

# Prosecutors' Perspective on California's Three Strikes Law

— *A 10-Year Retrospective* —

Summer 2004



*Published by the*  
California District Attorneys Association

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# Prosecutors' Perspective on California's Three Strikes Law — A 10-Year Retrospective —

Summer 2004

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# Acknowledgments

This paper would not have been possible without the hard work and dedication of the California District Attorneys Association's *Three Strikes White Paper Ad Hoc Committee* and CDAA staff, which includes the following individuals:

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# Preface

by *The Honorable James P. Fox, San Mateo County District Attorney*

As a part of this 10-year retrospective, my observations as a vocal opponent to the 1994 Three Strikes initiative might be informative. As District Attorney for San Mateo County since 1983, I testified before the Legislature in opposition to the proposed Three Strikes legislation. I also signed the ballot argument in opposition to the Three Strikes initiative.

In reality, the actual implementation of the law has been appropriate. In fact, it has operated as intended, by removing from California communities those who have demonstrated an unwillingness to conform their behavior to the expectations of a civilized society.

A strict reading of the language of the statute and the initiative back in 1994 led to the interpretation that there was no discretion for the prosecutor to dismiss qualifying prior convictions, regardless of the fairness of the ultimate sentence a defendant would receive.

It seemed that the court was also denied a role in determining a fair sentence if the defendant had two or more qualifying prior convictions, regardless of the nature of the current offense.

This narrow interpretation proved to be incorrect in light of the California courts' decisions in *People v. Superior Court (Romero)* and *People v. Kilborn*, among others. *Romero* highlighted the court's ability to strike prior strikes in the furtherance of justice and *Kilborn* highlighted the prosecution's ability to request the court to strike prior strikes in the furtherance of justice. Thus, in an effort to accomplish justice, the prosecutor has the discretion to request the court to dismiss prior convictions in order to prevent a defendant from being punished unjustly. And even if the prosecutor does not choose to exercise this discretion, the trial court, which has the obligation to impose a just and fair sentence, may dismiss prior strike convictions.

The fact that both the court and the prosecutor can cause priors to be stricken establishes a balance in the law that was missing when Three Strikes was first enacted. These interpretations of the law protect a defendant from being subjected to an arbitrary abuse of discretion by a prosecutor or judge.

**“I testified before the Legislature in opposition to the proposed Three Strikes legislation. ... In reality, the actual implementation of the law has been appropriate.”**



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# Preface

*by The Honorable Gregory D. Totten, Ventura County District Attorney*

The theory, as former Secretary of State Bill Jones has noted, was simple: “if we could incarcerate the small percentage of criminals who commit the vast majority of crimes in our state, we could effectively lower the crime rate and save thousands of lives.”

The citizens of California resoundingly agreed. Seventy-two percent of the voters passed Three Strikes into law in 1994, fully aware of its provision allowing any current felony to trigger sentencing under the new law.

It worked. Ten years later California’s dramatic reduction in crime has surpassed predictions by optimistic Three Strikes supporters. The overall crime index is down throughout the state. Compared to 1993, the 2002 California crime rate was down 35% and the violent crime rate was down 44% over the same time period.

Based on the number of crimes committed in the decade before and the decade after passage of Three Strikes, more than two million Californians were spared the heartbreak of victimization. Tens of thousands of California residents were not murdered, not raped, not robbed, and not burglarized. While a myriad of factors contribute to any reduction in crime, there can be no doubt that Three Strikes has had a direct and significant impact on the reduction of crime in California.

Not all prosecutors were in favor of the 1994 legislation that gave us Three Strikes. Indeed, as executive director of the California District Attorneys Association in 1994, it was my responsibility to promote a more narrowly drawn, competing legislative proposal authored by Assembly Member Richard Rainey. Prosecutors, who feared the ballot initiative did not provide sufficient sentencing discretion given the serious punishment it authorized, initially favored the Rainey bill. But the Rainey bill was dropped as the Three Strikes movement gathered unprecedented public support, ultimately including many prosecutors.

**“History has now proven that Three Strikes advances public safety and serves the interest of justice.”**

The California Supreme Court resolved our initial fears about the lack of sentencing discretion, granting trial judges the ability to reduce Three Strikes sentences in appropriate cases. District attorneys and judges throughout California have used their discretion wisely and fairly to decide whether, and to what extent, to impose Three Strikes. History has now proven that Three Strikes advances public safety and serves the interest of justice.

Weakening Three Strikes would serve neither of these purposes. Indeed, all previous attempts to do so have failed. The current efforts to water down this important law are misguided and must be rejected.

As prosecutors we recognize that not every recidivist offender deserves a life sentence. Some do. For that elite class of career criminals there is Three Strikes. Three Strikes is a valuable and effective law that has helped reduce crime and better protect all Californians. It is an essential and proven tool in the fight against crime that must be preserved.

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# Preface

*by The Honorable George Kennedy, Santa Clara County District Attorney*

In 1994 I supported limiting third strikes to violent or serious felonies (the Rainey bill) over the Reynolds initiative that became law. Experience shows I was wrong and Reynolds was right. That is, the People are best served by my having the ability to remove demonstrably violent and dangerous repeat felons from among us when they are arrested for nonserious, nonviolent felonies. Numerous persons, particularly women and children, have been spared having to endure those violent third strikes.

The 2004 initiative to limit Three Strikes goes way too far, for example, by essentially eliminating residential burglaries and limiting strike allegations to one strike per prosecution, even if the prosecution resulted in convictions for multiple violent felonies at different times against different victims. Fear is an appropriate reaction to the number of prisoner releases that will occur. The last time changes in the law released so many habitual felons (Senate Bill 42 in 1976, which ended indeterminate sentencing), there was a tragic increase in violent crime.

Finally, experience shows it is more costly to society to continually release high-propensity felons who would usually be in prison anyway following intermittent releases during which they again commit crimes.

**“[T]he People are best served by [the prosecutor] having the ability to remove demonstrably violent and dangerous repeat felons from among us when they are arrested for nonserious, nonviolent felonies.”**

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# Prosecutors' Perspective on California's Three Strikes Law — A 10-Year Retrospective —

*“[P]rotecting the public safety requires incapacitating [recidivist] criminals.”*

—United States Supreme Court in *Ewing v. California* (2003)<sup>1</sup>

## I. BACKGROUND

### A. A Snapshot in Time: California and Crime in 1994

Between 1970 and 1994 California consistently posted significantly higher crime rates than the rest of the nation.<sup>2</sup> In response, California began moving away from sentencing that emphasized rehabilitation, and focused instead on deterrence and punishment. One legislative movement of the era was to extend mandatory prison sentences for certain crimes. Another movement was to transform felony sentencing from indeterminate to determinate incarceration terms. In the late 1970s the determinate sentencing provisions were expanded to create longer prison terms for the most serious and violent crimes. Through the 1980s the Legislature continued to increase prison terms for some felony offenses. In 1982 the Victims' Bill of Rights formally recognized the victims' side of criminal prosecutions and created new five-year enhancements for felons who had a prior conviction for a serious felony and then committed a new serious felony offense.<sup>3</sup>

Despite these changes, by the mid-1980s, violent crime in California was sharply increasing.<sup>4</sup> The early 1990s brought new laws limiting judicial power to reduce felony sentences by striking certain enhancements. Evidentiary rules for the early stages of felony prosecutions were made more efficient by allowing some hearsay evidence in preliminary hearings.<sup>5</sup> Nevertheless, by 1992 violent crime in California, including homicides, continued to track at high levels.<sup>6</sup>

On the national level, statistics released in a 1989 Federal Department of Justice report<sup>7</sup> indicated that much of the nation's crime could be attributed to recidivist offenders. The report found that of those inmates released from prison in 1983, 62.5% were arrested for a new offense within three years. The Federal Department of Justice report also showed that in 11 selected states, 67,898 of the 108,580 offenders released from prison in 1983 were responsible for an additional 326,746 arrests during the three years subsequent to their release. That report also found that prior to their incarceration, from which they were released in 1983, those inmates had collectively been responsible for 1.3 million offenses (approximately 12 prior offenses per inmate).<sup>8</sup>

In the summer of 1992, 18-year-old Kimber Reynolds was murdered by a paroled felon during an attempted robbery in Fresno. Three weeks later, Kimber's father, Mike Reynolds, convened an informal group of judges, attorneys, and law enforcement representatives to discuss sentencing practices. In April 1993 Reynolds testified in front of the California Legislature in support of a bill creating a Three Strikes sentencing structure. The Three Strikes idea was to provide sentences of 25 years to life in prison for certain recidivist offenders. The proposed legislation, however, received little support. Meanwhile, in November 1993, Washington state voters overwhelmingly approved a ballot initiative creating the first Three Strikes law in the nation.<sup>9</sup>

On November 30, 1993, Richard Allen Davis was arrested and subsequently charged and convicted of the kidnapping and murder of 12-year-old Polly Klaas. Davis kidnapped Polly at knifepoint from her Petaluma home. She was missing for two months before being discovered dead. Davis had previously been convicted of kidnapping, assault, burglary, and receiving stolen property. In December support of the Three Strikes sentencing initiative and the initiative's signature drive began to thrive. KGO Radio in San Francisco launched a signature drive in support of the Three Strikes initiative, and people lined up for three blocks to sign petitions.

In his January 1994 State of the Union Address, President Bill Clinton announced the addition of a national Three Strikes law to his crime-legislation agenda. The President vowed to fight for additional police on the streets and, among other things, a new tough sentencing structure for recidivist offenders.<sup>10</sup>

Galvanized by Polly Klaas' brutal murder, the state Legislature revisited the Three Strikes bill, AB 971 (Jones/Costa). In January 1994 the Assembly passed the bill by a 63–9 vote.<sup>11</sup> On March 3, 1994, the Senate passed AB 971 by a 29–7 vote.<sup>12</sup> Four days later Governor Pete Wilson signed the bill into law as emergency legislation, which was codified as Penal Code section 667(b)–(h). On the same day Mike Reynolds submitted petitions qualifying the Three Strikes initiative (Proposition 184) for inclusion on the November ballot. Reynolds submitted over 800,000 signatures—more than twice the number necessary to qualify for the ballot.<sup>13</sup>

In September 1994 the federal omnibus crime bill was signed into law by President Clinton. The new federal legislation included a three-strikes sentencing provision.<sup>14</sup>

In November 1994 California voters overwhelmingly voted for the Three Strikes initiative. Seventy-two percent of voters supported the law, codified as Penal Code section 1170.12.<sup>15</sup> Enacted by the initiative process, the Three Strikes law may be amended or repealed only by a new ballot measure or legislation approved by a two-thirds vote in both the Assembly and Senate before being signed by the governor.<sup>16</sup>

## **B. A Brief Description of the Three Strikes Law**

The Three Strikes law sets out a sentencing structure for career criminals. Its stated intent is “to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.”<sup>17</sup> In plain language, the law is aimed at those criminals who are neither deterred by incarceration nor amenable to rehabilitation efforts. The law, while generally referred to as “Three Strikes,”

contains two major sentencing mandates designed to carry out its stated intent: a two-strikes provision and a three-strikes provision.

The two-strikes provision doubles the sentence for those criminals convicted of any current felony if they have one prior conviction for a serious or violent felony. These defendants are commonly referred to as “second strikers.” The three-strikes provision imposes a sentence of life with a minimum term of at least 25 years in state prison, or a minimum term that is triple the normal sentence, whichever is greater, on those convicted of any current felony if they have two or more prior convictions for violent or serious felonies. This sentencing structure is commonly referred to as “25 years to life” in prison, and these defendants are referred to as “third strikers.” In both of the provisions, the prior felony conviction must be serious or violent to qualify as a “strike,” but the current or instant offense can be any felony offense. Also, most criminals qualifying pursuant to either provision are not eligible for probation and must serve a prison term.

For a defendant to be sentenced under the two- and three-strikes provisions, he or she must first be convicted of a felony offense. The prosecutor must also allege the prior strike convictions and prove beyond a reasonable doubt that they occurred. Once the trier of fact has convicted a defendant of a felony and found that he or she suffered at least one strike conviction, the trial court may sentence the defendant pursuant to the Three Strikes law.

Prior convictions that are serious or violent are enumerated in Penal Code sections 667.5(c), 1192.7(c), and 1192.8. (See Appendix A for a complete list.) Crimes that qualify as strikes include murder, rape, robbery, felonies resulting in great bodily injury, residential burglary, kidnapping, and forcible sex crimes. Additionally, the Three Strikes law allows prior serious or violent felony convictions that were pled and proved together in one case to count as separate strikes.

An out-of-state adult felony conviction qualifies as a strike if it contains the same elements as a qualifying prior conviction in California.<sup>18</sup> A juvenile adjudication may qualify as a strike prior if the juvenile was 16 years or older at the time of the commission of the offense, the juvenile was eligible to be tried as an adult, and the offense is a serious or violent felony. The list of offenses that qualify as strikes if committed by a juvenile is very similar to the adult list.<sup>19</sup>

A qualifying prior conviction can be charged as a strike forever. That is, there is no “washout period” (the length of time between the prior felony conviction and the current felony) as there is for some penalty enhancements.

Finally, a criminal who is sentenced under one of the provisions of the Three Strikes law receives less work-time credit than other inmates. Most inmates can receive 50% work-time credit. In other words, if the inmate stays out of trouble while in prison, half of his or her imprisonment term will be eliminated.<sup>20</sup> Under the Three Strikes law, a sentenced second striker receives only 20% maximum work-time credit. In 1994 the Penal Code was further amended to limit work-time credits for those inmates committed to state prison for violent felonies. Those inmates now receive a maximum of only 15% work-time credit.<sup>21</sup> As with other defendants sentenced to life terms, a third striker does not earn any custody credits against the indeterminate life term imposed under the Three Strikes law.<sup>22</sup>



## II. CAREER CRIMINALS SENTENCED PURSUANT TO THE THREE STRIKES LAW

The following synopses are case examples of career criminals who have been sentenced under the Three Strikes law during the past 10 years.

### **Kenneth Parnell**

Spanning his adult life, 72-year-old Kenneth Parnell has committed repeated predatory crimes against children.

For example, in March 1951, when Parnell was 19 years old, he kidnapped a nine-year-old boy in Bakersfield. After driving to a remote area of Kern County, Parnell sodomized the boy and forced the boy to orally copulate him.

In 1960 Parnell used a revolver to rob a Salt Lake City service-station owner of \$150.

In December 1972 Parnell and another man kidnapped seven-year-old Steven Stayner on his way home from school in Merced. Parnell held Stayner hostage as his “son” for more than seven years. Although convicted only of kidnapping,<sup>23</sup> Parnell admitted to sexually assaulting Stayner.

In February 1980 Parnell added a new “son” to his family by kidnapping five-year-old Timmy White in Ukiah. Parnell and an accomplice grabbed White while he was walking to his babysitter’s house. Parnell gave the scared child sleeping pills in the car to quiet him. Parnell kept the young boy at a cabin along with Stayner. Finally, one evening in March 1980, Steven Stayner and Timmy White walked away from the cabin and went to the Ukiah Police Department. Parnell was convicted of the kidnappings and served five years in prison.

In December 2002 Parnell was living in Berkeley. He attempted to purchase a four-year-old boy from Parnell’s former caretaker’s sister. Parnell specifically asked the woman to find him an African-American boy who was “clean” and had a birth certificate. The woman went to the police, and a sting operation began. Parnell withdrew \$500 from the bank. He met with the woman on January 3, 2003. She exchanged a birth certificate with Parnell, and he gave her \$100. The woman promised to go out and bring in the child. Parnell told her that he wanted the child to be asleep, and if the boy woke up, she was to “pinch him” and tell him to “be quiet and stay quiet.” The woman left the apartment but did not return. Instead, Berkeley police officers entered the residence and arrested Parnell. In Parnell’s pants pockets was the \$400 he intended to use to buy the child.

Inside Parnell’s apartment police found a new teddy bear, children’s videotapes, and bags of children’s clothing. Police also found pornographic videotapes, condoms, and a sexual aid. Parnell was convicted of one count of solicitation to commit the crime of kidnapping, one count of buying or attempting to buy a person, and one count of attempted child stealing.

The trial court sentenced him to 25 years to life in prison. (Note: If the current form of the Three Strikes law were not in effect, Parnell would be released in approximately January 2005.)

## **Jose Arreola**

Jose Arreola's first felony conviction was for burglary in 1982.

The following year, he was convicted of sexually abusing a child. He had enticed a seven-year-old boy to the rear of a market where he kissed the boy and forced him to engage in mutual fondling. He was placed on a grant of probation.

Shortly thereafter, Arreola committed several sex offenses involving kissing and fondling boys aged eight to 10 years. At the time, he was convicted of child molestation and sentenced to eight years in prison. If the Three Strikes law had been in effect, Arreola could have been sentenced to 16 years in prison pursuant to the two-strikes provision.

In 1991 Arreola was convicted of driving under the influence of alcohol. A few months later, he was convicted of petty theft with a prior theft conviction.

In 1995, after the enactment of the Three Strikes law, Arreola was charged with felony possession of a controlled substance and felony hit-and-run. He hit a parked car with his minivan and failed to stop. He ran stop signs and nearly hit a pedestrian before crashing into another car. Arreola admitted he was under the influence of PCP. The trial court reduced his charge to a misdemeanor, disqualifying him from the Three Strikes sentence of 25 years to life, and placed him on probation.

In 1999 Arreola pled guilty to two counts of forcible lewd acts upon a child in connection with his molestation of three of his relatives for more than a five-year period. He admitted to mutual oral copulation and sodomy on boys ages seven, eight, and 10. Finally, pursuant to Three Strikes, Arreola was sentenced to 50 years to life in prison.

## **Cladius Johnson**

In 1979 Cladius Johnson was convicted for his role in gang-raping a woman at gunpoint.

Six years later, Johnson was convicted of robbery. During this offense, Johnson demanded a woman's purse on the street, and when she screamed he punched her in the face, grabbed her purse, and ran.

In 1988 Johnson was convicted of the felony of carrying an automatic machine gun that contained 29 live rounds. He was sentenced to 16 months in prison. If the Three Strikes law had been in effect at the time, Johnson likely would have been sentenced to 25 years to life in prison.

Months after being paroled in 1989, Johnson, along with two friends, entered a woman's residence by false pretenses. Once inside, one of Johnson's friends put a gun to the victim's head and later fired two rounds into the floor of the building. For Johnson's involvement in this offense, he was convicted of assault with a deadly weapon, for which he served less than six years in state prison. Again, if Three Strikes had been in effect at the time, Johnson likely would have been sentenced to 25 years to life in prison.

Finally, in 1995 Johnson was attending his estranged wife's daughter's birthday party in San Bernardino County when he became drunk and violent. During the course of his rage,

Johnson choked his wife into unconsciousness. Later, Johnson fought with neighbors in the street. When his wife regained consciousness, she hid Johnson's gun in fear that he would use it. When Johnson learned of his wife's actions, he beat her. The trial court sentenced Johnson under the Three Strikes law to 25 years to life in prison.

### **Kenneth Fuller**

In 1980 Kenneth Fuller lured a four-year-old girl into his apartment where he penetrated her vagina with his fingers and also orally copulated her. When the girl screamed, Fuller choked her and believed she was dead. He put the girl's body into a trash Dumpster. Even when he heard her moan, he continued to walk away. Fuller was convicted of attempted murder and felony child molestation causing great bodily injury.

In 1992, just after being released from prison, Fuller violated parole because he was living with a woman who had children.

In 1994 Fuller was convicted of failing to register as a sex offender.

In 1997 Fuller moved to a new residence in Kern County without re-registering as a sex offender, in violation of Penal Code section 290. He was convicted of the felony of failure to register as a sex offender, pursuant to Penal Code section 290, and the trial court sentenced him under the Three Strikes law to 25 years to life in prison.

### **Ervin Cole<sup>24</sup>**

In 1984 Ervin Cole was convicted of robbery using a firearm.

In 1991 Cole was convicted of burglary.

A year later Cole was convicted of assault with a deadly weapon.

Cole was sentenced to prison for each of these convictions. After his release, he violated parole five times from 1989 through 1997. During this same time, he was also convicted of two misdemeanors.

In 1999 Cole was observed driving a stolen vehicle in Hawthorne, California, and police officers attempted to stop him. Instead of stopping in response to police lights and sirens, Cole accelerated rapidly and led police on a chase. He swerved in and out of traffic, reached a speed of more than 85 miles an hour on a residential street, ran two red lights and three stop signs, swerved into opposing lanes of traffic, and nearly crashed into several other cars. Cole finally collided with another vehicle, spun out of control, and his vehicle rolled over. Cole's passenger and the driver of the other vehicle were injured. Cole fled on foot and was tackled by a police officer.

Cole pled guilty to felony evading arrest, car theft, and felony hit-and-run. He admitted two prior serious or violent convictions and three prior prison-term felony convictions, and was sentenced to prison for 25 years to life. During the sentencing hearing the Los Angeles County Superior Court judge said:

For the last 16 years, you have been continuously in prison or on parole from state prison. In fact, by my count it looks to me you have gone back to prison five times on various parole violations. And that's separate and apart from the additional burglary conviction .... I don't see anything in your future ... [except] more of the same.<sup>25</sup>

## **John Bunyard**

John Bunyard began his criminal career in 1955, and over a 20-year period was convicted of 10 felonies. In 1973 he embarked on a crime spree including the murders of two women and the rapes, assaults, and kidnappings of many others.

In March 1973 Bunyard, abducted a woman at knifepoint as she was getting out of her car in San Francisco. He forced her to drive to another location where he attempted to rape her. Bunyard ran away when the victim screamed and fought with him. That same month, Bunyard grabbed a young woman as she was leaving her San Francisco apartment. He forced her back into her apartment at knifepoint where he stabbed her repeatedly and choked her into unconsciousness. She ultimately survived after a three-week hospitalization.

The following month, Bunyard abducted a young woman near Lake Tahoe after she agreed to give him a ride. At knifepoint he forced her to drive to her apartment where he made her undress, tied her up, and raped her. He then took her up a hill, tied her up again, and left her. She was able to attract a passing motorist. When officers stopped Bunyard's car a short time later, a struggle ensued. He gained control of an officer's gun, fired several shots at the officers, and escaped.

The next day at Golden Gate Park, Bunyard surprised two officers at gunpoint, disarmed them, and commandeered a car driven by a woman and her young daughter. He later released them unharmed. That same day, he went to a house in Oakland and told the woman who lived there that his car had broken down. The victim let him in to use the bathroom. After he entered, he raped the woman at gunpoint. He then forced her to drive to Mariposa, where he broke into two motels and shot and killed two women. Shortly afterwards, he engaged in a gun battle with sheriff's deputies, eluded capture, broke into another motel, kidnapped a couple and forced them to take him to Merced. After another car chase, officers stopped the car. Bunyard got out, holding one of the victims at gunpoint. The victim's husband knocked her from Bunyard's grasp, and Bunyard was then shot by police in the chest and arm.

Altogether, Bunyard was convicted of two second-degree murders, two counts of attempted rape, two counts of assault with intent to commit great bodily injury, four counts of assault with a deadly weapon (firearm), four counts of kidnapping (two with gun enhancements), robbery with a firearm, assault with a deadly weapon (firearm) on a police officer, and one count of being a felon in possession of a firearm. He was sentenced to a total prison term of 19 years. He was released with a one-year period of parole in Santa Clara County in 1986. He returned to prison on a parole violation and was again paroled in 1987. He was convicted in 1992 for possessing a billy club, a felony for which he could have received a 25 year-to-life sentence had the Three Strikes law been in effect. Instead, Bunyard was placed on probation.

In 1996 Bunyard solicited a 14-year-old girl who was walking to a store in San Jose. He offered the girl money so that he could “look” at her. Bunyard was arrested and convicted of attempting to commit a lewd and lascivious act on a 14 year old. He was finally sentenced under the Three Strikes law to 28 years to life in prison.

### **Michael Cepeda<sup>26</sup>**

In the early 1980s Michael Cepeda burglarized two homes and broke into a car. He was convicted of two counts of residential burglary and sentenced to state prison.

In 1989 he violated parole by being under the influence of drugs. That same year he was convicted of robbery and sentenced to seven years in prison.

In September 1994 Long Beach police officers stopped five men, including Cepeda, in an alley. Cepeda allowed the officers to search him, and they found two rocks of cocaine and a cocaine pipe. Cepeda was charged with possession of cocaine, and it was alleged that he had three prior strike convictions. Cepeda pleaded guilty to possession of cocaine, and the trial court used its discretion to strike two of the prior three-strikes conviction allegations. Cepeda was sentenced under the two-strikes provision, receiving a total of eight years in prison.

### **Manuel Morales<sup>27</sup>**

In 1993 Manuel Morales was convicted of two counts of felony child molestation. The first victim was four years old at the time of the molestation. The second victim testified that she was molested by Morales for a six-year period. The victim said, “Everything you could imagine that could be done to a person was done to me by (Morales).”<sup>28</sup> Morales admitted to having a relationship when this second victim was 13 years old, and stated that he “felt in love with her,” and that “she was a nice, young girl.”<sup>29</sup>

In March 2001, in Los Angeles, Morales approached four pre-teen girls on two separate occasions and showed them pornographic magazines. In one case, Morales asked the girls if they knew “somebody who wants to do this.”<sup>30</sup> In the other case, Morales asked the girls if they knew “where to find these pictures.”<sup>31</sup> Morales was convicted by a jury of three counts of annoying or molesting a child. The jury also found that Morales had previously been convicted of two strike convictions. At sentencing, the trial court dismissed one of the prior strike convictions in furtherance of justice and sentenced Morales to 12 years, double the standard prison term, pursuant to the two-strikes provision in the Three Strikes law.

### **Jerry Williams**

Jerry Williams is the “Pizza Thief” made famous by many press accounts.

Between 1980 and 1990 Williams was arrested 14 times. At age 19, while on probation, Williams was convicted of robbery.

Two years later Williams was convicted of stealing a car.

In 1992 he was convicted of attempted robbery and sentenced to more prison time.

In July 1994, Williams approached four children who were sitting on the Redondo Beach pier eating pizza. Williams, who is six feet, four inches tall and weighed 220 pounds, demanded a slice of pizza from the children. After the children said no, Williams confronted them and took a slice of the pizza. He was convicted of committing petty theft with prior robbery-related strike convictions. The trial court eventually dismissed one of Williams' strike convictions and sentenced him under the two-strikes provision to six years in prison.

### **Steven Mathews**

Steven Mathews began his criminal career in 1968 when he was convicted of kidnapping and robbery in San Bernardino County. He was again convicted of robbery in 1971 in Yolo County. Eight years later, Mathews was convicted of murder, assault with intent to commit murder, and two counts of attempted murder in Imperial County.<sup>32</sup> If the Three Strikes law were in effect at the time, Mathews could have been sentenced to 25 years to life in prison. Instead, he was sentenced to prison and paroled in 1987. After his release, in October 1987, Mathews was convicted of the rape and forcible oral copulation of his mother and was sentenced to 17 years in prison.

In 2003 Mathews was stopped by law enforcement officers for drinking in public. As the officers approached, Mathews dropped his jacket. Inside the jacket was a two-foot long machete and a geological hammer. The hammer had the words, "fag finder reminder" inscribed on its handle. Mathews was convicted of felony weapons possession and sentenced to 25 years to life in prison pursuant to the Three Strikes law.

### **Leandro Andrade<sup>33</sup>**

Leandro Andrade had an addiction to heroin since 1977, and he stole to support his habit.

Andrade has been in and out of state and federal prison since 1982. During a 13-year period, Andrade suffered nine convictions, including five felony residential burglaries and several drug-trafficking offenses.

In 1991 Andrade was incarcerated for escaping from federal prison.

On two separate occasions in San Bernardino County in 1995, Andrade stole a total of nine videotapes valued at \$153 from a department store. A jury convicted Andrade of two counts of felony theft and found that he had suffered three prior strike convictions for residential burglary. The trial court sentenced Andrade to two consecutive 25-years-to-life prison terms. The United States Supreme Court found the sentence to be constitutional.

### III. THREE STRIKES IN PRACTICE

#### A. Screening Criminal Cases

As outlined above, a criminal who is convicted of any current felony offense and who has suffered one or more prior convictions for serious or violent felonies qualifies to be sentenced pursuant to the Three Strikes law. The small number of crimes that qualify as serious and violent felonies are listed in the Penal Code in sections 1192.7(c) and 667.5(c) (see Appendix A). All other felonies are found throughout the Penal Code and in several other codes, and total approximately 550.

When an individual commits a crime and the local or state law enforcement agency submits a report to the district attorney's office, the prosecutor must first determine what offenses were committed and at what level—felony or misdemeanor—punishment is appropriate. Some crimes are called “wobblers.” These crimes can be charged as either misdemeanors or felonies, depending on the circumstances surrounding the criminal activity. Examples of “wobblers” include auto theft, theft with a prior theft conviction, grand theft, and burglary in the second degree.<sup>34</sup> Other crimes are straight felony offenses, leaving no choice in a charging decision. Examples of these straight felony crimes include murder, rape, robbery, and residential burglary.

Where there are no statutory limitations, prosecutors must exercise discretion in a charging decision as to whether to file charges, whom to charge, what crimes to charge, and whether to charge those crimes as felonies or misdemeanors. In doing so, prosecutors consider any mitigating evidence and a defendant's prior criminal record. Stealing to feed one's family, for instance, is viewed differently than stealing to feed one's drug habit. On the other hand, suspects with lengthy criminal histories normally receive felony punishment.

If the determination is made that a defendant's crime is worthy of felony punishment, or that the particular crime committed is punishable only as a felony, then a defendant's prior criminal record is further scrutinized for prior convictions that may serve as enhancements to lengthen the ultimate sentence.

#### B. Prosecutorial Discretion

The Three Strikes law requires that in a new prosecution for a felony, each qualifying prior strike conviction be pled and proved by the prosecution.<sup>35</sup> Plea bargaining of strike priors is expressly forbidden.<sup>36</sup> The prosecution may, however, request that the court dismiss a felony strike under two circumstances: (1) in the furtherance of justice pursuant to Penal Code section 1385, or (2) if there is insufficient evidence to prove the prior conviction.<sup>37</sup>

Many of California's district attorneys have approved policies governing the exercise of the prosecutor's discretion in moving the trial court to dismiss strikes in the furtherance of justice.<sup>38</sup> Prosecutors consider many factors in evaluating the use of discretion to request dismissal of strikes in the furtherance of justice, including but not limited to: (1) Is the current offense a serious or violent felony? (2) Did the previous strikes occur within a single criminal incident? (3) Has the defendant remained crime and custody free for a reasonable period of time prior to the current offense? (4) Does the defendant have a record of weapons use or violence?<sup>39</sup>

Prosecutorial discretion is exercised in some fashion in most criminal cases. Data from California's most populous counties reveal that prosecutorial discretion to request the court to dismiss felony strikes is used in 21–40% of all Three Strikes cases.<sup>40</sup> Where the court grants the prosecutor's request to dismiss all but one felony strike, potential third strikers who would have received sentences of 25 years to life receive a two-strikes sentence of double the normal sentence for the current offense.<sup>41</sup>

## C. Judicial Discretion in Sentencing

### 1. Dismissing a Prior Strike Conviction to Lessen a Three Strikes Sentence

When the Three Strikes law was first enacted, one of the questions frequently posed was whether or not the trial court judge in a Three Strikes case had discretion to dismiss one or more prior convictions. In 1996, in *People v. Superior Court (Romero)*<sup>42</sup> the California Supreme Court answered that question by interpreting the law to allow for judicial discretion to dismiss serious or violent felony prior convictions on the court's own motion for purposes of two- strikes and three-strikes sentencing. This exercise of judicial discretion applies either to a single prior conviction or to all prior convictions applicable to a current case.<sup>43</sup> The *Romero* court found that a trial court may exercise its authority to dismiss strike priors on its own motion in the furtherance of justice pursuant to Penal Code section 1385.<sup>44</sup>

A trial court's decision to dismiss a prior strike may be reviewed for abuse of discretion, however.<sup>45</sup> The standard for exercising the court's discretionary power to dismiss a strike is set forth in *People v. Williams*.<sup>46</sup> A trial court should give "no weight whatsoever ... to factors extrinsic" to the sentencing scheme of the Three Strikes law.<sup>47</sup>

We therefore believe that, in ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.<sup>48</sup>

In *Williams*, the defendant was charged with felony driving under the influence with three prior convictions under Penal Code section 667.5(b) and two prior strike convictions (attempted robbery and rape) that were 13 years old. The trial court dismissed one prior strike conviction and then sentenced the defendant pursuant to only the two-strikes provision of the law for a total of nine years. The California Supreme Court granted review and found that the trial court abused its discretion by dismissing the strike prior conviction. *Williams* suffered his fourth driving-under-the-influence conviction, indicating that he failed to learn his lesson; his prior strike convictions were devoid of mitigation; and his background, character, and prospects were unfavorable since he was



unemployed, failed to follow through with efforts to control his substance abuse, and failed to refrain from criminal activity between his strike convictions and his current charge. Instead, he was either in prison or jail or violating his parole or probation on a regular basis.<sup>49</sup>

The court may also dismiss a qualifying prior strike conviction as it relates to one current charge but decline to dismiss it as to another current charge.<sup>50</sup> In *People v. Garcia*,<sup>51</sup> the trial court exercised its discretion under Penal Code section 1385 by dismissing both strike convictions as to one count but not the other. The California Supreme Court stated:

[A] defendant's sentence is also a relevant consideration when deciding whether to strike a prior conviction allegation; in fact, it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences. [Citation omitted.] A trial judge, applying the factors we enumerated in *Romero* and *Williams*, may find adequate justification for striking one or more prior conviction allegations, but may deem appropriate the sentence that results from striking the prior conviction allegations as to only some counts. When a proper basis exists for a court to strike prior conviction allegations as to at least one current conviction, the law does not require the court to treat the other current convictions with perfect symmetry if symmetrical treatment would result in an unjust sentence.<sup>52</sup>

A trial court's discretion to dismiss prior strike convictions in the furtherance of justice is limited, however.<sup>53</sup> In determining whether to dismiss a prior conviction, the trial court must consider both "the constitutional rights of the defendant, and *the interests of society represented by the People*."<sup>54</sup> A trial court abuses such discretion if it dismisses a prior simply (1) to accommodate judicial convenience or court congestion, (2) because the defendant pled guilty, or (3) out of personal antipathy for the Three Strikes law.<sup>55</sup> The trial court's decision to dismiss a prior conviction is reviewable for abuse of discretion by an appellate court.<sup>56</sup>

Examples of cases where an abuse of discretion has been found for a trial court's dismissal of a prior-strike conviction include: *People v. McGlothin*; *People v. Carter* [a trial court's personal antipathy for the Three Strikes law]; *People v. Gaston*; *People v. Strong*; *People v. Thornton* [a record demonstrating the defendant led a life of crime]; *People v. Smith*; *People v. Humphrey*; *People v. Williams* [failure to consider the intervening conduct of defendant between prior convictions]; *People v. Superior Court (Romero)* [mere accommodation of judicial convenience, court congestion, or reward for a guilty plea].<sup>57</sup>

In order to facilitate an appellate review, and as required by Penal Code section 1385, a trial court must enter its reasons for dismissing the prior conviction in the clerk's minutes of the sentencing proceeding.<sup>58</sup> Where the court's action lacks reason, it may be invalidated upon timely challenge. As stated in *Romero*:

“The statement of reasons is not merely directory, and neither trial nor appellate courts have the authority to disregard the requirement. It is not enough that on review the reporter’s transcript may show the trial court’s motivation; the *minutes* must reflect the reason ‘so that all may know why this great power was exercised.’” [Citation omitted.]<sup>59</sup>

Since neither the Legislature nor the electorate withdrew a trial court’s power to dismiss prior convictions under Penal Code section 1385 when they enacted the Three Strikes laws, a trial court retains such discretion.<sup>60</sup> Such discretion allows trial courts to fashion appropriate sentences for repeat offenders by striking prior convictions when judges believe a lesser sentence is warranted than that required by strict application of the Three Strikes law.

## 2. Reducing a Felony to a Misdemeanor

Another way a trial court judge may exercise his or her discretion is by reducing certain charged felony offenses to misdemeanors pursuant to Penal Code section 17(b). In *People v. Superior Court (Alvarez)*,<sup>61</sup> the California Supreme Court discussed this mechanism that may be used to fashion an appropriate sentence for a defendant with serious or violent prior convictions that would otherwise subject him or her to punishment under the Three Strikes law. The *Alvarez* court ruled that trial courts retain discretion to reduce current felony “wobbler” offenses<sup>62</sup> to misdemeanor offenses. Since current misdemeanor convictions do not trigger sentencing under the Three Strikes law, an exercise of such discretion prevents a defendant from being sentenced under Three Strikes.

On Christmas day in 1994, Steven Alvarez was stopped for riding his skateboard “on the wrong side of the street.”<sup>63</sup> Alvarez consented to a search of his bag, which contained drug paraphernalia and methamphetamine.<sup>64</sup> Alvarez was charged with, and convicted of, felony drug possession, and his four prior serious felony convictions were found to be true. This current felony conviction (along with his serious prior convictions) qualified him for sentencing under the Three Strikes law.<sup>65</sup>

Possession of methamphetamine is considered a “wobbler” under California law—a “crime[] that, in the trial court’s discretion, may be sentenced alternatively as [a] felon[y] or [a] misdemeanor[].”<sup>66</sup> There are three ways that a “wobbler” becomes a misdemeanor,<sup>67</sup> (1) the prosecutor charges the crime as a misdemeanor, (2) the magistrate reduces a “wobbler” charged as a felony to a misdemeanor,<sup>68</sup> and (3) the trial court reduces a “wobbler” resulting in a felony conviction to a misdemeanor at the time of sentencing.<sup>69</sup> The Three Strikes law applies only to felony convictions; it does not apply to misdemeanor convictions or “wobblers” that have been reduced from felonies to misdemeanors.<sup>70</sup>

The California Supreme Court concluded that, with regard to “wobbler” offenses, it cannot be determined whether the current offense is a felony or misdemeanor until the trial court pronounces sentence<sup>71</sup> and if the court reduces the charge to a misdemeanor at that time, the defendant avoids Three Strikes punishment for his or her offense.

The California Supreme Court further determined that the trial court's exercise of discretion under Penal Code section 17(b) is reviewable for abuse of discretion by an appellate court.<sup>72</sup> The fact that a "wobbler" offense originated in the context of a Three Strikes case will be given considerable weight, but the trial court's decision "should reflect a thoughtful and conscientious assessment of all relevant factors including the defendant's criminal history."<sup>73</sup> "[A]ny exercise of [Penal Code section 17(b)] authority must be an intensely fact-bound inquiry taking all relevant factors, including the defendant's criminal past and public safety, into due consideration ...."<sup>74</sup>

In Alvarez's case, for example, the California Supreme Court decided that the trial court had not abused its discretion. "[N]otwithstanding defendant's recidivist status, the balance of other factors could warrant a reduction of the charge."<sup>75</sup> Although the defendant had four prior convictions for residential burglary, "which it appears he committed to support a drug habit," "[d]efendant was cooperative with law enforcement," these priors were "relatively old and did not involve violence," and the court heard defendant's testimony that "he had been caring for a disabled friend."<sup>76</sup>

Thus, Penal Code section 17(b) demonstrates another way, in addition to striking prior convictions under Penal Code section 1385,<sup>77</sup> that trial courts exercise their discretion to determine an appropriate sentence for a particular offender with a recidivist history. Although the prosecution's charging of one or more prior convictions under the Three Strikes law is an important consideration in determining whether to reduce a current "wobbler" offense to a misdemeanor, it is not dispositive. The trial court judge retains considerable discretion in fashioning an appropriate Three Strikes sentence.

#### **D. Eligibility for Drug-Treatment Programs**

Proposition 36, which passed in November 2000 and went into effect in July 2001 as Penal Code section 1210.1, provides for probation and treatment for defendants charged with, and convicted of, nonviolent drug offenses. Under that law, a defendant with prior convictions for serious or violent offenses can still qualify for drug treatment pursuant to Proposition 36.

A Three Strikes candidate can qualify for drug treatment if he or she has been out of prison for the past five years and during that period has remained free of (1) parole or probation, (2) a felony conviction (other than narcotics possession), and (3) a misdemeanor conviction involving physical injury or the threat of physical injury.<sup>78</sup>

In other words, a defendant who is convicted of felony possession of narcotics and would otherwise qualify to be sentenced up to 25 years to life in prison under Three Strikes can receive drug treatment instead if he or she has been "clean" for the past five years. For example, a defendant charged with possession of narcotics who has robbery convictions from 1984 and 1989 and was paroled from state prison in 1995, and has not been in the criminal justice system since his parole ended, would qualify for drug treatment instead of a Three Strikes sentence. With narcotics possession cases, only defendants who have prior strike convictions **and** have recently continued a life of criminal activity are eligible for Three Strikes.

## **E. Jury Safeguards for the Three Strikes Defendant**

In a typical jury trial, both the prosecution and the defense are allowed 10 peremptory challenges to dismiss potential jurors. In other words, both sides can excuse up to 10 potential jurors without cause for almost any reason.<sup>79</sup> Cases where the potential sentence for the defendant is life in prison allow each side 20 peremptory juror challenges. If a third-striker defendant is on trial, he or she faces a possible sentence of 25 years to life in prison; therefore, the defendant is afforded 20 juror challenges.<sup>80</sup> These additional peremptory challenges help to ensure that the defendant has a fair and impartial jury to hear the case.

## **F. Appellate Safeguards for the Three Strikes Defendant**

There are many safeguards within the criminal justice system to protect against potentially excessive sentences for defendants eligible for the Three Strikes law. In addition to the protections mentioned above at the trial-court level, a defendant has several avenues and forums to challenge a sentence should he or she believe it to be excessive. A defendant may ask the state appellate courts, as well as federal courts, to review the sentence imposed.

Following conviction and sentencing, a defendant has the right to an appeal and to have counsel appointed for this appeal if he or she is indigent.<sup>81</sup> On appeal, a defendant may challenge the sentence on the ground that the trial court failed to exercise or abused its sentencing discretion.<sup>82</sup> A defendant might also challenge the trial court's discretionary decision whether or not to dismiss a prior conviction, the trial court's decision whether or not to reduce a felony "wobbler" offense to a misdemeanor, the actual sentencing term, or the court's decision to impose a consecutive sentence.<sup>83</sup>

As a last resort, the defendant may also argue that the sentence imposed was unconstitutionally cruel and unusual.<sup>84</sup> Should the defendant's appeal be unsuccessful or should the defendant become aware of additional facts outside of the record on appeal, he or she may seek additional review beyond an appeal by means of a petition for writ of habeas corpus.<sup>85</sup>

Once a defendant has exhausted all remedies in state court, he or she may also seek review of the sentence by a federal court.<sup>86</sup> Defendant's claims of federal constitutional violations may be alleged first in the federal district court and, should the ruling be unfavorable, the defendant may appeal the ruling to the Ninth Circuit Court of Appeals or petition for a writ of certiorari to the United States Supreme Court.<sup>87</sup>

## IV. THE THREE STRIKES LAW BY THE NUMBERS

### A. Sentenced Second-Strike Defendants Since 1994

As described earlier, a second-strike defendant (i.e., one who is convicted of a felony, having been earlier convicted of a serious or violent felony) receives double the sentence that a first-time offender could have received.

In each year since the passage of the law in 1994, the number of criminal defendants in California who have been convicted of a new felony offense and who had previously suffered a conviction for **one** serious or violent felony has remained relatively constant. (See Chart 1.) Other than in 1994, during which the law was in effect for less than one calendar year, the number of sentenced second-strike defendants has ranged from a high of 9,845 in 1995 to a low of 7,469 in 2002.

**Number of Second- and Third-Strike Offenders Admitted to the California Department of Corrections, Along with Total New Prison Admissions, by Year**

<b>YEAR</b>	<b>SECOND STRIKERS<sup>88</sup></b>	<b>THIRD STRIKERS<sup>89</sup></b>	<b>TOTAL NEW ADMISSIONS<sup>90</sup></b>
1994	3,632	150	41,580
1995	9,845	862	45,459
1996	9,369	1,248	46,487
1997	8,789	1,151	46,823
1998	8,968	1,046	46,589
1999	8,500	875	42,936
2000	7,786	684	40,276
2001	7,869	493	52,464
2002	7,469	422	53,033
2003	7,860	401	59,116
<b>TOTAL</b>	<b>80,087</b>	<b>7,332</b>	<b>474,763</b>

*Chart 1*

During the 10 years since the law was enacted, a total of 80,087 convicted felons in California have had their prison sentences doubled (from, on average, two and one-half years to, on average, five years) because of their having been convicted of one prior serious or violent felony. The majority of these sentenced two-strikes defendants have already served their entire sentences and have been released from prison. As of December 31, 2003, 32,177 of these second-strike defendants still remained in the custody of the California Department of Corrections (CDC). (See Chart 2.)

In 42% of these 32,177 inmates' cases, the most recent conviction, like the prior strike conviction, was for a serious or violent felony (such as rape, robbery, residential burglary, etc.). By contrast, in 58% of these second-strike cases, the most recent felony conviction was

for a nonserious or nonviolent felony (such as auto or commercial burglary, auto theft, embezzlement, petty theft with prior theft conviction and custody time, drug sales, etc.). (See Chart 2.)

**Number of Second- and Third-Strike Defendants Confined in State Prison and Sentence Type (as of December 31, 2003)<sup>91</sup>**

	<b>SECOND STRIKE</b>	<b>THIRD STRIKE</b>	<b>TOTAL</b>
<b>NONSERIOUS/NONVIOLENT</b>	18,731	3,452	22,182
<b>VIOLENT</b>	7,893	2,499	10,392
<b>SERIOUS</b>	5,553	1,381	6,933
<b>TOTAL</b>	32,177	7,332	39,507

Chart 2

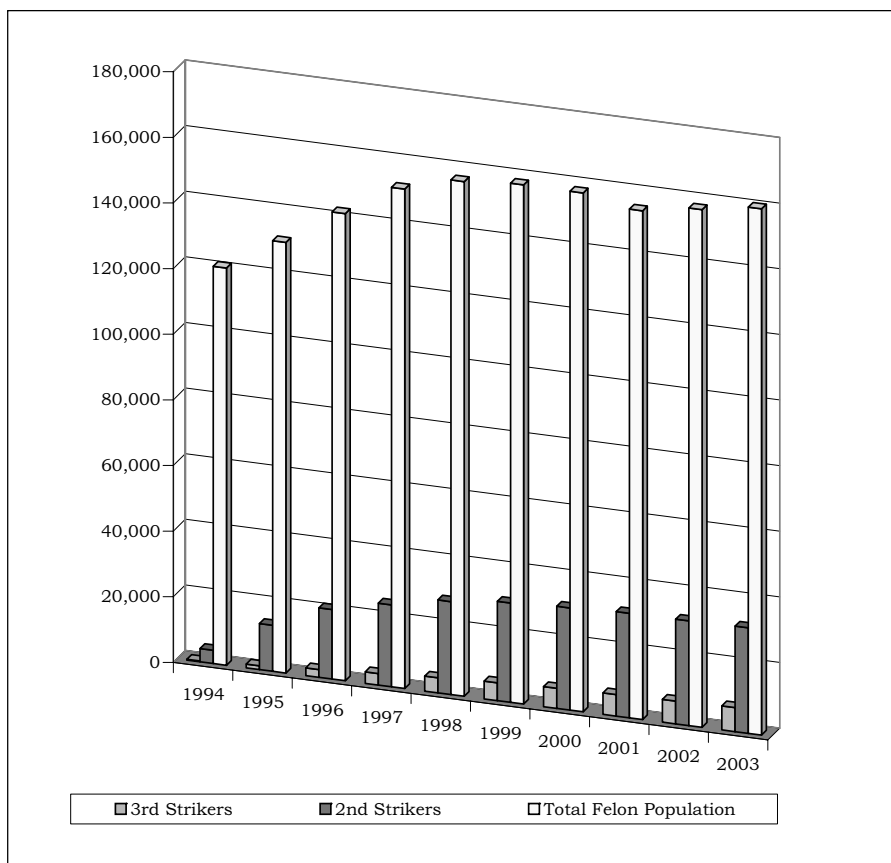
### **B. Sentenced Third-Strike Defendants Since 1994**

According to the California Department of Corrections, the number of sentenced third-strike defendants (i.e., defendants who have been convicted of a new felony while having been convicted previously of **two** or more serious or violent felonies) admitted to state prison since 1994 is 7,332. (See Chart 1.) During the nine full calendar years since Three Strikes was enacted, the annual number of defendants sentenced as third strikers has varied substantially from a high of 1,248 in 1996 to a low of 401 in 2003. In fact, the number has declined every year since 1996.

In the context of the number of annual felony convictions in California, the number of three-strikes convictions is relatively minuscule. For example, in 2002 there were more than 171,000 felony convictions in California.<sup>92</sup> In that same year, only 422 of those felony convictions were for defendants who were sentenced as third strikers (see Chart 1), amounting to less than one-fourth of 1% of all of the convicted felons in California during 2002.

A comparison of the 422 third-strike defendants sentenced to state prison in 2002 to the total number of California felony defendants sentenced to state prison that same year (53,033), shows that they made up only slightly less than 1% of defendants sentenced to prison statewide in 2002. (See Chart 1.)

**Second- and Third-Strike Population vs. Total Inmate Population Within  
the California Department of Corrections<sup>93</sup>**



Graph 1

Yet another comparison is reflected in the graph above, which shows by year the number of second- and third-strike defendants confined in state prison in comparison to the total inmate population in state prison. (Graph 1.) At the end of 2003, for example, the number of three-strikes sentenced inmates (7,332) made up less than 5% of the current inmate population of 160,362. Together, the 39,507 two- and three-strikes sentenced inmates comprise slightly less than one-fourth of the 160,362 current inmate population.

**C. For the Past 10 Years, Parolees Have Been Leaving California in Larger Numbers Than Parolees Who Have Been Coming Into the State**

Beginning in 1994, for the first time in more than 18 years, more parolees began to seek reciprocal supervision in states outside of California than the number of felony parolees from other states who were seeking to reside, and be supervised, in California.<sup>94</sup> Meaning that more parolees are leaving the state than entering.

While the impact of the 1994 Three Strikes initiative on this phenomenon might be subject to debate, the fact is that this abrupt reversal of a long-standing pattern has continued unabated for the eight years following the passage of Three Strikes, for which figures are available. (See Chart 3.)

**Number of Parolees from Other States Living in  
California vs. California Parolees Living in Another State, by Year<sup>95</sup>**

<b>YEAR</b>	<b>PAROLEES FROM OTHER STATES LIVING IN CALIFORNIA</b>	<b>CALIFORNIA PAROLEES LIVING IN OTHER STATES</b>
1990	2,241	1,533
1991	2,232	1,793
1992	2,178	2,039
1993	2,271	2,045
1994	1,789	2,392
1995	1,429	2,764
1996	1,422	2,518
1997	1,275	2,364
1998	1,284	2,193
1999	1,350	2,007
2000	1,294	1,880
2001	1,405	1,734
2002	<i>figures not yet available</i>	<i>figures not yet available</i>

Chart 3

During those eight years, in contrast to the previous 18 years, some 6,600 more felony parolees left California to live elsewhere than have come into California from other states. As a result, California has become a net exporter of felony parolees, rather than a net importer.

This phenomenon was cited by United States Supreme Court Justice Sandra Day O'Connor in her lead opinion in *Ewing v. California*,<sup>96</sup> in which she noted:

An unintended but positive consequence of “Three Strikes” has been the impact of parolees leaving the state. More California parolees are now leaving the state than parolees from other jurisdictions entering California. This striking turn-around started in 1994. It was the first time more parolees left the state than entered since 1976.<sup>97</sup>

**D. Ten Years of Substantial Drop in the California Crime Rate**

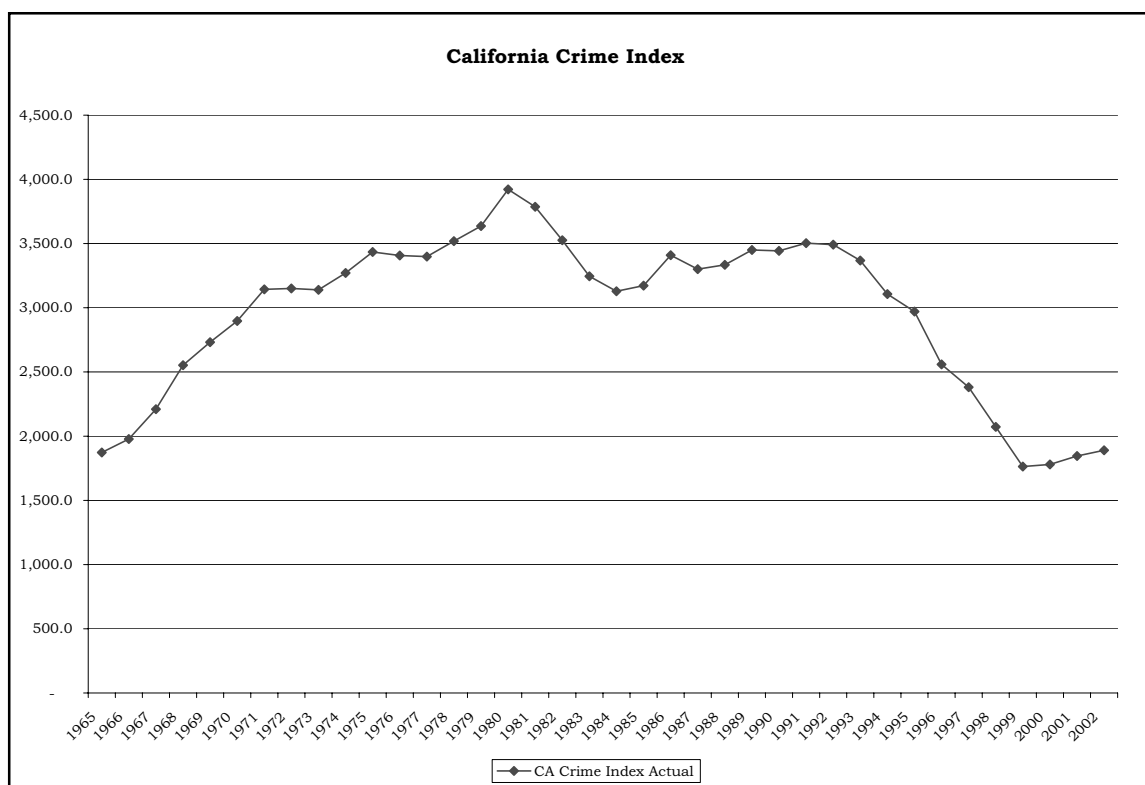
Calculations based on the California Crime Index indicate that since Three Strikes was first signed into law on March 7, 1994, there has been a dramatic drop in California’s crime rate.<sup>98</sup>

Whether or not such a decline over the past 10 years can be attributable to the Three Strikes sentencing scheme, other sentencing legislation enacted during the decade, changes in



demographics, economic trends, or a combination of these factors, the crime rate in California has fallen by approximately 45% during this 10-year period.

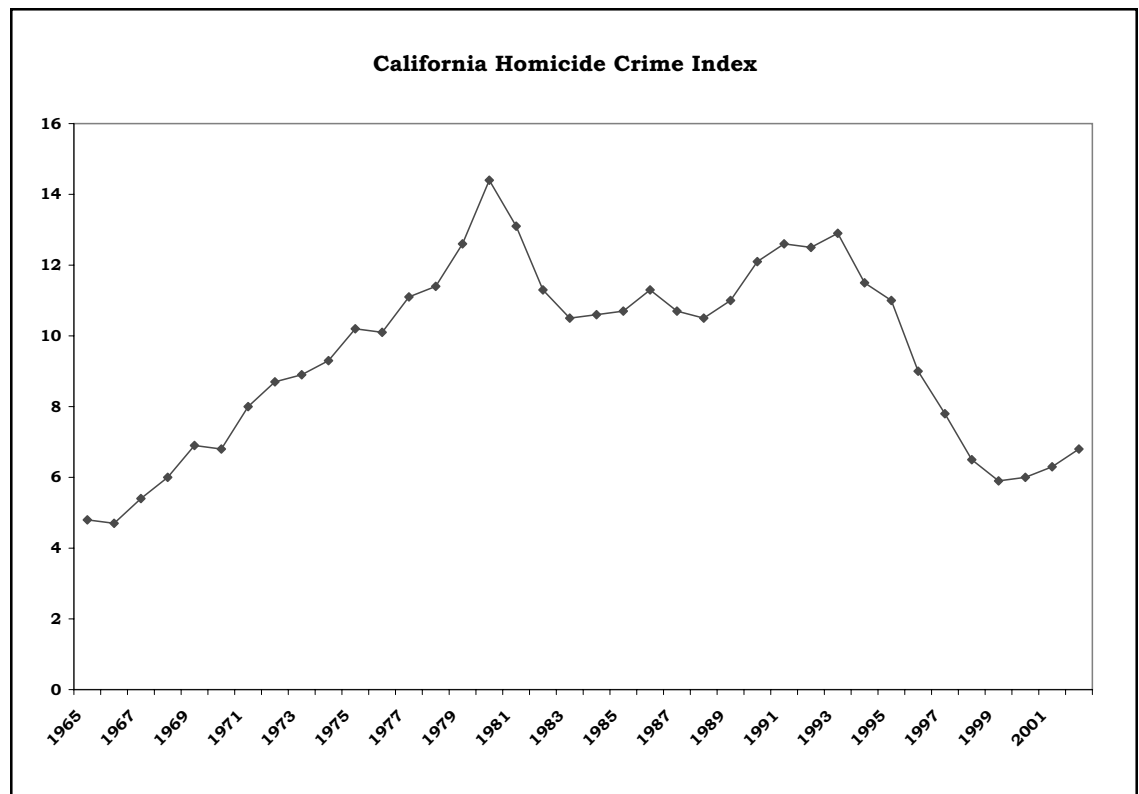
Since 1952 California has measured its crime rate by tracking a consistent set of crimes—willful homicide (including murder and voluntary manslaughter), forcible rape (along with assault to commit rape), robbery, aggravated assault (including assault with a deadly weapon, battery causing great bodily injury, felony domestic violence, etc.), burglary (including attempted burglary), and motor vehicle theft (including attempted vehicle theft)—known as the California Crime Index (CCI).<sup>99</sup> (See Graph 2.)



Graph 2<sup>100</sup>

The CCI measures those crimes in comparison to increments of 100,000 Californians. Graph 2 (above) shows that the CCI rose steadily from about 1,800 crimes per 100,000 Californians in calendar year 1965 to a level of approximately 3,300 crimes per 100,000 Californians in 1993. Beginning in 1994 and during the nine years since, the CCI has steadily fallen back to the levels last seen in California in 1965 (approximately 1,800 crimes per 100,000 Californians).

Thus, California, with a population near 35,000,000, suffered approximately 667,000 CCI-related crimes in calendar year 2002.<sup>101</sup> By contrast, if the higher 1993 crime rate of 3,300 per 100,000 had been maintained in the year 2002, the number of these same types of crimes in California would have reached close to 1,224,000.



Graph 3<sup>102</sup>

Similarly, the California rate of homicides (i.e., the unlawful, willful, non-negligent killing of one person by another, whether by murder or manslaughter), which in 1993 had averaged about 13 per 100,000 Californians per year, began to fall. Between 1994 and 2002 the homicide rate in California has dropped by more than 40% to the levels last recorded in the late 1960s and early 1970s (approximately seven homicides per 100,000 Californians).

If the homicide rate of 1993 (i.e., 13 per 100,000) had existed in 2002, there would have been approximately 4,600 homicides in California that year instead of the substantially smaller number of approximately 2,500.

As stated earlier, this dramatic drop in California’s crime might be properly attributable to several substantial factors. It is counterintuitive, however, to think that incarcerating violent recidivist felons for longer periods of time (whether under the two- or three-strikes provisions of this law) was not one of them.

As Justice O’Connor noted in *Ewing*, in refuting the cruel-and-unusual-punishment argument, Three Strikes sentences in California are “justified by the State’s public-safety interest in incapacitating and deterring recidivist felons.” And, she added, “When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime.”<sup>103</sup>

## V. DEBUNKING MISINFORMATION AND FALLACIES

From the time the Three Strikes concept began gaining recognition in the early 1990s, opponents have advanced a handful of arguments against it. These arguments were presented to the public while the Three Strikes legislation was going through the Legislature in early 1994, and again in the fall of 1994 when the Three Strikes initiative was on the November ballot. In fact, 10 years after Californians passed the initiative by 72% of the vote, opponents of the Three Strikes law continue to raise many of the same issues.<sup>104</sup> The following section of this paper responds to these arguments against Three Strikes sentencing.

### A. The Three Strikes Sentencing Structure Is NOT Cruel and Unusual Punishment

In *Ewing v. California*,<sup>105</sup> the United States Supreme Court found the Three Strikes law to be constitutional against a claim that its application results in cruel and unusual punishment. In a 5–4 decision, the Court affirmed Gary Albert Ewing’s Three Strikes sentence and quashed any doubts about whether the Three Strikes law was constitutional per se under the Eighth Amendment.<sup>106</sup>

On March 12, 2000, Ewing walked into the pro shop of a Los Angeles golf course and stole three golf clubs priced at \$399 each. He was arrested, tried, and convicted of felony grand theft. Ewing was on parole when arrested and had numerous prior strike convictions, including one for robbery and three for residential burglary.

Ewing committed the prior robbery and three prior burglaries at a Long Beach apartment complex over a five-week period during October and November 1993. In one of the cases, he awakened the victim, asleep on her living-room sofa, as he tried to disconnect her video-cassette recorder from the television in that room. When she screamed, Ewing ran out the front door. In one of the other cases, Ewing accosted a victim in the mailroom of an apartment complex. He claimed to have a gun and ordered the victim to hand over his wallet. When the victim resisted, Ewing produced a knife and forced the victim back to his apartment. While Ewing rifled through the victim’s bedroom, the victim fled the apartment screaming for help. Ewing absconded with the victim’s money and credit cards. In December, he was arrested on the premises of the apartment complex for trespassing and providing false information to a police officer. The knife used in the robbery and a glass cocaine pipe were later found in the back seat of the patrol car used to transport Ewing to the police station. Ewing was convicted of robbery and burglary and sentenced to state prison for nine years.<sup>107</sup>

In his 2000 case, the robbery and burglary convictions were found to be strikes under the Three Strikes law, and Ewing was sentenced to 25 years to life in prison for his third strike. The California Court of Appeal affirmed the conviction and sentence in an unpublished opinion. The California Supreme Court, agreeing with the appellate court, denied review, and the United States Supreme Court agreed to hear Ewing’s appeal.

Ewing asserted that his Three Strikes sentence was so disproportionate to his current culpability for stealing three golf clubs worth almost \$1,200 that it violated the Eighth Amendment’s prohibition of cruel and unusual punishment. The high court rejected this

claim. In the majority opinion, three justices held that Ewing's sentence was sufficiently proportional to his career-criminal culpability to satisfy the Eighth Amendment. Justices Antonin Scalia and Clarence Thomas agreed with the decision but did not even need to reach the proportionality-analysis issue. They concluded that since Ewing's sentence was authorized by statute, there was no need for any further Eighth Amendment analysis.

Justice O'Connor's opinion in *Ewing* noted the long and widespread use of enhanced prison sentences for repeat offenders. The tough sentencing law "effected a sea change" in the public's emphasis on isolating the most chronic offenders from society.<sup>108</sup> Three Strikes and similar laws were designed to protect society through long-term imprisonment of the most incorrigible, dangerous offenders.

Under the Eighth Amendment standard, the Court deferred to California's policy choices in sentencing, finding that the justification for the law "is no pretext."<sup>109</sup> As Justice O'Connor opined, recidivism was a serious problem in California before Three Strikes, and the law targets the most serious recidivists. As a result, she wrote, California has a "reasonable basis" for believing that the Three Strikes law advances public safety.<sup>110</sup>

While Ewing's current conviction was for a "wobbler" offense, and could have been charged either as a felony or a misdemeanor, his record justified his sentence under the Eighth Amendment. His inability or unwillingness to conform to the law validated his lengthy incarceration.

## **B. The Three Strikes Law Is NOT Just About Life Sentences**

Opponents of the Three Strikes law often argued that the law would mete out too many life sentences. This argument was used to bolster the claim that prisons were going to be overcrowded and that the law would bankrupt the state. But 10 years after the implementation of Three Strikes, only 4.6% of inmates in the California Department of Corrections are serving sentences of 25 years to life pursuant to the Three Strikes law.

The Three Strikes law's second-strike provision has been used far more often than its third-strike provision. As mentioned earlier, the second-strike provision doubles the normal prison sentence for a qualifying defendant. By the end of 2003 just over 80,000 criminals had been sentenced under the second-strike provision of the law, while only approximately 7,330 criminals had been sentenced under the third-strike provision.<sup>111</sup> Currently, there are more than four times more two-strikes (32,177) than three-strikes inmates.<sup>112</sup>

## **C. Three Strikes Has NOT Caused Prison Costs to Bankrupt the State**

In 1994 opponents often stated in newspaper articles that the Three Strikes law would increase the prison population to dangerous levels, causing California to bankrupt itself trying to house the resulting inmates.

In the context of the total state budget, that prediction has not come true. In fiscal year 1994–95 expenditures for Youth and Adult Corrections amounted to \$3.6 billion, accounting for 8.6% of the overall state budget.<sup>113</sup> As of fiscal year 2003–04, the Youth and Adult Corrections' budget had grown to \$5.4 billion, but by contrast, accounted for only 7% of the total state budget.<sup>114</sup>

And while the net corrections budget increase of \$1.7 billion over the last nine budget cycles amounts to a 49.6% increase in expenditures (an average of approximately 5.5% a year), such a percentage increase pales in comparison to the percentage increase of the previous decade.<sup>115</sup> In particular, in the 10 years preceding Three Strikes—from fiscal year 1984–85 to fiscal year 1993–94—state expenditures for Youth and Adult Corrections increased nearly 220%, more than four times greater than after the enactment of Three Strikes.<sup>116</sup> The largest single-year increase in the corrections budget in the last 20 years occurred in fiscal year 1985–86, when it increased 37.6% from the previous year.<sup>117</sup>

Developing a numerical value for the net savings of the Three Strikes law is beyond the scope of this paper. But when opponents of the Three Strikes law argue that it costs more than \$30,000 a year to incarcerate an inmate, it should be remembered that the savings produced by Three Strikes in terms of lives **not** destroyed, injuries **not** sustained, and property **not** stolen is ultimately immeasurable, but nevertheless, very significant.

#### **D. Three Strikes Has NOT Caused a Decrease in Funding for Education**

The Three Strikes law has not impacted education spending in the state. Simply looking at the last three fiscal years is instructive. Over the life of the Three Strikes law, the Legislative Analyst's Office's statistics on state expenditures for Education, Kindergarten through 12th Grade show no decrease in funding. Those expenditures for fiscal year 1992–93 were \$16.3 billion.<sup>118</sup> In fiscal year 2003–04 those expenditures were \$29.8 billion.<sup>119</sup> Since the passage of Three Strikes, state expenditures for Education, Kindergarten through 12th Grade have increased 83%.<sup>120</sup> In comparison, overall state expenditures for that same period of time increased 87.4%.<sup>121</sup> Certainly, the figures show education has kept pace with overall spending.

Likewise, the Legislative Analyst's Office's statistics on expenditures for Higher Education for fiscal year 1992–93 were \$5 billion.<sup>122</sup> In fiscal year 2003–04 Higher Education expenditures were \$8.8 billion—an increase of 76%.<sup>123</sup> Higher Education spending has been increased during the Three Strikes era.

The argument by opponents of Proposition 184 that education would have to be cut to fund Three Strikes has not been a correct prediction. A plain look at the data on education expenditures shows funding as a percentage of the state budget has stayed virtually the same, far outpacing expenditures for prisons.

## **E. Three Strikes Has NOT Overcrowded Prisons**

While a substantial number of inmates' sentences have been increased by the Three Strikes law, California's prisons have not been overwhelmed as predicted by the Legislative Analyst's Office and opponents. In particular, the 1994 forecast that the prison population would reach 230,000 in 2000 because of Three Strikes was grossly mistaken. And the prediction that the state will have to incarcerate 270,000 more inmates by the year 2026 also was significantly overstated.

The Three Strikes law has not caused overpopulation in California's prisons as predicted. The following chart shows the state's prison population compared with California's overall population from 1982 through 2003.<sup>124</sup> As the chart demonstrates, before Three Strikes, the prison population relative to California's population rose steadily. Following the passage of Three Strikes, the percentage of the prison population relative to the California population continued to rise through 1999 and then reversed and declined through 2001. Not only did the numbers decrease relative to California's population, the number of prisoners decreased from 1999 to 2000 by 32 inmates—from 160,687 to 160,655. The number of prisoners greatly decreased from the year 2000 to 2001 by 3,513 inmates. Since 1998 the prison population has remained relatively stable.

As of February 2002, the maximum prison capacity in California was approximately 170,100.<sup>125</sup> Based on the inmate population at the end of 2003, there were nearly 10,000 prison beds unused. By 2005, the projected maximum housing capacity will increase by more than 6,000 beds to approximately 176,500.<sup>126</sup>

**California Prison Population Compared with the Entire Population of California, by Year**

<b>YEAR</b>	<b>CALIFORNIA POPULATION<sup>127</sup></b>	<b>CALIF. PRISON POPULATION<sup>128</sup></b>	<b>PERCENT OF CALIF. POPULATION IN CDC</b>
1982	24,547,000	34,640	.1411%
1983	25,076,000	39,373	.1570 %
1984	25,587,000	43,328	.1693 %
1985	26,113,000	50,111	.1919 %
1986	26,742,000	59,484	.2224 %
1987	27,388,000	66,975	.2445 %
1988	28,061,000	76,171	.2714 %
1989	28,771,000	87,297	.3034 %
1990	29,588,000	97,309	.3292 %
1991	30,458,000	101,808	.3343 %
1992	30,987,000	109,496	.3534 %
1993	31,314,000	119,951	.3831 %
1994	31,523,000	125,605	.3985 %
1995	31,711,000	135,133	.4261 %
1996	31,962,000	145,565	.4554 %
1997	32,452,000	155,276	.4785 %
1998	32,862,000	159,563	.4856 %
1999	33,417,000	160,687	.4809 % *
2000	33,873,000	160,655 *	.4743 % *
2001	34,431,000	157,142 *	.4564 % *
2002	35,049,000	159,685	.4556 % *
2003	35,612,000	160,362 <sup>129</sup>	.4503 % *

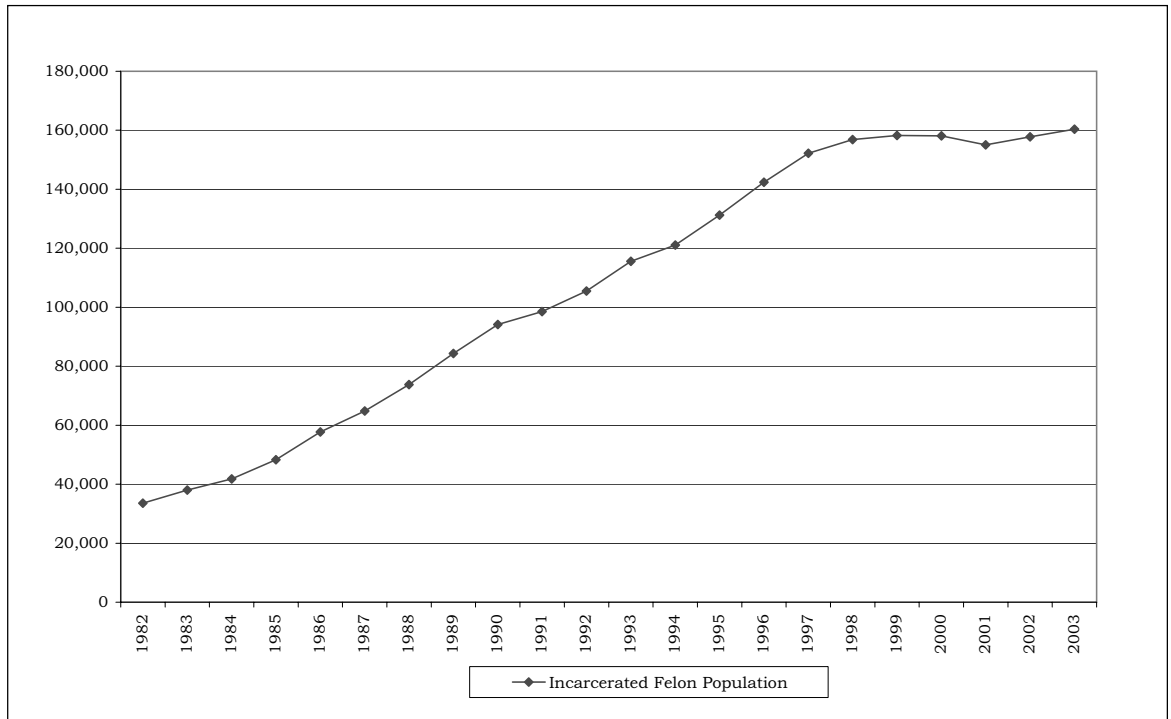
Chart 4

\* Indicates a decrease from the prior year

Third-strike inmates represent a small minority of the total felon population within California's correctional system. As of December 31, 2003, there were 7,332 prison inmates serving life-term sentences under Three Strikes.<sup>130</sup> As mentioned earlier, these 7,332 inmates represent less than 4.6% of the total California prison population. Among three-strikes inmates, 3,880 are in custody for being convicted of an additional serious or violent felony.<sup>131</sup> It is important to note that felons in custody for first-degree murder, or other convictions that involve life terms without the Three Strikes law, are not counted as part of the three-strikes population.

Out of the remaining inmates serving life terms under Three Strikes, only 357 are serving sentences for committing the crime of petty theft with a prior theft conviction, representing less than 5% of the total third strikers.<sup>132</sup> Other felons serving life terms under the Three Strikes law include 2,307 inmates for committing property crimes, including: second-degree burglary, grand theft, receiving stolen property, vehicle theft, and fraud; 395 inmates for weapon possession; and 26 inmates for arson crimes.<sup>133</sup> Every inmate sentenced to life in prison pursuant to Three Strikes has previously been convicted of committing two or more serious or violent crimes.

**California Incarcerated Felon Population (1982–2003)<sup>134</sup>**



Graph 4

The total number of new three-strikes convictions each year has significantly decreased since its peak in 1996. As shown in the chart below, in the three years following the passage of the law, 150 were added in the first year, 862 in the second year, and 1,248 in the third year. But in 1997 the rate of new three-strikes inmates began to decrease, dropping by nearly 7.7% and decreasing substantially every year through 2003. By 2003 there were only 401 new three-strikes inmates, which was the lowest number of third strikers annually added since the passage of the law in 1994.



**New Third Strikers vs. Cumulative Third Strikers, by Year<sup>135</sup>**

<b>YEAR</b>	<b>NEW THIRD STRIKERS PER YEAR</b>	<b>CUMULATIVE THIRD STRIKERS</b>
1994	150	150
1995	862	1,012
1996	1,248	2,260
1997	1,151	3,411
1998	1,046	4,457
1999	875	5,332
2000	684	6,016
2001	493	6,509
2002	422	6,931
2003	401	7,332

Chart 5

The decreasing trend, beginning in 1997, might correspond to the impact of the Three Strikes law in that a substantial number of active career criminals have remained in custody because of Three Strikes. That is, the number of new three-strikes sentences may have continued to decrease because fewer defendants eligible for Three Strikes are out of custody due to the longer prison sentences.

**F. Three Strikes Has NOT Required California to Open Numerous New Prisons**

The opponents of the Three Strikes law claimed that the anticipated increase in the prison population would cause the state to build as many as 20 prisons to accommodate the influx of prisoners from the implementation of the Three Strikes law.<sup>136</sup> As shown in the chart below, five prisons have been opened, one is scheduled to open, and one women's prison was closed since the law was enacted, for a net gain of five new prisons. Most important, the state prison currently scheduled to open in 2005 in Delano is the only prison whose introduction occurred after Three Strikes became law—all of the other new prisons were planned and approved prior to 1994.

<b>STATE PRISON</b>	<b>DATE</b>	<b>RATED CAPACITY</b>
Pleasant Valley State Prison, Coalinga	Opened Nov. 1994	2,208
Valley State Prison for Women, Chowchilla	Opened April 1995	1,980
High Desert State Prison, Susanville	Opened Aug. 1995	2,296
Salinas Valley State Prison, Soledad	Opened May 1996	2,224
Calif. Substance Abuse Treatment Facility, Corcoran	Opened Aug. 1997	3,324
Northern California Woman's Facility, Stockton	Closed 2002	
Delano II	Opening April 2005	

Chart 6<sup>137</sup>

For each of the prisons opened after Three Strikes' passage in 1994, authorization was granted before the law's enactment.<sup>138</sup> For example, funding for the latest prison to be opened, Corcoran II, which includes the California Substance Abuse Treatment Facility, was approved in Assembly Bill 10 (Costa/Harvey) by the Legislature and signed by the governor on September 28, 1993.<sup>139</sup> According to the Legislature's Senate Floor Analysis of September 9, 1993, the bill's supporters noted:

Regardless of the best efforts of the Legislature and the Department of Corrections to accommodate California's burgeoning prison population, projected growth figures indicate a need for additional capital outlay if the present policy of institutionalization is to be pursued. At present the Department of Corrections houses 111,415 inmates in facilities designed for 58,000. Based on Spring 1992 figures, there will be approximately 154,000 inmates in the system by 1998, requiring an additional 30,000 beds over the 16,000 currently in design or under construction if a manageable level of growth is to be achieved (125%).<sup>140</sup>

In 1987 the Department of Corrections began its search for a site near Coalinga to build a prison.<sup>141</sup> According to a 1990 *Los Angeles Times* article, future bond issues were "still on tap" for two prisons in Los Angeles County, others in Wasco and Delano, and a women's prison in Madera County.<sup>142</sup> In September 1992 Governor Pete Wilson signed legislation that would appropriate \$207 million for a new prison near the facility at Soledad and \$387 million to build previously approved prisons in Madera and Susanville.<sup>143</sup> With the closure of one prison after the implementation of Three Strikes the prison-building boom has been nonexistent.

Despite the fact that this feared expansion never took place, the concern that the Three Strikes law will cause major prison expansion still persists in some quarters. In the *Visalia Times Delta*, a 2003 editorial stated:

Prisons have become one of the state's growth industries. California has 160,000 prisoners in 33 prisons, more than half of them built since 1992, when Californians started passing a series of bonds that built prisons faster than schools, hospitals, bridges or highways. With the state's Three Strikes [l]aw and tougher sentencing, California quickly filled those prisons, tripling its prison population since 1985.<sup>144</sup>

In reality, it was the increase in crime prior to the enactment of the Three Strikes law that caused the legislative decisions that resulted in the prison development after Three Strikes. Five prisons were completed after the implementation of the Three Strikes law in 1994. And all five of those prisons were planned before the enactment of the law. The first and only post-Three Strikes prison project is scheduled to open in April 2005 in Delano.

### **G. Three Strikes Has NOT Created a Backlog in the Courts**

Critics of the Three Strikes law predicted that it would cause huge backlogs in the court system. But the factual data since 1994 clearly shows that a backlog in the courts never occurred. According to statistics from the Judicial Council and the Department of Finance,

the number of cases and trials have declined across the board with little adverse financial consequences.<sup>145</sup> At worst, the impact on the courts has been minimal.

In comparing fiscal year 1992–93, the last fiscal year before the Three Strikes law went into effect, with fiscal year 2001–02, Judicial Council statistics show that total filings in both civil and criminal courts have declined from 9.6 million to 8.1 million, a 15.8% decrease.<sup>146</sup> In this same time frame, criminal felony filings slightly decreased from 244,137 to 242,760.<sup>147</sup> Likewise, total filings per judge have declined in this same time frame by 21.8%.<sup>148</sup> Criminal felony filings per judge have declined 6.7% since their peak in 1997–98.<sup>149</sup> Since the passage of Three Strikes, the courts are handling fewer cases overall with more judges.

From fiscal year 1992–93 to fiscal year 2001–02, the total number of both criminal and civil cases going to trial has decreased by 27.8%.<sup>150</sup> Likewise, annual trials on felony criminal cases have diminished from 5,459 to 5,405, a slight decline.<sup>151</sup> The backlog in the courts predicted by Three Strikes’ opponents 10 years ago has not materialized.

## H. California Voters Understood the Three Strikes Law When They Voted for It

California voters were not misinformed regarding the consequences of the Three Strikes law. Three Strikes law opponents have claimed that in 1994 the voters of California did not understand that the law’s sentencing provisions could apply to a current nonviolent felony offense, and that a “fully informed” electorate would not have passed the law. This is not true.

Seventy-two percent of the voters, more than 5.9 million people, voted for the Three Strikes initiative, Proposition 184, in 1994.<sup>152</sup> The California Ballot Pamphlet for Proposition 184 began with a simple title, “Increased Sentences. Repeat Offenders (Three Strikes).” It went on to summarize the Three Strikes law and its effect. It stated that **any** felony conviction, in conjunction with prior convictions for violent or serious felonies, would be subject to an increased sentence. It also stated that **any** felon with two prior qualifying convictions would receive a prison sentence of 25 years to life.

Indeed, the 1994 California Ballot Pamphlet described a more severe version of the Three Strikes law than the current law allows because it described Three Strikes sentencing as mandatory. In 1996 the California Supreme Court held in *Romero* that a judge has the discretion on the court’s own motion *inter alia* to dismiss a prior-strike allegation in certain mitigating situations so that a defendant may not be sent to prison for 25 years to life.<sup>153</sup> The voters, however, passed the law based on the idea that this would be a mandatory penalty without review by a judge. Thus, the voters believed that they passed into law a more stringent version of the Three Strikes law than what we have today.

Further, the 1994 California Ballot Pamphlet emphasized the fact that “any new felony conviction (not just a serious or violent felony)” would subject a three striker to 25 years to life in prison.<sup>154</sup> Opponents of Proposition 184 also emphasized this fact in their arguments against Three Strikes contained in the California Ballot Pamphlet: “The third strike does not have to be violent or serious—it can be any felony at all.”<sup>155</sup> The pamphlet even used a “wobbler” crime—receiving stolen property—as the example of a crime for which a Three Strikes defendant could get a sentence of 25 years to life. It specifically pointed out that,

without Three Strikes, a defendant convicted of receiving stolen property would otherwise only be sentenced to two years in state prison.<sup>156</sup> Yet the electorate overwhelmingly passed Proposition 184.

Moreover, eight months prior to the election, the California Legislature passed nearly identical legislation in a separate effort to address the problem of recidivism in California. Thus, Californians and the criminal justice system had been using the Three Strikes law for eight months when they passed Proposition 184. The fact that Three Strikes passed in a landslide by ballot proposition and was also drafted into law by a large majority in the state Legislature strongly demonstrated Californians' knowing and intelligent adoption of the Three Strikes law.

## **I. Attempts to Limit the Three Strikes Law Have Consistently Failed**

Since 1994 a number of legislative proposals to weaken the Three Strikes law have been defeated in committee, on the floor of the Legislature, and by gubernatorial veto. In 10 years, the California Legislature has never passed a single bill that would weaken or amend the Three Strikes law.

The first bill, AB 1444 (Kuehl), was introduced during the 1995–96 legislative session. It failed passage in the Assembly Public Safety Committee.<sup>157</sup> This bill would have precluded second- and third-strike sentences in all cases except those where the current conviction was either serious or violent. During the 1997–98 session, a substantially similar bill (SB 1317) (Lee) was introduced. It failed passage on the Senate floor by almost a 2–1 margin.<sup>158</sup>

Another bill, AB 2447 (Wright and Washington), which would have limited third-strike sentences to those cases where the current offense was either serious or violent, was introduced during the 1999–2000 session. It was ultimately amended as a bill to modify Penal Code section 1385 (which allows courts to dismiss strikes in furtherance of justice) to require judges to place “great weight” on the nonserious or nonviolent nature of a current offense when considering whether to exercise their discretion to dismiss a strike allegation. This bill failed passage on the Assembly floor, by again, an almost 2–1 margin.<sup>159</sup>

During the 1999–2000 session, SB 79 (Hayden) was defeated on the Senate floor. This bill was originally intended to limit indeterminate terms under the Three Strikes law to those cases where the new sentence was serious or violent, but it was amended to establish a committee to study the effects of the law. It was still defeated.<sup>160</sup>

A study bill was proposed during the 1999–2000 legislative session but vetoed by the Governor. Senate Bill 873 (Vasconcellos)<sup>161</sup> would have required a study similar to the one called for in SB 79, but the study was to be completed by the Legislative Analyst's Office with assistance from the Attorney General, the Judicial Council, and the University of California. In his veto message, Governor Davis noted that numerous studies of the law had already been undertaken by the Department of Justice, the RAND Corporation, and various academics. The governor pointed out that “no study, or series of studies, can resolve contentious philosophical and ideological disagreements over the purpose of imprisonment [and] the appropriate penalty for repeat felons.”<sup>162</sup> Governor Davis also cited the drastic decrease in crimes such

as robbery *and* homicide that had occurred since the enactment of the Three Strikes law and observed that “[t]he savings associated with the law, in terms of lives not destroyed, injuries not sustained, and property not stolen ... is ultimately incalculable, but very significant.”<sup>163</sup>

Governor Davis’ comments in his SB 873 (Vasconcellos) veto message in 1999 echoed the comments made by Governor Wilson in 1998 when he vetoed a virtually identical study bill, SB 2048 (Vasconcellos). In his veto message, Governor Wilson concluded that the proposed study was merely intended to “disprove the obvious[ly]” positive impact of the Three Strikes law.<sup>164</sup> Governor Wilson noted that SB 2048, as originally introduced, would have limited third-strike sentences to those cases where the current conviction was serious or violent. This would have “abrogate[ed] the intent of the voters” who enacted the Three Strikes law by approving Proposition 184.<sup>165</sup> “There are many mysteries in life,” Governor Wilson concluded, but “the efficiency of ‘Three Strikes’ ... is not one of them.”<sup>166</sup>

The remaining bills intended to modify the Three Strikes law, AB 1652 (Goldberg)<sup>167</sup> and 1790 (Goldberg),<sup>168</sup> were introduced during the 2001–02 legislative session, and AB 112 (Goldberg)<sup>169</sup> was introduced during the 2003–04 session. The first bill would have created a 10-year “washout” period for prior strike offenses, allowed concurrent sentencing where existing law mandates consecutive sentencing, required strikes to have been committed after the 1994 enactment of the Three Strikes law, and eliminated juvenile adjudications from the list of eligible strike offenses. The bill failed in that form. Assembly Bill 1790 again would have allowed second- and third-strike sentences only where the *current* offense was either serious or violent. The bill also proposed certain limitations to the list of qualifying serious or violent felonies and mandated the resentencing of inmates sentenced under the pre-AB 1790 law. Assembly Bill 1790 died in the Senate Appropriations Committee. Assembly Bill 112, introduced during the 2003–04 session, contained substantially the same provisions as AB 1790. But AB 112 proposed the amendments as an initiative statute to be submitted to the voters. The bill was sent to the inactive file at the author’s request.

## VI. CONCLUSION

*“There are many mysteries in life, the efficiency of ‘Three Strikes,’ however, is not one of them.”*<sup>170</sup>

— former California Governor Pete Wilson

Ten years ago the citizens of California took an active stand against crime, targeted those who are not deterred by previous convictions and punishments, and enacted Three Strikes into law. In the decade since, tens of thousands of serious and violent felons have been stopped, and millions of Californians have been protected.

Three Strikes has directly and significantly acted to reduce crime in California. At the same time, during the past 10 years no new prisons have been opened because of Three Strikes. The criminal justice system has not crumbled. And although a 45% drop in crime does not come without costs, each victim spared, each life saved is priceless.

The purpose of this paper is not to attempt to change the minds of those philosophically opposed to Three Strikes. Rather, this paper provides an historical overview of California’s Three Strikes law, aimed at educating all who seek objectively and fairly to examine this important law.

It is our overriding ethical obligation as prosecutors always to seek justice—a quality we believe is reflected in the pages of this paper. We welcome debate on the impact of the Three Strikes law and are certain it will continue for years to come. In service to the People of the State of California, who soon will be asked to reexamine the law, let us wage the debate based on the facts.

When used with the appropriate discretion, Three Strikes is a valuable, essential, and proven tool in the fight against crime. The facts show the Three Strikes law works.

## ENDNOTES

1. *Ewing v. California* (2003) 538 U.S. 11, 25.
2. Jennifer Edwards Walsh, *Tough For Whom? How Prosecutors and Judges Use Their Discretion to Promote Justice Under the California Three Strikes Law* 8 (Henry Salvatori Center Monograph, New Series No. 4, 2004) Table 1. (Expected publication date, August 2004.)
3. Proposition 8 (1982), “Victims’ Bill of Rights,” Cal. Const. art. I, § 28.
4. Office of the Attorney General, State of California, Department of Justice, *California Crime Index, 1952–2002* <http://caag.state.ca.us/cjsc/glance/cht1.htm> (accessed June 19, 2004).
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163. *Id.*
164. Official California Legislative Information, Veto Message for SB 2048 (Vasconcellos, 1998) [www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_2001-2050/sb\\_2048\\_vt\\_19980913.html](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_2001-2050/sb_2048_vt_19980913.html) (accessed June 19, 2004).
165. *Id.*
166. *Id.*
167. Official California Legislative Information, Complete Bill History for AB 1652 (Goldberg, 2001) [www.leginfo.ca.gov/pub/01-02/bill/asm/ab\\_1651-1700/ab\\_1652\\_bill\\_20020926\\_history.html](http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1651-1700/ab_1652_bill_20020926_history.html) (accessed June 19, 2004).
168. Official California Legislative Information, Complete Bill History for AB 1790 (Goldberg, 2002) [www.leginfo.ca.gov/pub/01-02/bill/asm/ab\\_1751-1800/ab\\_1790\\_bill\\_20021130\\_history.html](http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1790_bill_20021130_history.html) (accessed June 19, 2004).
169. Official California Legislative Information, Complete Bill History for AB 112 (Goldberg, 2003) [www.leginfo.ca.gov/pub/bill/asm/ab\\_0101-0150/ab\\_112\\_bill\\_20040202\\_history.html](http://www.leginfo.ca.gov/pub/bill/asm/ab_0101-0150/ab_112_bill_20040202_history.html) (accessed June 19, 2004).
170. Official California Legislative Information, Veto Message for SB 2048 (Vasconcellos, 1998) [www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_2001-2050/sb\\_2048\\_vt\\_19980913.html](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_2001-2050/sb_2048_vt_19980913.html) (accessed June 19, 2004).

## APPENDIX A

(The following information is from the March 2004 edition of *Sentencing* (pgs. S-16–S-21), by San Diego County Deputy District Attorney Charles E. Nickel, published by the California District Attorneys Association. )

### **VIOLENT FELONIES – PC 667.5(c) [CURRENT]**

PC 667.5(c) For the purpose of this section, "violent felony" shall mean any of the following:

- (1) Murder or voluntary manslaughter.
- (2) Mayhem.
- (3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.
- (4) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
- (5) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
- (6) Lewd acts on a child under the age of 14 years as defined in Section 288.
- (7) Any felony punishable by death or imprisonment in the state prison for life.
- (8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5 or 12022.55.
- (9) Any robbery.
- (10) Arson, in violation of subdivision (a) or (b) of Section 451.
- (11) The offense defined in subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
- (12) Attempted murder.
- (13) A violation of Section 12308, 12309, or 12310.
- (14) Kidnapping.
- (15) Assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220.
- (16) Continuous sexual abuse of a child, in violation of Section 288.5.
- (17) Carjacking, as defined in subdivision (a) of Section 215.
- (18) A violation of Section 264.1.
- (19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 of the Penal Code.
- (20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code.
- (21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.
- (22) Any violation of Section 12022.53.
- (23) A violation of subdivision (b) or (c) of Section 11418.<sup>1</sup>

...

<sup>1</sup> Added to list effective 9/17/02.

## VIOLENT FELONIES – PC 667.5(c)<sup>1</sup> [PRIOR TO 3/8/00]

Murder	PC 187
Attempted murder	PC 664/187
Voluntary manslaughter	PC 192(a)
Mayhem	PC 203; PC 205
Kidnapping for child molest	PC 207(b)
Kidnapping a child	PC 208(b)
Residential robbery with weapon use <sup>2</sup>	PC 211/212.5(a) + PC 12022(b)
Home invasion robbery	PC 211/212.5(a)/213(a)(1)(A) <sup>3</sup>
Carjacking with weapon use <sup>2</sup>	PC 215(a) + PC 12022(b) <sup>4</sup>
Forcible rape	PC 261(a)(2); PC 261(a)(6); PC 264.1 <sup>5</sup>
Forcible spousal rape	PC 262(a)(1); PC 262(a)(4); PC 264.1 <sup>5</sup>
Forcible sodomy	PC 286(c)(2); PC 286(d) <sup>5</sup>
Lewd act on a child	PC 288(a); PC 288(b)(1)
Continuous sexual abuse of a child	PC 288.5
Forcible oral copulation	PC 288a(c)(2); PC 288a(d) <sup>5</sup>
Forcible penetration by foreign object	PC 289(a)(1); PC 264.1 <sup>5</sup>
Arson with great bodily injury	PC 451(a)
Any felony with firearm use <sup>2</sup>	PC 12022.5; PC 12022.53 <sup>6</sup> ; PC 12022.55
Any felony with great bodily injury <sup>2</sup>	PC 12022.7; PC 12022.9
Exploding destructive device to murder	PC 12308
Any felony punishable by death or life	See list <sup>7</sup>

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<sup>1</sup> Note: Attempts, unless specifically listed, are not included as violent felonies (*People v. Ibarra* (1982) 134 CA3d 413, 424-25) [but attempts are included as serious felonies]. Also, contrary to the serious felony list, violent felonies do not include crimes by conduct (compare *People v. Jackson* (1985) 37 C3d 826, 832, *People v. Murphy* (2001) 25 C4th 136, 141-49, and *People v. Henderson* (1987) 195 CA3d 1235 [serious felony], with *People v. Mena* (1988) 206 CA3d 420 [violent felony]).

<sup>2</sup> Note: Violent felonies based on weapons or injury require that a specific enhancement has been charged and proved; conduct alone does not qualify as a violent felony (PC 667.5(c)(8); (c)(9); (c)(17); see *People v. Hernandez* (1981) 30 C3d 462, 466-68; *People v. Wolcott* (1983) 34 C3d 92, 102-06; *People v. Hawkins* (2003) 108 CA4th 527).

<sup>3</sup> Added effective 1/1/98; qualifies as a prior "strike" based on robbery (see PC 1192.7(c)(19)).

<sup>4</sup> Effective 10/1/93; qualifies as a prior "strike" based on personal weapon use (see PC 1192.7(c)(23)).

<sup>5</sup> Forcible sex crimes in concert are included (see 64 Ops.A.G. 819 (1981); PC 264.1 specifically listed, effective 1/1/98 [declaratory of existing law – Stats. 1997, ch. 504 § 4]).

<sup>6</sup> Effective 1/1/98; qualifies as a prior "strike" based on personal gun use (see PC 1192.7(c)(8)).

<sup>7</sup> Offenses: PC 37(a) [Treason]; PC 128 [Perjury causing execution]; PC 182(a) [Conspiracy – Life or death crime]; PC 187 [Murder]; PC 205 [Aggravated mayhem]; PC 206 [Torture]; PC 209 [Kidnap for ransom, robbery, or sex]; PC 209.5 [Kidnap during carjacking]; PC 217.1(b) [Attempted murder – Govt. official]; PC 218, 219 [Train wrecking]; PC 269 [Aggravated sexual assault of a child]; PC 273ab [Child abuse causing death]; PC 451.5 [Aggravated arson]; PC 664(a)/189 [Attempted premeditated murder]; PC 664(e)/187 [Attempted murder – Peace officer or Firefighter]; PC 664(f)/189 [Attempted premeditated murder – Peace officer or Firefighter]; PC 667.61 [Aggravated sexual assault]; PC 4500 [Assault by lifer]; PC 11418(b)(1) [Terrorism causing risk to people]; PC 12308 [Explosion to murder]; PC 12310 [Explosion causing death/GBI]; MV 1670, 1671 [Sabotage] (see *People v. Thomas* (1999) 21 C4th 1122).

## SERIOUS FELONIES – PC 1192.7(c); PC 1192.8 [CURRENT]

**PC 1192.7(c)** As used in this section, "serious felony" means any of the following:

- (1) Murder or voluntary manslaughter;
- (2) mayhem;
- (3) rape;
- (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person;
- (5) oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person;
- (6) lewd or lascivious act on a child under the age of 14 years;
- (7) any felony punishable by death or imprisonment in the state prison for life;
- (8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm;
- (9) attempted murder;
- (10) assault with intent to commit rape or robbery;
- (11) assault with a deadly weapon or instrument on a peace officer;
- (12) assault by a life prisoner on a noninmate;
- (13) assault with a deadly weapon by an inmate;
- (14) arson;
- (15) exploding a destructive device or any explosive with intent to injure;
- (16) exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem;
- (17) exploding a destructive device or any explosive with intent to murder;
- (18) any burglary of the first degree;
- (19) robbery or bank robbery;
- (20) kidnapping;
- (21) holding of a hostage by a person confined in a state prison;
- (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life;
- (23) any felony in which the defendant personally used a dangerous or deadly weapon;
- (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phencyclidine (PCP) or any methamphetamine-related drug, as described in paragraph (2) of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamines as described in subparagraph (A) of paragraph (1) of subdivision (f) of Section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code;
- (25) any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person;
- (26) grand theft involving a firearm;
- (27) carjacking;
- (28) any felony offense, which would also constitute a felony violation of Section 186.22;
- (29) assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220;
- (30) throwing acid or flammable substances, in violation of Section 244;
- (31) assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245;
- (32) assault with a deadly weapon against a public transit employee, custodial officer, or school employee, in violation of Sections 245.2, 245.3, or 245.5;



- (33) discharge of a firearm at an inhabited dwelling, vehicle, or aircraft, in violation of Section 246;
- (34) commission of rape or sexual penetration in concert with another person, in violation of Section 264.1;
- (35) continuous sexual abuse of a child, in violation of Section 288.5;
- (36) shooting from a vehicle, in violation of subdivision (c) or (d) of Section 12034;
- (37) intimidation of victims or witnesses, in violation of Section 136.1;
- (38) criminal threats, in violation of Section 422;
- (39) any attempt to commit a crime listed in this subdivision other than an assault;
- (40) any violation of Section 12022.53;
- (41) a violation of subdivision (b) or (c) of Section 11418; and
- (42) any conspiracy to commit an offense described in this subdivision.

**PC 1192.8(a)** For purposes of subdivision (c) of Section 1192.7, "serious felony" also means any violation of Section 191.5, paragraph (1) or (3) of subdivision (c) of Section 192, paragraph (a) or (c) of Section 192.5 of this code, or Section 2800.3, subdivision (b) of Section 23104, or Section 23153 of the Vehicle Code, when any of these offenses involve the personal infliction of great bodily injury on any person other than an accomplice, or the personal use of a dangerous or deadly weapon, within the meaning of paragraph (8) or (23) of subdivision (c) of Section 1192.7.

**Note:** (1) New PC 667.1 and new PC 1170.125 provide that all references to other statutes in the "Three Strikes" laws (PC 667(b)-(i) and PC 1170.12) are to those other statutes as they existed on March 8, 2000. Thus, the lists of violent felonies (PC 667.5(c)), serious felonies (PC 1192.7(c); 1192.8), and juvenile priors (WI 707(b)) now have a new "lock-in date" of 3/8/00, instead of 6/30/93, for crimes committed on or after 3/8/00 (*Manduley v. Superior Court* (2002) 27 C4th 537, 574-75, 577-79; *P. v. James* (2001) 91 CA4th 1147; *P. v. De Porceri* (2003) 106 CA4th 60, 64-66; *P. v. Bowden* (2002) 102 CA4th 387 [juvenile priors]; see also *P. v. O'Roark* (1998) 63 CA4th 872 [date of current offense, not prior offense, is controlling]).

(2) Although subdivision (c)(18) refers to "any burglary of the first degree," a second degree residential burglary can still qualify as a serious felony and a "strike" (*P. v. Jackson* (1985) 37 C3d 826; *P. v. Guerrero* (1988) 44 C3d 343; *P. v. Myers* (1993) 5 C4th 1193; *P. v. Riel* (2000) 22 C4th 1153, 1203-07; *P. v. Garrett* (2001) 92 CA4th 1417; *P. v. Avery* (2002) 27 C4th 49, 53 fn. 3).

(3) The Supreme Court will review whether an enhancement under PC 186.22(b)(1) converts an offense into a serious felony under subdivision (c)(28) (*P. v. Briceno* (2003) 109 CA4th 1330, modified 110 CA4th 1114c, review granted 9/24/03 [not citable]).

(4) Although subdivision (c)(29) refers to "assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220," all forms of PC 220 should qualify as serious felonies and as prior "strikes" based on being attempted serious felony crimes (see *P. v. Rupp* (1953) 41 C2d 371, 382; *P. v. Martinez* (1985) 171 CA3d 727, 734; *P. v. Pierce* (2002) 104 CA4th 893, 897-99; *P. v. De Porceri* (2003) 106 CA4th 60; *P. v. Rich* (2003) 109 CA4th 255, 260-61; see also PC 7.5).

(5) PC 7.5 provides that when reference is made to an offense by using both descriptive language and a particular code section, the code section definition of the offense controls over the descriptive language, unless a contrary intent is clearly apparent. However, courts have held that an assault by means of force likely to produce great bodily injury under PC 245(a)(1) is not a serious felony under subdivision (c)(31) (*Williams v. Superior Court* (2001) 92 CA4th 612; *P. v. Winters* (2001) 93 CA4th 273; *P. v. Haykel* (2002) 96 CA4th 146). Conversely, effective 3/8/00, the crime of assault with a deadly weapon alone (PC 245(a)(1)) qualifies as a serious felony under subdivision (c)(31), even without personal use of the weapon (*P. v. Luna* (2003) 113 CA4th 395).

(6) Subdivision (c)(41) was added to the list effective 9/17/02.

(7) For further information on qualifying offenses, see the list and notes on Serious Felonies [Prior to 3/8/00].

## SERIOUS FELONIES<sup>1</sup> – PC 1192.7(c); PC 1192.8 [PRIOR TO 3/8/00]

Murder <sup>19</sup>	PC 187
Voluntary manslaughter	PC 192(a)
Mayhem	PC 203; PC 205
Kidnapping	PC 207; PC 208 <sup>2</sup> ; PC 209; PC 209.5
False imprisonment of a hostage <sup>3</sup>	PC 210.5
Robbery (including bank robbery <sup>4</sup> )	PC 211
Carjacking <sup>5</sup>	PC 215
Assault with intent to commit a specified felony <sup>6</sup>	PC 220
Throwing a caustic or flammable substance <sup>7</sup>	PC 244
ADW on a peace officer	PC 245(c) <sup>8</sup> ; PC 245(d)
ADW on a firefighter <sup>9</sup>	PC 245(c); PC 245(d)
Rape	PC 261; PC 262; PC 264.1 <sup>10</sup>
Forcible sodomy	PC 286(c)(2); PC 286(d) <sup>10</sup>
Lewd act on a child <sup>11</sup>	PC 288(a); PC 288(b)(1)
Continuous sexual abuse of a child <sup>12</sup>	PC 288.5
Forcible oral copulation	PC 288a(c)(2); PC 288a(d) <sup>10</sup>
Forcible penetration by a foreign object	PC 289(a)(1); PC 264.1 <sup>10</sup>
Arson <sup>19</sup>	PC 451; PC 451.5
Residential burglary	PC 459/460(a) <sup>13</sup>
Grand theft of a firearm	PC 487(d)(2)
Assault by a life prisoner on a non-inmate	PC 4500
ADW by an inmate	PC 4501
Holding a hostage by a prisoner	PC 4503
Any felony with personal use of a deadly weapon <sup>14</sup>	PC 12022(b); PC 12022.3(a)
Any felony with personal use of a firearm <sup>14</sup>	PC 12022.5; PC 12022.3(a); PC 12022.55
Specified felony with use of a firearm <sup>15</sup>	PC 12022.53
Any felony with personal infliction of great bodily injury <sup>14</sup>	PC 12022.7; PC 12022.8; PC 12022.9
Exploding a destructive device with intent to injure	PC 12303.3
Exploding a destructive device with intent to murder	PC 12308
Exploding a destructive device causing mayhem or GBI	PC 12310(b)
Selling or furnishing drugs to a minor <sup>16</sup>	HS 11353(c); HS 11380; HS 11380.5 (repealed)
Specified drug conspiracies with a minor <sup>17</sup>	PC 182(a)(1)/HS 11353(c), 11380/HS 11370.4
Any felony punishable by death or life	See list <sup>18</sup>
<u>Attempt</u> of any listed crime except assaults	PC 664 <sup>1, 19</sup>
Specified vehicular offenses with GBI or deadly weapon	See list <sup>20</sup>

<sup>1</sup> Serious felonies include both completed and attempted crimes, except assaults (PC 1192.7(c)(33) [(34) 1/1/00]). Crimes that were on the list or fit within the definition of a serious felony as of 6/30/93 qualify as both serious felony priors (PC 667(a)(1)) and as prior "strikes" (PC 667(d); PC 1170.12(b)); crimes added to the list after 6/30/93 qualify as serious felonies, but do not qualify as prior "strikes," unless the crime qualifies by definition, by class (such as life imprisonment), or by conduct (such as using a weapon or inflicting injury – see fn. 14) (PC 667(h); Prop. 184 § 2 ["lock-in date" of 6/30/93 on referenced statutes]).

<sup>2</sup> Former PC 208(d) defined an offense (*P. v. Rayford* (1994) 9 C4th 1); that offense was incorporated into PC 209(b) 1/1/98, and PC 208 is now a penalty section only (Stats. 1998, ch. 925 § 9).

<sup>3</sup> PC 210.5 was added to the list 1/1/00; it does not qualify as a prior strike unless defendant personally used a deadly weapon or inflicted GBI; also, PC 210.5 often involves robbery or kidnapping (see fn. 1, 14).

<sup>4</sup> Federal bank robbery [18 USC 2113(a), first ¶] qualifies as a serious felony and as a prior "strike" (*P. v. Jones* (1999) 75 CA4th 616, 631-35).

<sup>5</sup> Carjacking was added to the list 10/1/93; carjacking alone is a serious felony, but does not qualify as a prior "strike" unless defendant personally used a deadly weapon or inflicted GBI; also, carjacking often involves robbery (see fn. 1, 14; *P. v. Nava* (1996) 47 CA4th 1732 [carjacking with a gun is a prior "strike"]).

<sup>6</sup> Assault with intent to commit rape or robbery were already included (prior to 6/30/93) on the serious felony list; assault with intent to commit mayhem, sodomy, or oral copulation were added to the list 1/1/99, but these offenses (and other forms of PC 220) should qualify as serious felonies and as prior "strikes" based on being attempted serious felony crimes (see *P. v.*

*Rupp* (1953) 41 C2d 371, 382; *P. v. Martinez* (1985) 171 CA3d 727, 734; *P. v. Pierce* (2002) 104 CA4th 893, 897-99; *P. v. De Porceri* (2003) 106 CA4th 60; *P. v. Rich* (2003) 109 CA4th 255, 260-61).

<sup>7</sup> PC 244 was added to the list 1/1/99; it does not qualify as a prior "strike" unless defendant personally inflicted GBI (or used a weapon) (see fn. 1, 14).

<sup>8</sup> Requires proof of use of a deadly weapon by defendant or an accomplice (*P. v. Williams* (1996) 50 CA4th 1405; *P. v. Encinas* (1998) 62 CA4th 489).

<sup>9</sup> ADW on a firefighter was added to the list 1/1/99; it does not qualify as a prior "strike" unless defendant personally used a deadly weapon or a firearm (or inflicted GBI) (see fn. 1, 14).

<sup>10</sup> Forcible sex crimes in concert are included as serious felonies and as prior "strikes" (see 64 Ops.A.G. 819 (1981)); rape in concert is also included as a form of rape (see *P. v. Davis* (1999) 76 CA4th 1347, 1356-58, decertified 3/29/00 [not citable]); PC 264.1 was specifically added to the serious felony list 1/1/99, and to the violent felony list 1/1/98 (see Stats. 1997, ch. 504 § 4 [declaratory of existing law]).

<sup>11</sup> Sex crimes on children under **PC 286(c)(1)**, **PC 288a(c)(1)**, and **PC 289(j)** are included as serious felonies (*P. v. Murphy* (2001) 25 C4th 136, 141-49; *P. v. Henderson* (1987) 195 CA3d 1235); cf. *P. v. Mena* (1988) 206 CA3d 420 [not violent felonies]).

<sup>12</sup> PC 288.5 was added to the PC 1192.7(c) list 1/1/99, but PC 288.5 was included, prior to 6/30/93, as a serious felony under former PC 1192.8(a) and as a violent felony under PC 667.5(c)(15) [later (16)], and thus qualifies as a prior "strike."

<sup>13</sup> Definition of residential burglary was updated 1/1/99, but this merely conformed the serious felony list to existing law (*P. v. Cruz* (1996) 13 C4th 764). Note: Second degree residential burglaries can qualify as serious felonies and prior "strikes" (*P. v. Jackson* (1985) 37 C3d 826; *P. v. Guerrero* (1988) 44 C3d 343; *P. v. Myers* (1993) 5 C4th 1193; *P. v. Riel* (2000) 22 C4th 1153, 1203-07).

<sup>14</sup> Special allegations concerning serious felony conduct can be charged and proved. With ADW (PC 245(a)(1)) it can be alleged that the defendant personally used a dangerous or deadly weapon, effectively making the crime a serious felony (see PC 1192.7(c)(23) [(24) 1/1/00]); the same is true in certain cases with personal use of a firearm or personal infliction of great bodily injury on any person other than an accomplice (see PC 1192.7(c)(8)). PC 969f (effective 1/1/92; see *P. v. Yarbrough* (1997) 57 CA4th 469); see: *P. v. Jackson* (1985) 37 C3d 826; *P. v. Equarte* (1986) 42 C3d 456 [ADW – **PC 245(a)(1)**]; *P. v. Brown* (1988) 201 CA3d 1296 [Involuntary manslaughter – **PC 192(b)**]; *P. v. Ybarra* (1988) 206 CA3d 546 [DUI with injury – **VC 23153(a)**]; *P. v. Boyajian* (1991) 228 CA3d 771 [**PC 245(b)**]; *P. v. Sanchez* (1991) 230 CA3d 768 [**PC 245(a)(1)**]; *P. v. Moore* (1992) 10 CA4th 1868 [Battery with SBI – **PC 243(d)**]; *P. v. Gonzales* (1994) 29 CA4th 1684 [Vehicular manslaughter – **PC 191.5**; **PC 192(c)(1)**]; *P. v. Bartow* (1996) 46 CA4th 1573 & *P. v. Leslie* (1996) 47 CA4th 198 [Negligent discharge of firearm – **PC 246.3**]; see also PC 1192.8 and fn. 20. Note: Even without a special allegation, prior convictions can qualify as serious felonies if serious felony conduct, including personal use of a dangerous or deadly weapon or personal infliction of great bodily injury, can be proved by using the record of conviction (*P. v. Equarte, supra*; *P. v. Guerrero* (1988) 44 C3d 343; see Witkin, *California Criminal Law*, 3rd ed., ch. IX §§ 343; 373).

<sup>15</sup> PC 12022.53 was added to the list 1/1/99, but it qualifies as a prior "strike" based on personal use of a firearm (see PC 1192.7(c)(8); also, almost all specified crimes in PC 12022.53 are serious felonies); vicarious use by gang members under PC 12022.53(e)(1) and PC 186.22(b) is a serious felony, but does not qualify as a prior "strike" if the underlying crime is not a serious felony [e.g., PC 12022.53(d) in a PC 246 or PC 12034(c) or (d)] (see fn. 1).

<sup>16</sup> See PC 667(a)(5) limitation (formerly PC 667(e)).

<sup>17</sup> Drug conspiracy was added to the list 1/1/94; it does not qualify as a prior "strike" (see fn. 1).

<sup>18</sup> Offenses: **PC 37(a)** [Treason]; **PC 128** [Perjury causing execution]; **PC 182(a)** [Conspiracy – Life or death crime]; **PC 187** [Murder]; **PC 205** [Aggravated mayhem]; **PC 206** [Torture]; **PC 209** [Kidnap for ransom, robbery, or sex]; **PC 209.5** [Kidnap during carjacking]; **PC 217.1(b)** [Attempted murder – Govt. official]; **PC 218, 219** [Train wrecking]; **PC 269** [Aggravated sexual assault of a child]; **PC 273ab** [Child abuse causing death]; **PC 451.5** [Aggravated arson]; **PC 664(a)/189** [Attempted premeditated murder]; **PC 664(e)/187** [Attempted murder – Peace officer or Firefighter]; **PC 664(f)/189** [Attempted premeditated murder – Peace officer or Firefighter]; **PC 667.61** [Aggravated sexual assault]; **PC 4500** [Assault by lifer]; **PC 11418(b)(1)** [Terrorism causing risk to people]; **PC 12308** [Explosion to murder]; **PC 12310** [Explosion causing death/GBI]; **MV 1670, 1671** [Sabotage] (see *P. v. Thomas* (1999) 21 C4th 1122).

<sup>19</sup> Attempted murder is specifically listed (PC 1192.7(c)(9)); attempted murder includes assault with intent to commit murder [former **PC 217**] (*P. v. Koontz* (1984) 162 CA3d 491). For attempted arson, see also **PC 455** (*P. v. Flores* (1995) 39 CA4th 1811). For **PC 220**, see fn. 6.

<sup>20</sup> The following vehicular offenses qualify as serious felonies and as prior "strikes" when they involve personal infliction of great bodily injury on any person other than an accomplice or personal use of a dangerous or deadly weapon, within the meaning of PC 1192.7(c)(8) or (23): **PC 191.5** [Vehicular manslaughter while intoxicated, with gross negligence]; **PC 192(c)(1)** [Vehicular manslaughter with gross negligence]; **PC 192(c)(3)** [Vehicular manslaughter while intoxicated]; **PC 192.5(a)** [Vehicular manslaughter with gross negligence, involving a vessel]; **PC 192.5(c)** [Vehicular manslaughter while intoxicated, involving a vessel]; **VC 2800.3** [Evading police causing death or serious injury]; **VC 23104(b)** [Reckless driving causing GBI, with a prior]; **VC 23153** [Driving while intoxicated causing injury] (PC 1192.8). Note: VC 20001 [Hit and run causing injury or death] usually will not qualify as a serious felony (*P. v. Wood* (2000) 83 CA4th 862).

## APPENDIX B

### Three Strikes Law — Significant Published Cases

(Updated June 21, 2004)

#### Calculation of Sentence

##### ***In re Cervera* (2001) 24 Cal.4th 1073**

A defendant does not earn any custody credits against the indeterminate life term imposed under the Three Strikes law.

##### ***In re Young* (2004) 32 Cal.4th 900**

“[R]eduction of the sentence” under Penal Code section 2935 (for performing heroic acts in life-threatening situations) is distinct from credits under the Three Strikes law. Therefore, it is not subject to the Three Strikes law’s 20 percent conduct credit limitation.

##### ***People v. Acosta* (2002) 29 Cal.4th 105**

The calculation of the minimum term of the indeterminate sentence to be imposed under Penal Code section 667(e)(2)(A)(i) requires tripling of the minimum period of parole eligibility (excluding enhancements) for the term that, absent the Three Strikes law, would apply under either Penal Code section 3046 (providing a minimum confinement period) or some other statute, i.e., the One Strike law.

##### ***People v. Casper* (2003) 33 Cal.4th 38**

When the court dismisses one or more prior convictions on one or more charges of a multiple-charge case in order to remove that charge (or charges) from the three-strikes sentencing scheme, then the mandatory consecutive sentencing provisions of Penal Code section 667(c)(6)–(7), still apply to all charges, even those charges for which the priors were stricken.

##### ***People v. Coelho* (2001) 89 Cal.App.4th 861**

If a jury could have based its verdicts upon a number of unlawful acts and the court cannot determine beyond a reasonable doubt the particular acts the jury selected, the court should assume that the verdicts were based on those acts that would give it the most discretion to impose concurrent terms.

Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, a finding at sentencing on the factual issue of whether the crimes committed by a defendant arose from the same set of operative facts is one that the sentencing court is constitutionally authorized to make.

##### ***People v. Deloza* (1998) 18 Cal.4th 585**

Since defendant robbed four victims on the “same occasion,” consecutive sentences for those convictions was discretionary. The phrase “committed on the same occasion,” as used in Penal Code section 667(c)(6)–(7), and section 1170.12(a)(6)–(7), means a close temporal and spatial proximity between the acts underlying the current convictions; although, it may

involve other factors as well. This phrase is not coextensive with the analysis for determining whether Penal Code section 654 permits multiple punishment or with the analysis for determining “separate occasions” within the meaning of Penal Code section 667.6(d).

***People v. Dominguez* (1995) 38 Cal.App.4th 410**

The trial court properly doubled the base term imposed for each current offense. The sentence for each offense must be doubled; enhancements are not doubled.

***People v. Dotson* (1997) 16 Cal.4th 547**

When calculating a sentence under Penal Code section 1170.12(c)(2)(A)(iii), the court properly includes enhancements as part of the calculation of the minimum term of the indeterminate sentence and then also adds the enhancements onto the indeterminate term as a separate determinate term.

***People v. Durant* (1999) 68 Cal.App.4th 1393**

The term “same set of operative facts” refers to the facts of a case that prove the underlying act upon which a defendant had been found guilty, i.e., the nature and elements of the current offense charged. In this case, although defendant burglarized three residences in sequence, the burglaries did not arise from the same set of operative facts because each crime was completed upon defendant’s felonious entry. Hence, the trial court imposed an unauthorized sentence in imposing concurrent sentences for the three burglaries.

***People v. Helms* (1997) 15 Cal.4th 608**

The “comprehensive” language of Penal Code sections 667(e)(2)(B) and 1170.12(c)(2)(B) requires that the three-strikes term be served consecutive to any other term unless there is some other bar to consecutive sentencing.

***People v. Hill* (1995) 37 Cal.App.4th 220**

Defendants are entitled to full presentence conduct credits under Penal Code section 4019.

***People v. Jefferson* (1999) 21 Cal.4th 86**

Penal Code section 3046 provides a minimum confinement period, a term of seven years, which can be doubled under the Three Strikes law to set a defendant’s minimum eligible parole date. Similarly, the minimum 15-calendar-year confinement under the Criminal Street Gang Statute (Penal Code section 186.22), which supersedes the seven-year minimum under Penal Code section 3046 and which is not a sentencing enhancement, also establishes a minimum term that can be doubled under the Three Strikes law.

***People v. Lawrence* (2000) 24 Cal.4th 219**

Even though defendant was still in flight from his first crime when he committed his second crime, his crimes were not committed on the “same occasion” because they were separated by two to three minutes, one to three blocks, and several victims. The phrase “same set of operative facts” imports the same concepts of closeness in time and space as does the phrase “same occasion,” but it also refers to the facts and elements of a case that prove the underlying charged offenses. If the elements of the first crime are satisfied prior to the commission of the second crime, the crimes do not arise from the same set of operative facts. If crimes are not committed on the same occasion and do not arise from the same set of operative facts, consecutive sentences are mandatory.

***People v. Nguyen* (1999) 21 Cal.4th 197**

The minimum term of an indeterminate sentence is calculated separately for each offense.

Trial courts retain discretion under Penal Code section 1170 to select the upper, middle, or lower term as appropriate when selecting a term to triple under Penal Code section 667(e)(2)(A)(i).

***People v. Spears* (1995) 40 Cal.App.4th 1683**

The limit on custody credits in Penal Code section 667(c)(5) does not violate equal protection or due process. Defendant is not similarly situated to defendants with current violent felonies but no prior convictions or to defendants whose current crimes predate passage of the Three Strikes law.

**Construction with Other Laws**

***In re Varnell* (2003) 30 Cal.4th 1132**

Although a trial court may dismiss a prior conviction for purposes of the Three Strikes law, it cannot ignore the *fact* of the prior conviction and resulting prison term in finding the defendant ineligible under Proposition 36.

***People v. Acosta* (2002) 29 Cal.4th 105**

The Three Strikes law and the One Strike law operate jointly. Accordingly, the court properly tripled, pursuant to the Three Strikes law, defendant's 25-years-to-life sentence set by reference to the One Strike law, even though the same prior conviction was used to bring the defendant within the confines of both the One Strike law and Three Strikes law. It is also proper to impose a Penal Code section 667(a) enhancement for the same prior conviction.

***People v. Carpenter* (1999) 21 Cal.4th 1016**

The Three Strikes law did not abolish the death penalty.

***People v. Gipson* (2004) 117 Cal.App.4th 1065**

Defendant's three-strikes sentence does not violate the federal and state contract clauses because his plea bargain in the prior case is "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy." The 1994 amendment to Penal Code section 667 (enacting the Three Strikes law) did not affect the defendant's 1992 plea bargain.

***People v. Murphy* (2001) 25 Cal.4th 136**

The court properly applied both the Three Strikes law and the Habitual Sexual Offender law because defendant met the criteria of each statute. Therefore, the court properly tripled, under the Three Strikes law, defendant's term of 25 years to life, which was imposed under the Habitual Sexual Offender law. Penal Code section 654 does not bar use of same prior convictions to impose sentence under both laws because a prior conviction is not an "act or omission."

***People v. Nguyen* (1999) 21 Cal.4th 197**

Penal Code section 667(e)(1) requires a court to double “the term otherwise provided.” The phrase “otherwise provided” seems to encompass all the sentencing provisions outside the Three Strikes law. Therefore, unless the Three Strikes law expressly abrogates the relevant provisions of another sentencing statute (i.e., Penal Code section 1170.1), such provisions apply.

***People v. Snow* (2003) 105 Cal.App.4th 271**

Under *Acosta*, the court used defendant’s prior conviction to sentence him under the One Strike law and to triple his minimum term under the Three Strikes law. Under *Murphy*, the court imposed sentence under the Habitual Sexual Offender law and tripled his term under the Three Strikes law. The court must set the minimum term of the indeterminate term under either the One Strike law or the Habitual Sexual Offender law but not under both. But the court has discretion regarding which sentencing scheme to use.

**Cruel and Unusual Punishment**

***Ewing v. California* (2003) 538 U.S. 11**

The defendant’s sentence of 25 years to life for felony grand theft, under the Three Strikes law, did not violate the Eighth Amendment’s proscription against cruel and unusual punishment.

***Lockyer v. Andrade* (2003) 538 U.S. 63**

The California Court of Appeal’s affirmance of a sentence of 50 years to life for two convictions of petty theft with a prior theft-related conviction, under California’s Three Strikes law, is not an unreasonable application of clearly established Supreme Court authority.

***Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755**

Defendant’s 25-years-to-life sentence for petty theft with a prior theft conviction (VCR shoplift) and two 1991 prior robbery convictions constitutes cruel and unusual punishment because it is grossly disproportionate in violation of the Eighth Amendment. Defendant’s robberies constituted his entire criminal record, and the “force” in these robberies consisted of defendant pushing a security guard out of the way as he ran from a store, and, on a separate occasion in a different store, a codefendant driving the getaway car running over a security guard’s foot. Although the state court’s decision is not contrary to clearly established United States Supreme Court precedent, the state court unreasonably applied United States Supreme Court precedent to the unique facts of defendant’s case.

**Double Jeopardy/Retrial of Priors**

***Monge v. California* (1998) 524 U.S. 721**

Agreeing with the California Supreme Court (*People v. Monge* (1997) 16 Cal.4th 826), the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context.

***People v. Barragan* (2004) 32 Cal.4th 236**

Retrial of a prior conviction allegation is permissible where a trier of fact finds the allegation to be true but an appellate court reverses that finding for insufficient evidence. Retrial of the prior conviction does not violate the constitutional requirement of fundamental fairness, the equitable principles of law of the case and res judicata, or any relevant statutory provisions.

***People v. White Eagle* (1996) 48 Cal.App.4th 1511**

No double jeopardy violation in allowing a court to use one prior conviction to impose a prior prison term enhancement, elevate a petty theft to a felony, and impose a longer sentence under the Three Strikes law.

**Dual Use of Prior Convictions**

***People v. Dotson* (1997) 16 Cal.4th 547**

The Three Strikes law is a sentencing scheme, not an enhancement. Therefore, *People v. Jones* (1993) 5 Cal.4th 1142 and Penal Code section 654 are inapplicable. Also, a Penal Code section 667(a) enhancement is properly added to a Three Strikes sentence.

***People v. Garcia* (2001) 25 Cal.4th 744**

No dual-use violation to use the same prior conviction to qualify a defendant for Penal Code section 290 registration and a Three Strikes sentence. Since not all violent and serious felonies qualify a defendant for Penal Code section 290 registration, there is no “automatic doubling” of all registrable offenses.

***People v. Murphy* (2001) 25 Cal.4th 136**

Penal Code section 654 does not bar the use of the same prior conviction to impose sentence under both the Three Strikes law and the Habitual Sexual Offender law because a prior conviction is not an “act or omission.”

***People v. Thomas* (1997) 56 Cal.App.4th 396**

No dual-use violation when using an enhancement provision both in the calculation of the minimum indeterminate term and as the basis for separate punishment. Enhancements are separate punishment and do not “merge” into the minimum indeterminate term.

***People v. White Eagle* (1996) 48 Cal.App.4th 1511**

The same prior robbery conviction may be used to elevate a petty theft to a felony, to impose a longer sentence under the Three Strikes law, and to impose an enhancement for serving a prior prison term.

**Due Process**

***People v. Sipe* (1995) 36 Cal.App.4th 468**

The Three Strikes law is reasonably related to a proper legislative goal of curbing recidivist criminal activity. Hence, it does not violate due process.



## Eligibility for Alternative Sentences

### ***People v. Carrillo* (2001) 87 Cal.App.4th 1416**

The Three Strikes law expressly makes a defendant subject to its sentencing provisions ineligible for commitment to the California Rehabilitation Center (CRC). Thus, unless the court dismisses all prior convictions under *Romero*, a defendant cannot be sent to CRC.

### ***People v. Davis* (2000) 79 Cal.App.4th 251**

The allegation of a prior conviction within the meaning of the Three Strikes law does not render a defendant ineligible for participation in the deferred entry of judgment program (formerly the diversion program) listed in Penal Code sections 1000 et seq.

### ***People v. Superior Court (Roam)* (1998) 69 Cal.App.4th 1220**

Unless the court dismisses all of a defendant's prior convictions pursuant to *Romero*, a defendant is ineligible for diversion, probation, or any disposition other than state prison.

### ***In re Varnell* (2003) 30 Cal.4th 1132**

Although a trial court may dismiss a prior conviction for purposes of the Three Strikes law, it may not ignore the *fact* of the prior conviction and resulting prison term in finding the defendant ineligible under Proposition 36 for drug treatment.

## Equal Protection

### ***People v. Andrews* (1998) 65 Cal.App.4th 1098**

Differences in the application of the Three Strikes law by local prosecutors, not based on invidious discrimination, do not rise to the level of a denial of equal protection.

### ***People v. Cressy* (1996) 47 Cal.App.4th 981**

Since defendant's prior convictions are serious and/or violent, he is not similarly situated to persons who have prior convictions that are not serious or violent. Therefore, there is no equal-protection violation.

### ***People v. Garcia* (1999) 21 Cal.4th 1**

The defendant lacks standing to raise an equal-protection violation on behalf of hypothetical felons on the ground that some prior juvenile adjudications included in Welfare and Institutions Code section 707(b) may qualify as "strikes" even though they are not included in Penal Code section 667.5(c) or section 1192.7(c).

### ***People v. Nguyen* (1997) 54 Cal.App.4th 705**

A compelling justification supports the distinction between persons currently convicted of theft with two prior serious felony convictions, at least one of which is for a theft-related offense, and persons currently convicted of theft with two prior serious felony convictions that do not include any convictions for theft-related offenses. Thus, there is no equal-protection violation.

## **Expungement of Prior Convictions**

### ***People v. Daniels* (1996) 51 Cal.App.4th 520**

Expungement of a prior conviction under Welfare and Institutions Code section 1772 (which allows for release from “penalties and disabilities” after an honorable discharge from the California Youth Authority) does not preclude use of this prior conviction as a “strike” in subsequent proceedings.

### ***People v. Diaz* (1996) 41 Cal.App.4th 1424**

Penal Code section 1203.4, by its express terms, does not apply to preclude the court from using defendant’s prior convictions as “strikes,” even though they were dismissed pursuant to this section.

## **Foreign Convictions**

### ***People v. Hazelton* (1996) 14 Cal.4th 101**

Despite ambiguous language in Penal Code section 1170.12(c)(2)(A), unequivocal evidence of the voters’ intent clarifies that out-of-state prior convictions are included as “strikes” in Penal Code section 1170.12.

### ***People v. Laino* (2004) 32 Cal.4th 878**

The Full Faith and Credit Clause does not bar a state from determining, under its own laws, whether an out-of-state guilty plea constitutes a “conviction” for purposes of the Three Strikes law.

## **Jury Nullification**

### ***People v. Cardenas* (1997) 53 Cal.App.4th 240**

The court properly denied defendant’s request to question the jury about the Three Strikes law because sentencing is not the jury’s concern. A juror’s impartiality can be verified without questioning about the Three Strikes law, especially when a defendant asks for a bifurcated trial on his prior convictions.

### ***People v. Cuevas* (2001) 89 Cal.App.4th 689**

The court did not err in instructing the jury not to consider penalty or punishment. A defendant has no constitutional right to jury nullification.

## **Jury Trial on Prior Convictions**

### ***People v. Epps* (2001) 25 Cal.4th 19**

Although the right to a jury trial on a prior-conviction allegation is limited under Penal Code section 1025, it is not completely eliminated. The court determines the identity of the perpetrator, but the defendant retains a statutory right to a jury trial on whether the documents proving his prior conviction are authentic and, thus, whether the prior conviction occurred. A denial of a defendant’s statutory right to jury trial on prior convictions is subject to review for harmless error.

***People v. Kelii* (1999) 21 Cal.4th 452**

Whether a prior conviction qualifies as a “strike” is to be determined by the trial court (through documents) and not the jury.

**Plea-Bargaining Prohibition**

***People v. Cortez* (1997) 55 Cal.App.4th 426, fn. 4**

Once an information is filed, which includes prior-conviction allegation(s) under the Three Strikes law, a plea bargain that contemplates dismissal of the prior conviction allegation(s) is prohibited under Penal Code section 667(g).

**Prosecutorial Discretion**

***People v. Kilborn* (1996) 41 Cal.App.4th 1325**

A prosecutor’s charging discretion may be limited by the Legislature without violating the separation-of-powers doctrine. But prosecutors retain substantial discretion under the Three Strikes law.

**Qualifying Priors**

***Gonzales v. Superior Court* (1995) 37 Cal.App.4th 1302**

A sentencing court must determine whether, as of the date of a prior conviction, a prior conviction was a felony or misdemeanor. But it does not matter whether, on the date the prior conviction was suffered, the prior conviction constituted a “strike” or a “serious felony” or a “violent felony.” Rather, the prior conviction must qualify as a “strike” on the date that the defendant commits his new offense.

***People v. Benson* (1998) 18 Cal.4th 24**

The plain language of Penal Code section 1170.12(b)(1)(B) clearly allows for the use of the defendant’s two prior convictions as two “strikes” even though they constituted a single act against a single victim committed at the same time with a single intent and one prior conviction was stayed under Penal Code section 654. There is a rational basis for this rule.

***People v. Bowden* (2002) 102 Cal.App.4th 387**

A prior juvenile adjudication qualifies as a “strike” despite the lack of a right to a jury trial in juvenile court because (1) *Apprendi v. New Jersey* (2000) 530 U.S. 466 does not apply in California since California defendants have a statutory right to a jury trial on the issue of whether they suffered a prior conviction, and (2) the lack of a jury trial in juvenile court does not undermine the reliability of juvenile adjudications since all the other procedural protections available in juvenile proceedings are ample to ensure the reliability that *Apprendi* requires.

***People v. Davis* (1997) 15 Cal.4th 1096**

An implied finding that the juvenile was found fit to be dealt with by the juvenile court is sufficient under Penal Code section 667(d)(3)(C) for a juvenile adjudication to qualify as a “strike.”

***People v. Franklin* (1997) 57 Cal.App.4th 68**

Pursuant to Penal Code section 667(d)(1), a qualifying prior conviction is a “strike” under the Three Strikes law even though the felony is later reduced to a misdemeanor pursuant to Penal Code section 17(c).

***People v. Fuhrman* (1997) 16 Cal.4th 930**

Prior convictions need not have been brought and tried in separate cases in order to qualify as separate “strikes” under the Three Strikes law.

***People v. Garcia* (1999) 21 Cal.4th 1**

Under Penal Code section 667(d)(3)(B), a prior juvenile adjudication qualifies as a “strike” if it is listed in Welfare and Institutions Code section 707(b), or Penal Code section 1192.7(c) or section 667.5(c). Under Penal Code section 667(d)(3)(D), a prior juvenile adjudication qualifies as a “strike” if, in the prior juvenile proceeding, the juvenile was adjudged a ward of the juvenile court because he or she committed an offense listed in Welfare and Institutions Code section 707(b). It is irrelevant whether that offense is the same offense that is currently alleged as a “strike.” Both requirements must be met.

***People v. Williams* (1996) 49 Cal.App.4th 1632**

When guilt is established, either by plea or verdict, the defendant stands convicted and has a “prior conviction.”

**Trial Court Discretion**

***In re Varnell* (2003) 30 Cal.4th 1132**

A trial court may not use Penal Code section 1385 to disregard “sentencing factors” — “a circumstance which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury’s finding that the defendant is guilty of a particular offense” — that are not themselves required to be a charge or allegation in an indictment or information.

***People v. Couch* (1996) 48 Cal.App.4th 1053**

Defendant may not challenge on appeal his Three Strikes sentence because he agreed to accept it (as part of a plea bargain) and thereby waived any alleged *Romero* error.

***People v. Garcia* (1999) 20 Cal.4th 490**

The court has discretion to dismiss a prior conviction allegation on one charge and to decline to do so for other charges in a multiple-count case. Striking a prior conviction is not equivalent to a determination that the defendant did not, in fact, suffer the conviction.

***People v. Gaston* (1999) 74 Cal.App.4th 310**

The court abused its discretion in striking defendant’s 17-year-old prior conviction because defendant is the “revolving door” criminal that the Three Strikes law was devised for. Defendant’s diabetes and drug dependency are not mitigating factors.

***People v. Konow* (2004) 32 Cal.4th 995**

A defendant does not have a formal right to make a Penal Code section 1385 motion to dismiss a prior conviction, but he may informally request that the magistrate consider dismissal on the magistrate's own motion.

***People v. McGlothlin* (1998) 67 Cal.App.4th 468**

The court abused its discretion in striking defendant's prior conviction because of his lengthy criminal history. The court's personal antipathy for the Three Strikes law is an inadequate basis to exercise discretion.

***People v. Rodriguez* (1998) 17 Cal.4th 253**

Per Penal Code section 1260, a defendant has a right to be present at a hearing on remand for resentencing under *Romero*.

***People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968**

Regardless of prior-conviction allegations under the Three Strikes law, a trial court may reduce a wobbler offense originally charged as a felony to a misdemeanor either by imposing a misdemeanor sentence (Penal Code section 17(b)(1)) or by declaring it to be a misdemeanor upon a grant of probation (Penal Code section 17(b)(3)). The trial court's decision is reviewable for abuse of discretion.

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

Since the Three Strikes law does not expressly remove a trial court's power under Penal Code section 1385, the court may dismiss a defendant's prior convictions under Penal Code section 1385 in the interests of justice. If the Three Strikes law were construed to allow the court to dismiss prior convictions only with the prosecutor's consent, then the law would violate the separation-of-powers doctrine. The Legislature may eliminate a court's power to dismiss priors but may not condition it upon the prosecutor's approval. This holding is fully retroactive. A court dismissing a prior conviction may only consider certain factors in reaching its decision and, if it dismisses a prior conviction, it must write its reasons for doing so in the minute order.

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

The trial court's order dismissing a prior conviction was both ineffective and unsound. The court's failure to set forth its reasons for dismissal rendered its order ineffective. The court also abused its discretion in striking the prior conviction because defendant's present offense and his record are both unfavorable. The case must be remanded to allow defendant the opportunity to withdraw his plea since he obviously pled in response to the court's indication that it would dismiss one of his prior convictions.

**Vagueness**

***People v. Fuhrman* (1997) 16 Cal.4th 930, fn. 9**

The Three Strikes law does not violate due process because it provides fair warning as to what constitutes a "strike."

## APPENDIX C

### Proposition 184 Ballot Arguments

Record:	1004
Proposition #:	184
Title:	Increased Sentences. Repeat Offenders (Three Strikes)
Year:	1994
Proposition type:	Initiative Statute
Popular vote:	Yes: 5,906,268 (71.8%); No: 2,314,548 (28.2%)
Pass/Fail:	Pass

#### Argument in Favor of Proposition 184

On June 29, 1992, 18 year old Kimber Reynolds was leaving a Fresno restaurant when two men on a stolen motorcycle tried to steal her purse. When Kimber resisted, her assailant, without warning, produced a .357 magnum and shot her point blank in the head. She died 26 hours later with family at her bedside.

Mike Reynolds, Kimber's father, vowed to spare others from the senseless tragedy that killed his daughter. Thus began 3 Strikes and You're Out. 3 Strikes keeps career criminals, who rape women, molest innocent children and commit murder, behind bars where they belong.

Here's how it works:

- Strike One: One serious/violent felony serves as a first strike toward a stiffer prison term.
- Strike Two: A second felony conviction, with one prior serious/violent felony, **DOUBLES** the base sentence for the conviction. Any additional enhancements under existing law, including those for prior convictions, are then added.  
No probation.
- Strike Three: A third felony conviction, with two serious/violent prior felonies, **TRIPLES** the base sentence or imposes 25 years to life, whichever is greater.  
No probation.

A "truth in sentencing" provision requires felons to serve at least 80% of their terms for second and third strike convictions. Harsher punishments like the death penalty still apply.

Convictions before 1994, including the murder charge for which one of Kimber's killers is serving just nine years, are counted as strikes. Felonies committed outside California, or by juveniles, are counted as strikes. Prosecutors have discretion, with court approval, to dismiss a prior strike in the interest of justice.

The threat of our initiative forced Sacramento politicians to pass 3 Strikes. Now, they're trying to weaken it. Our vote for Proposition 184 will strengthen the law and tell politicians, "hands off 3 Strikes."

In addition to saving lives, California taxpayers will no longer have to pay the outrageous costs of running career criminals through the judicial system's revolving door over and over again.

3 STRIKES SAVES LIVES AND TAXPAYER DOLLARS!

According to the Office of Planning and Research, 3 STRIKES SAVES \$23 BILLION over five years.

Every repeat felon returned to our streets costs nearly \$200,000 annually in direct losses to victims and the enormous expense of running the same criminals through the police stations, courts, and prisons time and again.

3 STRIKES SAVES LIVES AND TAXPAYER DOLLARS!

Proposition 184 is supported by:

- Parents of Murdered Children
- California Correctional Peace Officers Association
- National Tax Limitation Committee
- Women Prosecutors of California
- California Police Chiefs' Association
- Crime Victims United
- Center for the California Taxpayer
- California Peace Officers' Association
- Doris Tate Crime Victims Bureau
- Paul Gann Citizens Committee
- California State Sheriffs' Association
- Committee to Protect the Family
- Americans for Tax Reform
- Peace Officers Research Association of California
- Justice for Murder Victims
- California Narcotic Officers' Association
- Memory of Victims Everywhere
- National Victim Center

3 Strikes is supported by police chiefs, sheriffs, district attorneys, victims' organizations, and taxpayer groups throughout California.

Why do they all say "YES" ON 184?

Because 3 STRIKES SAVES LIVES AND TAXPAYER DOLLARS!

FOR(au)

MIKE REYNOLDS, Board Member, Crime Victims United

JAN SCULLY, Director of Policy, Women Prosecutors of California

MIKE HUFFINGTON. Co-Chair, 3 Strikes and You're Out

## **Rebuttal to Argument in Favor of Proposition 184**

DON'T BE FOOLED!!

FACT: PROPOSITION 184 WILL COST TAXPAYERS BILLIONS ANNUALLY.

The “savings” claimed by the proponents are false. Their numbers have been totally discredited by researchers at the Rand Corporation and the University of California. The California Department of Corrections estimates that Proposition 184 will quickly cost billions per year--significantly more than the current cost for all of higher education.

LOCAL SCHOOLS, COLLEGES, HOSPITALS, POLICE AND FIRE DEPARTMENTS WILL BE CRIPPLED BY THE HUGE COST OF PROPOSITION 184.

FACT: PROPOSITION 184 LUMPS IN NONVIOLENT OFFENDERS WITH VIOLENT CRIMINALS.

The Los Angeles District Attorney's Office says that three out of four who get life sentences under Proposition 184 will be nonviolent offenders--at a cost of \$48 billion over 20 years for L.A.'s prisoners alone.

FACT: MANY LAW ENFORCEMENT OFFICIALS OPPOSE PROPOSITION 184.

District attorneys and police across the state have repeatedly criticized this initiative because it will fill our prisons with aging, nonviolent offenders.

FACT: CRIME VICTIMS OPPOSE PROPOSITION 184.

The Klaas family, whose little girl's violent death spurred on “three strikes,” opposes Proposition 184 as the wrong approach to violent crime. Recently, a San Francisco grandmother refused to prosecute a car break-in because the perpetrator would have gotten life.

FACT: PROPOSITION 184 DOES NOT CHANGE THE LAW.

This measure is identical to three strikes legislation already signed into law. Don't endorse a bad and unworkable law. Tell the legislature to correct this badly flawed and overpriced law.  
VOTE NO ON PROPOSITION 184.

Rebuttal(au)

JAMES FOX, District Attorney, San Mateo County

MARLYS ROBERTSON, President, League of Women Voters of California

MARC KLAAS, Member of the Board of Directors, Polly Klaas Foundation



## Argument Against Proposition 184

Californians are sick and tired of the violence and misery caused by people who go to prison for violent crimes, only to be released to strike again. We need strong laws that keep these repeat, violent offenders in prison for life if necessary.

BUT PROPOSITION 184 IS THE WRONG LAW. IF IT PASSES, OUR PRISON SYSTEM WILL BE BLOATED WITH NON-VIOLENT OFFENDERS SERVING LIFE TERMS.

Here are some of the problems with Proposition 184:

- The third strike does not have to be violent or serious--it can be any felony at all. A 50-year-old man who twice stole a bicycle from a garage as a teenager, and who now writes a bad check, will get a life sentence under Proposition 184.

Three out of four people convicted under this Proposition will be imprisoned for NON-VIOLENT offenses!

- This Proposition arises from the tragic kidnap and killing of Polly Klaas. But even the Polly Klaas family opposes Proposition 184, because it treats non-violent crimes the same as murder, rape or armed robbery.
- Because so many people will be drawn into the Proposition 184 net, taxpayer costs for prisons will soar. The Department of Corrections estimates that this law will cost taxpayers \$21 billion to build new prisons, and quickly cost billions each year to run them.

WHERE WILL THE BILLIONS OF DOLLARS COME FROM TO KEEP ALL THESE NON-VIOLENT OFFENDERS IN PRISON FOR LIFE? The state will have to INCREASE OUR TAXES or SEVERELY CUT ESSENTIAL SERVICES such as:

- Police and fire services
- Education for our children, our hope for the future
- Medical care for seniors and children
- Creating and preserving our parks and open spaces

The politicians are refusing to give voters a choice. We need a repeat offender law that targets violent criminals—not one that sweeps HUNDREDS OF THOUSANDS OF NON-VIOLENT OFFENDERS INTO LIFE PRISON TERMS.

Don't sign a blank check for a bad law. Send a message to the politicians. Tell them to do their job by passing a law that targets repeat, violent criminals—not a grandstanding law that fills our prisons with aging non-violent offenders.

THIS THREE STRIKES MEASURE IS A SLOGAN, NOT A SOLUTION. VOTE NO ON PROPOSITION 184.

Against(au)

MARC KLAAS, Member of the Board of Directors, Polly Klaas Foundation

TERRENCE STARR, President, California Probation, Parole and Correctional Association

MARY BERGAN, President, California Federation of Teachers

### **Rebuttal to the Argument Against Proposition 184**

815,000 California voters signed petitions to place 3 Strikes and You're Out on the ballot. We did it because soft-on-crime judges, politicians, defense lawyers and probation officers care more about violent felons than they do victims. They spend all of their time looking for loopholes to get rapists, child molesters and murderers out on probation, early parole, or off the hook altogether. Well, this time it's victims first!

Opponents of 3 Strikes and You're Out will say anything to keep criminals out of jail. But, their false accusations won't work.

Here is what they would like you to believe:

CLAIM: "Our prison system will be bloated with non-violent offenders."

FACT: NOT TRUE: 3 Strikes targets only career criminals--those with a history of committing SERIOUS/VIOLENT crimes.

CLAIM: "The state will have to increase our taxes."

FACT: FALSE: Under 3 Strikes, California taxpayers will no longer have to pay the outrageous costs of running career criminals through the judicial system's revolving door time and again. The Office of Planning and Research estimates 3 STRIKES WILL SAVE TAXPAYERS \$23 BILLION over five years.

CLAIM: Proposition 184 will "severely cut essential services."

FACT: HOGWASH: Taxpayers will save \$23 Billion under 3 Strikes. Services will not be cut. 3 Strikes is endorsed by the California Police Chiefs' Association, California Peace Officers' Association, California State Sheriffs' Association and law enforcement throughout the state.

**3 STRIKES SAVES LIVES AND TAXPAYER DOLLARS! YES ON 184!**

Rebut Against(au)

JAN MILLER, Chairperson, Doris Tate Crime Victims Bureau

CHIEF LARRY TODD, President, California Police Chiefs' Association

LEWIS K. UHLER, Chairman, Center for the California Taxpayer

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