

# Arguing

## THE THIRD STRIKE

### PROSECUTORS DEFEND THEIR GET-TOUGH STRATEGY.

Since the three strikes law was enacted five years ago (Pen C §667(b)-(i)), state prisons have become the long-term home of defendants convicted for stealing things like shampoo, cigarettes, or vitamins. Such cases are often used to prove that the three strikes law isn't having the intended effect. Instead of locking up just dangerous criminals, critics say, the law is warehousing minor offenders at taxpayers' expense. Last year the California Department of Corrections reported that more than half of the sentences under the law were for nonviolent offenses. The law's critics are making some headway. The state Senate is currently considering a bill that would ask the legislative analyst to study three strikes to determine whether or not it needs fixing. A similar proposal is also being weighed by the state Assembly. And in September a coalition of anti-three strikes organizations announced it was filing an initiative to reform the law.

Three strikes was enacted by both initiative vote and legislative action in the wake of the much-publicized kidnapping and murder of twelve-year-old Polly Klaas by paroled convict Richard Allen Davis. Designed to lock away dangerous, repeat criminals, the law says that if two serious or violent felony priors are alleged and proved, a third felony conviction, even if not violent, mandates an indeterminate life sentence for the defendant with a minimum of 25 years.

For prosecutors three strikes is a powerful weapon. But even for them it hasn't always been universally popular. The law's first draft rigidly required all possible strikes to be charged—even nonviolent ones. The sponsors finally gave prosecutors the ability to disregard earlier felonies, but they didn't extend the same power to judges: In 1996 the state Supreme Court ruled that such an arrangement violated the separation of powers doctrine and gave judges the discretion to strike priors at sentencing. *People v Superior Court (Romero)* 13 C4th 497. With these modifications, three strikes was embraced by perhaps every prosecutor in the state. Even San Mateo District Attorney James Fox, perhaps the only DA to publicly oppose the law at first, has changed his mind. "Now that both prosecutors and judges can strike priors, the law works," he says.

Since Romero three strikes cases get two levels of review: one by the prosecutor and one by the judge. If neither the DA's office nor the judge see fit to strike a prior, say the law's supporters, the defendant

deserves the heavy sentence he or she is getting—even if the third felony might be considered a misdemeanor under different circumstances. Most prosecutors don't have a problem with convicting at least some nonviolent third offenders, although sentiment does vary geographically. In Los Angeles, for example, almost any defendant who can be charged under three strikes will be. In San Francisco, however, giving someone a strike for a nonviolent third offense is rare. Most other counties fall somewhere in between, charging nonviolent third offenders on a case-by-case basis.

When justifying why they prosecute nonviolent third offenses, prosecutors point to a

variety of circumstances. Some say that many criminals who served ridiculously light sentences before the law was enacted are finally being reasonably punished. Others believe the law allows them to prevent crime. For example, Mann County Deputy District Attorney Kevin Jones recalls a case in which a defendant with a long history of rape convictions told the court his attacks on women coincided with his cocaine use. So when he was caught with the drug in an area where women were known to jog, prosecutors felt a third strike was justified. "After thorough consideration we concluded that public safety permitted, even mandated, that this defendant be prosecuted under three strikes," says Jones. Some prosecutors also point out that before three strikes, small-time criminals already served life sentences in installments, with multiple lesser sentences. Now they are simply paying up front.

We've asked prosecutors to zero in on specific examples of third-strike cases to explain why cookie theft, failure to appear, and other relatively minor crimes can be considered third-strike offenses.

### **Jerry Dewayne Williams**

#### **3rd Strike Theft of a slice of pizza**

**Sentence: 25 years to life, reduced to 6**

On a warm evening in July 1994 Jerry Williams was having a few drinks and relaxing on the Redondo Beach pier. After he and a friend had bought some slices of pizza, they noticed a group of kids dining on an extra-large pepperoni pie and demanded some of theirs. The oldest child refused, but Williams and his friend each took a piece anyway. The friend got away, but Williams was arrested in a nearby arcade after the pizza shop owner called the police. The Los Angeles District Attorney charged Williams with robbery, saying he used intimidation to scare the kids. In the end, the jury hung on the robbery charge but convicted Williams of petty theft with priors, netting him a 25 years to life sentence. Deputy Public Defender Arnold T. Lester filed a defense motion that argued the sentence constituted cruel and unusual punishment. Superior Court Judge Donald F. Pitts denied the motion but later, after Romero, reduced the sentence to six years. *People v Williams*, Cr No.YA 020612-01.

**The Prosecution:** "I didn't think the judge would do it," says prosecutor Bill Gravlin, referring to the sentence reduction. "Three strikes," he says, "is supposed to deal with recidivist criminals." And Williams had earlier charges for robbery, attempted robbery, unauthorized use of a motor vehicle, and possession of a controlled substance. "[Williams] ripped off four defenseless little kids," adds Gravlin. "The youngest was only seven." During the trial Gravlin asked the seven-year-old to stand next to the six-foot five-inch Williams to try to prove the robbery charge that didn't stick. "This was his fifth adult conviction and the second time he'd gotten caught using the threat of force," says Gravlin. But even though the pizza thievery was bad enough, Gravlin says, "It's wrong to focus just on the last offense. [Williams] was only 27 and had 14 years of criminal history. He is a habitual criminal. Some young people make mistakes and get better," adds Gravlin. "He just got worse."

### **Kevin Weber**

#### **3rd Strike Taking four chocolate chip cookies**

**Sentence: 26 years to life**

Kevin Weber got his third strike while homeless and unemployed. His earlier offenses,

however, occurred while he was working as a maintenance man at a local apartment complex. Using his master key he broke into one of the apartments twice. The first time, Weber made off with several firearms, When he broke in again, the apartment's resident, a police officer, was home and caught him in the act. Weber grabbed a .22 caliber pistol belonging to the policeman's roommate and, in an effort to escape, threatened to use it. Weber was charged with two counts of burglary and assault with a deadly weapon and went to prison for two years. He was released in 1990. In May 1995 Weber and some friends bought beer and tequila after a soup-kitchen dinner. Weber claims that he broke into Eric's Gazebo Restaurant in Santa Ana

resident Franciscan monks, and on occasion McCoy drove Taylor to South Central Los Angeles to see his mother, Lois Taylor. Just before dawn on July 11, 1997, two police officers on patrol caught Taylor allegedly trying to force open the church's kitchen door. Taylor told them he was trying to get something to eat. Taylor's trial attorney, public defender Graciella Martinez, argued that since the kitchen was where Taylor had been given food before, he believed he had permission to enter, making the crime nothing more than a simple misdemeanor trespassing. But based on Taylor's record-priors for purse snatching and attempted unarmed robbery-prosecutors filed the case as a third strike. The second conviction dates back to 1985, and he served two years for it. A jury found Taylor guilty of second-degree burglary, and Los Angeles Superior Court Judge James Dunn sentenced him to 25 years to life. *People v Taylor* (1999) 83 Cal Rptr 2d 919, review gr (July 21, 1999) No. S079437.

**The Prosecution:** Deputy District Attorney Dale Cutler points out that he wasn't the one who decided to file the case as a strike. But, he says, if he felt uncomfortable about the decision, he could have argued for reconsideration or refused to try it. He chose to do neither. "It's unrealistic to think he was trying to break in for food," says Cutler. "They'd helped him out in the past. If he couldn't wait for an hour until someone was up, he could have rung the buzzer and asked for food." Cutler believes Taylor was after something more valuable, like money from the alms box or the gilded icons and chalices. "It's just common sense," he says. "He'd been hanging around there for nine years. He knew when they were asleep and awake. He was familiar with the operation of the church. This guy has an extensive drug record," Cutler says, "he's got a big habit." The father that befriended him even drove him to see his mother, and he repays that kindness by trying to steal precious and sacred artifacts. That speaks to his character."

### **Michael Jerome Powell**

#### **3rd Strike: Failure to appear**

#### **Sentence: 25 years to life**

At age 20, Vallejo native Michael Powell was convicted of robbed for purse snatching and served several years in prison. Three years after his release he stole a bike and served seven more years for residential burglary. Out on parole in 1994 he got into an argument in San Francisco's tough Tenderloin district with a gang member who was chased away by Powell's friend. A few nights later the gang member shot at the friend and killed a two-year-old girl. Powell wasn't there the night of the shooting but told his parole officer, and later the police, about the event that led up to it. When prosecutors asked him to testify at the gang member's trial, he agreed. Then Powell pleaded guilty to a drug charge under a plea bargain. While he was awaiting sentencing, the murder trial started, and Powell reported getting paged with threatening messages from gang

members. He even claimed shots were fired at him while he was driving. Powell said he was afraid of serving time for the drug charge in the same facility as the gang member. Nevertheless, he did testify at the murder trial, and the gang member was convicted. When it came time for his own sentencing hearing, however, Powell skipped town. He was caught a year later after being stopped for a traffic violation. By this time, the three strikes law was in place, and Powell got a third strike for failing to appear for his sentencing hearing. *People v Powell* (SF Super Ct) Cr No. SC086106A.

**The Prosecution:** At trial Powell's attorney tried to argue that his reason for not appearing should be considered. It wasn't his intent to evade the process of the court, said defense attorney Stephen Berlin, but the consequences he feared he would face in jail. But Mann County Superior Court Judge John S. Graham didn't allow the jury to hear that, saying such factors should be weighed at sentencing. Berlin argued that this essentially left Powell without a defense—a point that has led to a federal habeas corpus petition. But Main County Deputy District Attorney Kevin Jones says there is no need to consider Powell's alleged fear because his investigation has completely discredited it. The prosecutor had a prison gang specialist investigate the claim, and he found no evidence of a contract on Powell's life. "Powell made claims that people in unknown vehicles were shooting at him, but there was no documentation," says Jones. And as for the altercation that led to the shooting, "It wasn't just a fight, it was a drug turf war," says Jones. "Powell tried to paint himself as a hero who performed a great service, but in fact he created problems that led to the baby's death." Jones adds that Powell did get some sentencing leniency in exchange for testifying at the murder trial. At the request of the San Francisco prosecutor who tried the murder case, Jones recommended that three years' worth of sentencing enhancements be stricken, and the judge agreed. Jones says he has no qualms about Powell's sentence. He points to the defendant's serious juvenile record and prior robbery strikes. He also says that Powell, during his 1996 incarceration, shouted racial slurs at Latino inmates, called guards fags, and said he was going to kill the Solano sheriff. When a defendant has shown improvement, it may not be appropriate to give him a strike for a nonviolent offense, says Jones, "but this guy is not a wonderfully reformed individual."

### **James Metters**

#### **3rd Strike Robbery of a fast-food restaurant**

#### **Sentence 35 years to life**

In 1994 James Metters entered a Wendy's restaurant in Oakland. After ordering food, he told the cashier to give him all the twenties. He wasn't armed, but the cashier testified that she thought his covered right hand held a gun. He left the restaurant with about \$300. A police officer ordering at the drive-through window caught Metters with the cash nearby at his trial Metters said he stole the money to pay back some drug dealers. He also said that in an effort to get off the street and out of danger, he had asked police to arrest him for a parole violation. Instead, his parole officer got him on the waiting list for a halfway house. He lost his placement, however, when he was mistakenly taken to San Quentin on a parole hold. After being released, he returned to his old neighborhood to await another opening. But before he could get one, the drug dealers kidnapped and threatened to kill him and his family if they didn't get their money. They released Metters so he could get the cash, and he held up the restaurant a few hours later. Metters's prior convictions included forcing an acquaintance who allegedly owed him money to write a check in his name. A year later, when he was 19, he robbed \$13 from a taxi driver. Based

on these priors the Alameda District Attorney's career criminal unit charged the crime as a third strike.

**The Prosecution:** The court refused to instruct the jury to consider the alleged threats against Metters's life. That decision was initially upheld by the First District Court of Appeal, which agreed that even if the drug dealers were threatening Metters, he didn't have to commit the crime. Instead, he could have borrowed money from his family, relocated them, or called the police. As a result, his defense of necessity didn't apply. *People v Metters* (1998) 72 Cal Rptr 2d 294. At trial, however, one juror refused to convict Metters because she thought the defendant's "purpose for committing the alleged crime" should be considered. This led to a jury deadlock, and the case was moved to a different court. The new judge ultimately dismissed the juror, and Metters was convicted. (The validity of the juror's dismissal is currently on appeal to the state Supreme Court. Review gr (June 10, 1998) No. 5069442.) The trial judge also refused to use the sentencing discretion available through *Romero*. Phil Daly, the Alameda deputy district attorney who prosecuted the case, says Metters got what he deserved. This, he points out, was the defendant's third violent offense in a short span of time. "Metters had a long criminal history and an inability to complete parole" says Daly. Though there was no real gun, he adds, it's not right to consider this case nonviolent. "This is exactly the type of case three strikes envisioned," says Daly. "It's a violent crime when the threat of force or fear exists and in this case it did."

## **Roney Nunes**

### **3rd Strike: Theft of painting supplies**

#### **Sentence: 25 years to life**

Just before closing time on March 12, 1995, 69-year-old Roney Nunes set off the alarm as he tried to leave a Santa Clara County Home Depot store with \$114 worth of merchandise. He told a store employee that his pacemaker was the cause and went back in. A guard followed Nunes and saw him remove the sensor tags from merchandise and hide the goods under his sweater. The guard stopped him outside the store and told Nunes he was under arrest. After a scuffle the guard managed to handcuff him. The court refused the defense's request to treat the crime as a misdemeanor, saying Nunes's criminal record was too extensive for leniency. The fact that the defendant was 70 at the time of his sentencing and had a heart condition didn't sway the court either. In the summer of 1995 Nunes was convicted and sent to jail for 25 years to life. His attorney says he knows of no other case where someone so old was given a third strike. Nunes appealed, arguing that the sentence constituted cruel and unusual punishment. But the trial court decision was upheld by the Sixth District Court of Appeal. *People v Nunes*, No. HO 14789 (order filed April 17, 1997).

**The Prosecution:** The lower court case was tried by now-retired Santa Clara Deputy District Attorney Tom Hanford, who had met the defendant before. In 1982 Hanford had prosecuted a rape case against Nunes and won. "Nunes saw Tom as his mortal enemy," says David Tomkins, head of the Santa Clara District Attorney's career criminal unit. "He went crazy when he saw who was trying the case." Tomkins says that his office normally reduces petty theft with a prior. "In this case we didn't. Nor did the judge. This shows who this guy is," he says. Nunes's criminal history spans nearly

five decades. During World War II he went AWOL from the military and was court martialled. In 1945 he was convicted of rape. Between 1965 and 1982 he was convicted of robbery felony theft, receiving stolen property, and rape. After serving 6 years of a 28-year sentence for the second rape charge, Nunes failed to register as a sex offender and went back to prison for several more months. "It's astonishing how short his rape sentences were," says Tomkins. Nunes was released early after being convicted for the 1982 rape when the case was reversed. "We couldn't retry it because the victim was so traumatized that she had to go to a mental institution, and we couldn't ask her to testify again," explains Tomkins. "This third-strike sentence is remedial."

### **Michael Wayne Riggs**

#### **3rd Strike: Shoplifting vitamins from a supermarket**

#### **Sentence: 25 years to life**

In the fall of 1995 Michael Riggs walked into an Albertson's grocery store in Banning and tried to leave without paying for a \$23 bottle of vitamins. Store employees tried to stop him, but Riggs, who was on parole at the time, took off. The workers chased and eventually caught him, and Riggs was arrested. His record showed eight prior convictions- four nonviolent crimes and four robberies. He'd been to prison three times before and had committed the vitamin robbery less than four months after being released. He was convicted of petty theft with a prior in Riverside Superior Court and was sentenced to 25 years to life. His lawyer filed a Romero motion hoping to get the judge to strike enough priors to reduce Riggs's sentence, but the court refused. Riggs appealed to the Fourth District Court of Appeal, where the court described his offense as a "petty theft motivated by homelessness and hunger" but also ruled that the trial court was authorized, and perhaps required, to treat the crime as a felony due to Riggs's record. Riggs next appealed to the U.S. Supreme Court, arguing that applying convictions that predated the passage of three strikes violated the Constitution's ban on ex post facto laws. He also claimed that his heavy sentence went against the Eighth Amendment prohibition against cruel and unusual punishment. The Supreme Court denied cert, noting that the petitioner had not exhausted all of his lower court remedies. But Justice John P. Stevens, who wrote the accompanying opinion, indicated that the petitioner's Eighth Amendment claim raised a substantial question. He was joined by Justices David H. Souter and Ruth B. Ginsburg. Justice Stephen G. Breyer also agreed and, in a dissenting opinion, said he would have granted Riggs's request for a hearing. *Riggs v California* (1999) 119 5 Ct 890.

**The Prosecution:** Michael Rushton, the assistant district attorney who prosecuted the case, admits that the high court's decision seems to indicate that Riggs might have a case if he perfects his appeal. But the prosecutor thinks three strikes provides the state with a "preventative remedy." Though Riggs didn't have a weapon when he took the vitamins, armed robbery is part of his record. And after the Albertson's employees caught him, says Rushton, Riggs pretended to have a knife. "Now we don't have to worry about Riggs committing more crimes of violence for another 25 years," he points out. In the vitamin caper, the defendant's weapon may have been fake, but police found a very real syringe in one of his socks. "He wasn't motivated by hunger or health concerns," says the prosecutor. "He didn't just take a bottle of vitamin C. He took something called Ripped and Pumped, a high-end weightlifter's supplement, and it wasn't to enhance his new workout program. It was to sell on the street so he could buy heroin." Taken alone, the

charge would be petty theft. In Riggs's case it was petty theft with a prior, and Rushton says that if he'd chosen to, he could have charged Riggs with robbery and enhanced his sentence by five years. "Guys like Riggs who've been to prison and commit a crime while still in the honeymoon period after their release clearly have a difficult time conforming to society," he says.