certificate.

I declare under penalty of perjury that the foregoing is true and correct, executed at Alameda County on March 14, 2014.

_____
Dirck Newbury

CERTIFICATE OF WORD COUNT
(Cal. Rules Court, rule 8.360(b)(1))

I, Dirck Newbury (State Bar No. 87959), declare under penalty of perjury that I am a citizen of the United States over eighteen years of age, not a party to the above action or proceeding and that my business address is Post Office Box 5575, Berkeley, California 94705 and that the attached brief contains 7,918 words (per WordPerfect X5 wordprocessor).

I declare under penalty of perjury that the foregoing is true and correct, executed at Alameda County on March 14, 2014.

_____
Dirck Newbury