

CRIME AND JUSTICE POLICY

TOUGH FOR WHOM?

HOW PROSECUTORS AND JUDGES
USE THEIR DISCRETION TO
PROMOTE JUSTICE UNDER THE
CALIFORNIA THREE-STRIKES LAW

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EXECUTIVE SUMMARY

The California “Three-Strikes and You’re Out” law has been labeled as the harshest sentencing law in the nation. It targets repeat offenders who have accumulated one or more “strike” offenses and mandates enhanced punishment upon conviction of *any* subsequent felony. Offenders convicted of a second strike receive double the usual sentence and offenders convicted of a third strike receive triple the usual sentence or a minimum sentence of 25 years-to-life.

Unlike other mandatory sentencing laws, however, three-strikes gives prosecutors and judges the opportunity to bypass the law if it is “in the furtherance of justice.” In its evaluation of this use of discretion this study reveals that:

- Discretion is used in a substantial portion of three-strike cases in California. Data from urban jurisdictions indicate that approximately 25-45% of eligible three-strike offenders will have a prior strike dismissed by either the prosecutor or the judge and thus will receive a corresponding sentence reduction.
- Only 5% (7,626) of the state’s 163,000 prison inmates are three-strike offenders. The law was expected to add thousands of new three-strikers to the prisons each year, yet the combined total of two- and three-strike offenders represents only one quarter of all offenders incarcerated in the state prison system.
- Of the 7,626 three-strikers sentenced since 1994, over half (4,471) were convicted of the following offenses: Murder (319), Sexual Assault (467), Kidnapping (90), Robbery (1,548), Assault With a Deadly Weapon (375), Other Assault (457), Residential Burglary (826), and Illegal Possession of a Weapon (393). Altogether, nearly two-thirds (66%) of three-strikers were convicted of a violent offense, burglary (residential or commercial), or illegal possession of a weapon.
- When deciding whether to use discretion, prosecutors usually base their decisions upon the severity of the criminal record as well as the severity of the present offense. District Attorneys

vary, however, in the amount of emphasis that they place upon a specific factor as well as the procedures that must be followed when discretion is used. Some require deputy prosecutors to use discretion only when certain criteria have been satisfied, whereas others allow deputies to use it more liberally, particularly when the current offense is “non-serious.”

- District Attorneys in large metropolitan areas use internal policies to help guide their use of discretion. These guidelines facilitate the consistent enforcement of the law and equal treatment of offenders within the jurisdiction.

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FOREWORD

Laws that impose sharply enhanced sentences on criminal recidivists are nothing new in the American criminal justice system, for they can be found in the earliest criminal statutes of the American colonies. Yet “three-strikes” laws have generated renewed controversy in recent years as California and other states have embraced them as part of a broad strategy to toughen punishment for serious and violent offenders.

The Henry Salvatori Center for the Study of Individual Freedom in the Modern World is pleased to publish this important new study of California’s “Three-Strikes” law by Professor Jennifer Walsh of California State University, Los Angeles. The most far-reaching of any such law in the nation, California’s statute, now a decade old, is often misunderstood. Drawing upon her extensive original research, Professor Walsh shows, for example, that contrary to the common view the law does *not* result in lengthy sentences for all eligible three-time recidivists. Rather, in 25-45% of all eligible cases prosecutors or judges use their discretion under the law to “strike” prior strikes in less serious cases, resulting in much shorter sentences. This is one reason why only 5% (7,626) of California’s prison population is composed of three-strike offenders, despite the predictions of many when the law was passed in 1994 that it would result in tens (or even hundreds) of thousands more.

Professor Walsh also shows that it is a myth that most offenders sentenced under the law committed minor offenses as their third strike. On the contrary, two-thirds of those now serving a three-strike sentence in California committed, as their most recent offense, a violent crime, burglary (residential or commercial), or illegal possession of a weapon.

“Three-strikes” laws will likely remain the focus of vigorous public debate in California and elsewhere for years to come. The finding of this timely report will help to ensure that that debate is informed by an accurate understanding of how prosecutors and

judges use their discretion under the California law to promote both just punishment and public safety.

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INTRODUCTION

The passage of California's "Three-strikes and You're Out" sentencing law in 1994 stands out as a pivotal point in the state's war on crime.¹ California voters communicated their concern over rising crime rates by enacting a law that greatly increases the punishment for troublesome career criminals. Specifically, the law targets repeat offenders who have accumulated "strike" offenses. Strike offenses are crimes that are designated as "serious" in the state's penal code, and they include such felonies as murder, rape, kidnapping, robbery, and residential burglary.² According to the provisions of the law, offenders with one previous strike offense are ineligible for probation and are to be sentenced to double the usual punishment upon conviction of any second felony. Offenders who have two prior strike offenses are also ineligible for probation and must be sentenced upon conviction of any third felony to the greater of: a) triple the usual sentence; b) a minimum indeterminate prison sentence of 25 years-to-life; or c) an alternate term (e.g., life without parole) if required by another sentencing measure.

Although the law passed with 72% of the vote, opponents of the law have lobbied consistently — albeit unsuccessfully — to have the law overturned, abolished, or modified.³ Lawsuits alleging cruel and unusual punishment in violation of the Eighth Amendment reached the U.S. Supreme Court in November 2002, but the Court declared the law to be constitutional in its rulings the following spring.⁴ Bills to amend the law were introduced in 1996,⁵ 1997,⁶ 1999,⁷ twice in 2002,⁸ and again in 2003,⁹ but all failed to clear the legislative process. Two measures authorizing the state to study the impact of the law made it through the legislature, but were subsequently vetoed; first by Governor Pete Wilson in 1998,¹⁰ and then again by Governor Gray Davis in 1999.¹¹

Out of frustration with the lack of success in the legal and electoral arenas, opponents of the law have declared their intent to use California's ballot initiative process to get the law amended. Spearheading the reform movement is FACTS (Families Against California Three-Strikes), a lobby organization composed primarily of family members of three-strike offenders. After the U.S. Supreme

Court upheld the law in 2003, the group signaled its intent to take the matter directly to the voters. By April 2004, enough signatures had been gathered to put a three-strikes amendment before the voters on the November 2004 ballot.¹²

Critics of California's three-strikes law have denounced the measure for two primary reasons. First, they contend that all mandatory sentences are inherently unjust because judges do not have the ability to alter sentence lengths below the designated minimum – no matter what the circumstances of the crime or the characteristics of the individual offender might entail. Recently, Supreme Court Justice Stephen G. Breyer criticized this aspect of mandatory minimums stating that the laws were unfair because they deprived judges of sentencing flexibility in “unusual or exceptional case[s].”¹³ This echoed remarks made earlier by Supreme Court Justice Anthony Kennedy to the American Bar Association (ABA). In his address at their annual meeting in 2003, he expressed his opinion that “in too many cases [federal] mandatory minimum sentences are unwise or unjust” and he urged the ABA to lobby Congress for a repeal of the sentencing legislation.¹⁴

Second, critics particularly oppose California's version of three-strikes because it allows any type of felony offense to act as the last “strike,” which then triggers the imposition of the mandatory sentencing enhancement. They point out that because all felonies are eligible to serve as the last strike, offenders could face a doubled sentence (as a two-striker) or an indeterminate 25-year-to-life sentence (as a three-striker) for less significant offenses such as drug possession or larceny. Consequently, they argue that law unfairly imposes long sentences on many offenders for crimes that are comparatively insignificant.

However, what many of the law's critics either do not know or will not acknowledge is that California's three-strikes law is not a typical mandatory sentencing measure. Unlike other mandatory policies, this law gives prosecutors and judges a substantial amount of discretion to bypass the enhancement when they consider it to be “in the furtherance of justice.”¹⁵ The ability to petition for the dismissal of one or more previous strike offenses in order to forgo the sentencing enhancement amounts to an “escape clause” that prosecutors and judges can employ when they believe that the resulting life sentence would be unjust or inappropriate for the offense or the offender.

Moreover, prosecutors and judges use their discretion independent of one another; therefore, each case is reviewed twice before the sentence is imposed—once by the prosecutor and once by the judge—in order to determine if prior strikes should be dismissed.¹⁶

Conservative estimates from the state’s most populous counties indicate that discretion is exercised in 25 – 45% of all three-strikes cases. In these cases, offenders eligible for a third-strike sentence of 25 years-to-life are typically sentenced instead to a two-strike sentence, which is twice the normal sentence for the present offense. This gives the average third-strike offender a substantial sentence reduction, as the two-strike sentence is usually much shorter than 25 years-to-life.

Furthermore, discretion is most often used in cases involving a less serious current offense or for an offender who has a non-violent record.¹⁷ Because discretion is used regularly and routinely, prosecutors and judges are easily able to weed out offenders who do not fit their conception of “true” three-strikers.

In view of this discretion, the criticisms of the measure’s opponents may no longer be defensible. The California three-strikes law allows professionals within the system to shield less serious offenders from the full effects of the law, while retaining the ability to effectively incapacitate other offenders who are violent or who pose a real and continued threat to the public. Through careful implementation, prosecutors and judges can use their discretion to consider the safety needs of the community while taking into account the circumstances of individual offenders.

Although California’s three-strikes law has been discussed in a number of published studies, none has specifically investigated the use of discretion by prosecutors and judges.¹⁸ Consequently, our comprehension of how the law functions in the real world is incomplete. An understanding of how discretion is being exercised may reassure both policymakers and the public that the law is accomplishing what it was designed to do—namely, incapacitating the state’s most serious offenders. Furthermore, amendments to three-strikes to make it more flexible or less stringent may be unnecessary if prosecutors and judges are using their available discretion to shield less serious offenders from severe sentences.

The purpose of this monograph is to assess this use of discretion and explain the impact that it has had on the implementation

of the law. Part I of this study explains the passage of the three-strikes law in light of the overall “get tough” movement of the early 1990s. Part II identifies the specific provisions of the law. Part III describes both the restrictions placed upon prosecutors and judges as well as the discretion that is imparted to them. Part IV analyzes the impact that the use of discretion has had on the three-strikes law. Part V identifies the three-strike policies of prosecutors in selected jurisdictions. Finally, Part VI summarizes the findings and provides an overall assessment of how the exercise of discretion has alleviated the harshest portions of the law while allowing the intent and purpose of the measure to be preserved.

PART I: PASSAGE OF THE LAW

California's crime control policies, like the three-strikes law, stem from the state's perennial battle with crime. At least since 1960, California has consistently posted crime rates that are significantly higher than the rest of the nation. As can be seen in Table 1, there was a brief respite from the rising crime rates in the early 1980s, but in 1986 violent crime began to increase sharply. By the early 1990s, violent crime in California had reached an all-time high: the overall violent crime rate peaked at over 1,100 offenses per 100,000 people in 1992, and the murder rate crested at 13.1 in 1993. Property crime rates, although lower than they had been in the 1970s, were still significantly higher than the national average. Thus, as can be seen below, when three-strikes was enacted in early 1994, crime in the Golden State remained a critical problem.

To complicate matters, statistics released by the federal Bureau of Justice Statistics (BJS) in 1989 indicated that much of the nation's crime could be attributed to repeat offenders.¹⁹ As shown

Table 1: Crime Rates – California and the United States
(Number per 100,000 Population)

Year	Violent Crime (California)	Violent Crime (U.S.)	Property Crime (California)	Property Crime (U.S.)
1960	239	161	3235	1726
1965	282	200	4037	2249
1970	475	364	5864	3621
1975	655	488	6549	4811
1980	894	597	6940	5353
1985	765	557	5753	4651
1986	921	618	5842	4863
1987	918	610	5588	4940
1988	930	637	5706	5027
1989	978	663	5786	5078
1990	1045	732	5558	5089
1991	1090	758	5683	5140
1992	1120	758	5560	4903
1993	1078	747	5379	4738
1994	1013	714	5161	4660

Source: FBI's Uniform Crime Reports

in Table 2, of those inmates who were released from state prison in 1983, over 60% were arrested for a new offense within three years, and over 40% returned to prison. The BJS study also found that the 108,580 offenders released from prisons in 11 states in 1983 had been arrested in the past for more than 1.3 million offenses, averaging about 12 arrest offenses per person. Within the three years subsequent to their release in 1983, they were responsible for an additional 326,746 arrest offenses—or an average of three additional charges per offender. Many lawmakers interpreted these statistics to mean that the criminal justice system was nothing more than a revolving door and concluded that traditional sentencing policies were not effective in deterring or incapacitating serious offenders.

Table 2: Rate of Recidivism by Repeat Offenders

Time After Release	Percent of State Prisoners Released in 1983 who were:		
	Rearrested	Reconvicted	Reincarcerated
6 months	25.0%	11.3%	8.4%
1 year	39.3	23.1	18.6
2 years	54.5	38.3	32.8
3 years	62.5	46.8	41.4

Source: Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983*, Table 2, p. 3.

The Specific Impetus Behind “Three-Strikes”

The public became sensitized to the public safety threat that career criminals posed after a number of brutal crimes committed by repeat offenders received extensive coverage by the press. A case of rape and torture perpetrated by a repeat sex offender prompted lawmakers in Washington State to pass the nation’s first three-strikes law.²⁰ In California, the 1992 murder of Kimber Reynolds by a repeat offender led to the introduction of the first three-strikes proposal by Assemblymen Bill Jones and Jim Costa, but the measure was later voted down in the Committee on Public Safety.²¹ Shortly after the bill’s defeat, proponents of the measure began to circulate petitions to put a similar proposal before the voters in the form of a ballot initiative.

Lawmakers did not intend to reintroduce the proposal in the legislature until the kidnapping and murder of 12-year old Polly Klaas in October 1993 revealed overwhelming public support for the reform. When Polly was first abducted from her bedroom, a strong media campaign was launched to aid her family in the search efforts. By the time her body was found, the circumstances surrounding Polly's abduction had become a topic of household conversation. The collective anguish over her murder was directed at her killer, Richard Allen Davis, a repeat offender, who had recently been released after serving only half of a sixteen-year sentence for kidnapping. At Polly's memorial service, California Governor Pete Wilson pressed for tougher laws: "We must turn our grief to action and see that this never happens again..."²²

Although the Polly Klaas case proved to be the primary catalyst for three-strikes, the political timing for a major crime bill in California was also just right. In 1994, when crime rates were near their record high levels, public fear of crime was also at an all-time high. In a national survey on crime, 83% of respondents indicated that crime represented a "very serious threat" to the nation; 85% said that criminals were not treated harshly enough; and 75% of respondents said that the nation was spending too little to fight crime.²³ A January 1994 *Time/CNN* poll also found that 81% of adults favored mandatory life imprisonment for anyone convicted of a third serious felony.²⁴ Government leaders, both nationally and within California, seemed eager to address these concerns. Commenting on the Polly Klaas case in his 1994 State of the Union address, President Clinton expressed the need for tougher laws, urging Congress to pass his crime bill, which included a federal three-strikes provision. He remarked, "...those who commit crimes should be punished. And those who commit repeated, violent crimes should be told, 'when you commit a third violent crime, you will be put away, and put away for good.'"²⁵ In California, Governor Pete Wilson, who faced a tough re-election battle in a recession year, made a similar plea as he focused on an anti-crime, law-and-order platform.

With the Polly Klaas murder still fresh in their minds, California voters quickly collected the required number of signatures to qualify the three-strikes proposal for the November 1994 ballot. The language of the proposal was virtually identical to the text of

the previously discarded three-strikes bill (AB 971) proposed earlier by Jones and Costa in 1993. The legislature, perhaps sensing the rising political momentum, also quickly revived AB 971. Although alternative three-strike measures (AB 167 and AB 1568) were also introduced and debated, none seemed to garner much political favor. The Jones and Costa version (AB 971) passed easily in the Assembly and in the Senate and was signed by Governor Wilson on March 7, 1994. Approved under an “urgency clause,” the law went into effect immediately.

Shortly after the law was enacted, a study by the RAND Corporation predicted that three-strikes would be costly; an estimated \$4.5 billion to \$6.5 billion per year would be needed for additional court expenses (as three-strike cases would be more likely to go to trial), annual support of additional long-term prisoners, and ongoing prison construction.²⁶ RAND researchers also estimated, however, that three-strikes would generate a substantial reduction in crime—22 to 34%—with a third of the reduction coming from violent offenses such as murder, rape, and assault.²⁷

The public appeared largely unconcerned about the predicted costs. A nationwide survey conducted by the *Los Angeles Times* in January 1994 found strong support for three-strikes measures in spite of the projected expenses. Over half of the respondents (58%) said they favored three-strikes no matter what the costs were; 21% said they favored it depending on the cost; 17% indicated that they opposed any three-strikes measure, and 4% were undecided.²⁸ Indeed, even though Californians were warned that three-strikes would be expensive, voters approved Proposition 184, the ballot initiative version of the three-strikes law, by a margin of nearly three-to-one (72% in favor; 28% opposed).²⁹

The content of the initiative that voters approved is “nearly identical” to the Jones and Costa measure that was enacted earlier by the legislature.³⁰ However, there is one important distinction. Whereas the earlier version was enacted as a legislative statute, able to be amended or repealed by a simple majority vote of the legislature, the initiative version was enacted by the will of the people. Accordingly, the law may only be amended or abolished by voters through another initiative statute or by a statute passed with a two-thirds supermajority of the state legislature.³¹

PART II: DESCRIPTION OF THE LAW

The three-strikes statute states that the purpose of the law 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.”³² This reflects an intent to deter and incapacitate offenders who are unwilling to conform to the rule of law. Accordingly, the measure prohibits the use of probation and also identifies new mandatory minimum sentences for two types of repeat offenders. Offenders with one previous “strike” and a second felony conviction are considered to be “two-strikers.” These offenders receive double the usual sentence upon conviction of a second felony offense.³³

Offenders with two previous strikes and a third felony conviction are the designated “three-strikers.” These offenders receive an indeterminate sentence of life imprisonment upon conviction of the third felony offense. The minimum term that the offender must serve is the greater of: a) three times the usual sentence; b) a minimum term of 25 years; or c) an alternate term required by other sentencing provisions (such as life in prison or the death penalty).³⁴

Previous offenses that count as strikes are ones that have been designated in the state penal code as being “serious.” Specifically, Penal

FACTS AT A GLANCE

The California Three-strikes Law

Purpose of the Law:

To ensure longer prison sentences and greater punishment for repeat offenders.

Population Identified by the Law:

- **Two-strike** offenders have **one** previous strike conviction and a second current felony conviction
- **Three-strike** offenders have **two** previous strike convictions and a third current felony conviction.

Punishment Required by the Law:

- **Two-strike** offenders receive a doubled sentence
- **Three-strike** offenders receive an indeterminate sentence of life imprisonment. The minimum term for the indeterminate sentence is the **greater** of:
 - a) Three times the usual term provided as punishment for the third felony offense;
 - b) A prison term of 25 years; or
 - c) An alternate term required by other sentencing provisions.

Code Section 1192.7(c) identifies over forty offenses that qualify as “serious” offenses. The list includes mostly violent offenses, such as murder, voluntary manslaughter, robbery, kidnapping, rape, assault with a deadly weapon, and arson. Only two offenses do not involve direct physical harm to victims: residential burglary and the selling or furnishing of heroine, cocaine, PCP, or methamphetamine to a minor.

To be eligible for sentencing under the three-strikes law, offenders must have been previously convicted of crimes identified on the “serious” felony list. Two-strikers must have one “serious” felony; three-strikers must have two. The last strike (strike number two for two-strikers or strike number three for three-strikers) does not need to come off of the list of “serious” offenses; any felony can count as the last strike. This widens the strike zone to include lesser felony offenses, such as commercial burglary, vehicle theft, involuntary manslaughter, possession or sale of controlled substances, and weapon possession. The rationale behind the widening of the strike zone for the current offense is that recidivism studies, like the one completed by the federal Bureau of Justice Statistics (BJS), indicate that over two-thirds of criminals continue to commit crimes after their release from prison. Rather than waiting for an offender to commit a third “serious” offense—which, according to the BJS report, is a likely probability if the offender is given enough time—the state is instead choosing to incapacitate that offender at the first sign that he has resumed his criminal career.

FACTS AT A GLANCE
<p>Felonies that Count as “Strikes”</p> <p>Previous offenses that count as “strikes” are ones that are designated as “serious” offenses within the state penal code. Every offender sentenced to a three-strikes sentence must have at least two of these offenses in his criminal history. The complete list of qualifying offenses found in Penal Code §1192.7 is included in Appendix B. Representative offenses include:</p> <ul style="list-style-type: none">• Murder or Voluntary Manslaughter• Mayhem• Rape• Robbery• Kidnapping• Assault with a Deadly Weapon• Residential Burglary• Arson• Carjacking

The three-strikes statute also states that if the defendant's current offense includes multiple felony charges committed on separate occasions, and not arising from the same set of operative facts, then the offender is to receive consecutive three-strike sentences for each eligible count. Thus, if an offender with two prior strikes is released from prison and commits and is convicted of three convenience store robberies over the course of a week, he would face three separate three-strike sentences, each with a minimum term of 25 years. Because the three-strikes law requires the sentences to be imposed consecutively, the total sentence imposed would be 75 years-to-life.

Special provisions for juvenile offenders are also included in the three-strikes law.³⁵ If a juvenile who is 16 years of age or older commits an eligible felony offense, it can be counted as a "strike" against him in a future proceeding. However, determining which felonies count as strikes for juvenile offenders has been a matter of some controversy. As it stands now, the list of eligible offenses is different for juveniles than it is for adults. In 1999, the California Supreme Court interpreted conflicting language within the statute to mean that only offenses identified in Welfare and Institutions Code §707(b) qualify as "strike" offenses for juvenile offenders.³⁶ Although most of the offenses identified in this section conform to the list of eligible strike offenses for adults, there is one notable omission. Residential burglary, or first-degree burglary, which qualifies as a strike offense for adults, is not included in Welfare and Institutions Code §707(b), and thus cannot count as a strike for a juvenile offender.

Removal of Discretion in Sentencing Reforms

For most of our nation's history, much of the discretion in the sentencing of offenders belonged to the justice system. Legislatures delegated their authority over sentencing matters to such an extent that in many jurisdictions the judge, and subsequently, the parole board, had almost complete authority over individual sentences.³⁷ Consequently, the legislature was relegated to a figurehead status with regard to the fixing of criminal penalties. However, this approach was consistent with a rehabilitative philosophy, which encouraged an individualized program of correction so as bring about the rehabilitation or reformation of an individual offender.

The indeterminate sentencing system remained largely intact until criticisms of its use and effectiveness in the late 1970s and early 1980s prompted state legislatures to act. Research from the academic community revealed that the wide discretion that judges exercised produced sentences that were often grossly disparate from one another. Much of this disparity was linked to the defendants' economic standing, race, or gender, prompting concern that some judges were using their discretion and power in a discriminatory manner. At this time, sensitivity toward discrimination was heightened because of the gains made during the Civil Rights Movement and many elected leaders were reluctant to allow a system to continue if it produced criminal sentences that were biased against racial and ethnic minorities. State legislatures were also being pressured to reform the system because skyrocketing crime rates and the high rates of recidivism called into question the entire rehabilitative ideal.³⁸

In response to these and other findings, state legislatures reclaimed their statutory authority over criminal defendants in ways that dramatically reduced judges' influence in sentencing. Some states established formal sentencing guidelines that were designed to direct the judge in the sentencing process. Sentencing commissions responsible for creating these guidelines often predetermined sentences according to the nature and severity of the current offense and the severity of the offender's criminal history. Although many states initially enacted sentencing guidelines as voluntary recommendations, others made them mandatory. Judges who wished

to deviate from the guidelines would have to justify their departures in writing, and in some cases, receive approval from a higher court.³⁹

In 1976, California passed the Uniform Determinate Sentencing Act and became the first state in the modern era to adopt a system of determinate sentencing. This sentencing scheme converted indeterminate or open-ended sentences into fixed sentences determined by the legislature. Under determinate sentencing, the offense is linked to three possible penalties. The middle punishment is considered to be the presumptive sentence. Judges can impose the lower sentence if there are mitigating circumstances, or they can sentence the offender to the higher term if there are aggravating circumstances.⁴⁰ For example, the offense of residential burglary in California triggers a presumptive sentence of four years in the state penitentiary. If there are mitigating circumstances, the offender might be sentenced to the minimum sentence of two years, or if there are aggravating factors, the offender could be sentenced to the maximum penalty of six years. Under this system, judges retain some discretion over the sentencing process, but their influence is structured and limited in scope.

Since the new sentencing laws tie penalties to specific offenses, discretion in sentencing matters has practically shifted from the judge to the prosecutor. Assuming that the offender is subsequently convicted, the prosecutor has the ability to limit the scope of the sentence by controlling the charge that she files. In the United States, prosecutors have the sole authority over the charging decision, and thus can direct the sentencing outcome to a large degree by altering the actual crime that is charged.

Typically, prosecutors use this ability to their advantage when negotiating plea bargaining arrangements with defendants. During the course of plea negotiations, the prosecutor might offer to file a less severe charge because the lesser charge would correspond to a lower sentence. For example, if a felony charge of commercial burglary was lowered to a misdemeanor charge of petty theft, the amount of time that an offender might face upon conviction would be reduced from one year in state prison to a \$1,000 fine and/or no more than six months in the county jail.⁴¹ So, while the prosecutor does not have any authority over the fixing of penalties for a specific offense —that authority belongs to the legislature—he can affect the

outcome for an individual defendant through the charging process. However, this influence is predicated on the assumption that the prosecutor can persuade the defendant to plead guilty or is able to secure a conviction for the charged offense.⁴²

Legislatures have tried to remove any remaining discretion that prosecutors and judges might have over the sentencing process by increasing the number of laws that require mandatory prosecution and mandatory sentencing. These provisions may compel prosecutors to file charges if the defendant's conduct matches the conduct described in the legislation. They may also prohibit prosecutors from plea bargaining in specific cases. Additionally, they often require judges to impose a fixed sentence that cannot be altered or reduced in any way. Nonetheless, research has shown that despite these restrictions, prosecutors and judges often find ways around the mandatory minimum laws because they are reluctant to impose sentences that they perceive as being too harsh. Prosecutors may try to reduce the level of the charge, such as from a felony to a misdemeanor, and judges may grant an outright dismissal of the case.⁴³

Prosecutorial Discretion

Under the California three-strikes law, prosecutors are required to file the sentencing provision against every eligible offender. However, before they can charge the offender as a striker, they have to first assess whether old convictions qualify as strikes under California's law. To do this, prosecutors must examine the offender's complete criminal history. Old convictions and out-of-state convictions can be difficult to assess if the circumstances of the case are not recorded because the names of the offenses may not be specific enough to identify them as comparable strikes.

Once the previous strikes have been alleged in the complaint, the prosecutor must prove to the jury beyond a reasonable doubt that these convictions qualify as strike offenses as defined by the California penal code. If there is not enough evidence to support their characterization as strikes, the trial jury (or judge, in the case of a bench trial) is free to reject the prosecutor's three-strikes allegation. At any time prosecutors may move to dismiss one or more prior convictions if they believe the evidence of such convictions is weak.

More generally, however, the three-strikes law also allows prosecutors to petition the court to dismiss one or more prior strike

offenses “in the furtherance of justice.” This means that after the offender has been charged with the three-strikes enhancement, the prosecutor can move to dismiss one or more prior strike convictions in the defendant’s record.⁴⁴ Since the three-strikes enhancement is proven after conviction, the prosecutor may petition the court to dismiss a prior strike at any time up until the time of sentencing. After a strike conviction is removed in the furtherance of justice,

a defendant who is a true “three-striker” would instead be sentenced as a “two-striker,” and a “two-striker” who has had his prior strike offense dismissed would avoid the strike enhancement altogether.

Undoubtedly, the ability of prosecutors to petition the court for the dismissal of valid strike convictions in order to further the cause of justice gives them an enormous amount of discretionary power. Unlike other mandatory sentencing policies, the California three-strikes law gives prosecutors an available escape clause so that they can legitimately avoid imposing the mandatory sentence when the required punishment appears to be too severe for the offense. This ability to bypass the law has eluded prosecutors at other times under other laws, which is why they have often resorted to extralegal measures to get around mandatory sentences that have been perceived as excessively harsh or inflexible.⁴⁵ Typically in these situations, prosecutors openly express their opposition to the mandatory minimum laws. In contrast, district attorneys across California, with few exceptions, support the law and are opposed to efforts to amend or abolish it.⁴⁶

FACTS AT A GLANCE

The Prosecutor’s Discretion

Prosecutors Must:

- Apply the law to every eligible case
- Plead and prove all strike offenses

Prosecutors Must Not:

- Agree to dismiss strike offenses as part of a plea bargain arrangement

Prosecutors May:

- Move to dismiss a prior strike offense if there is insufficient evidence to prove it in court
- Move to dismiss a prior strike offense if doing so would be “in the furtherance of justice”

Judicial Discretion

Because judges have traditionally held the bulk of the sentencing power, the restrictions found in mandatory sentencing laws are primarily aimed at judges. California's three-strikes law restricts judges in two important ways. First, the statute prohibits judges from sentencing offenders to probation: two- and three-strike offenders must be sentenced to prison. Second, judges must impose the strike sentences consecutively, not concurrently, to other sentences or sentence enhancements that apply to the offender. They must also impose the sentences consecutively with other sentences that the offender may still be serving. Thus, if an offender commits the third strike while on parole, then he must first serve out the remainder of his initial sentence for which parole has been revoked before the time for his third strike sentence can begin.

However, the three-strikes law does permit judges to exercise some discretion in sentencing. They are able to grant the dismissal of prior strike offenses if there is insufficient evidence to support their allegation. Similar to the discretion given to prosecutors, this provision allows judges to dismiss from consideration offenses that do not meet the required evidentiary thresholds.

Judges also have the ability to dismiss a prior conviction "in the furtherance of justice." However, this discretion is not explicitly granted to judges in the statute. Rather, this authorization

FACTS AT A GLANCE

The Judge's Discretion

Judges Must:

- Impose the required mandatory sentence stipulated by the legislature
- Commit offenders to state prison
- Sentence the defendant consecutively on each count (if current conviction involves multiple offenses committed on separate occasions)
- Sentence the defendant consecutively to any other sentence the offender is currently serving

Judges Must Not:

- Grant probation
- "Age out" strike offenses based upon the length of time between the prior strikes and the current felony conviction

Judges May:

- Grant the dismissal of a strike offense based upon insufficient evidence
- Grant the dismissal of a prior strike offense if doing so would be "in the furtherance of justice"

is a result of the ruling issued by the California Supreme Court in the 1996 case *People v. Superior Court (Romero)*.⁴⁷ According to the state's highest court, if prosecutors are given the ability to request the dismissal of a strike conviction in the furtherance of justice, then judges must be able to do so as well. Unless the law specifically prohibits the exercise of judicial discretion, the state's separation of powers doctrine demands that the exercise of power must not be greater for prosecutors than it is for judges. The court's extension of this discretion to judges was applied retroactively, which gave judges an opportunity to review the cases of strike offenders sentenced prior to the ruling.

PART IV: IMPACT OF DISCRETION ON THE LAW

Although the ability of prosecutors and judges to move to strike a prior conviction gives them a great deal of discretion, their authority is not absolute. In principle, they are constrained by the boundaries found in the phrase “in the furtherance of justice.” Although the legislature has yet to give specific meaning to this phrase, the California Supreme Court has offered judges (and tangentially, prosecutors) guidance and instruction on how to interpret this standard. In *People v. Superior Court (Romero)* (1996),⁴⁸ the court ruled that judges ought to consider both the defendant’s constitutional guarantees against disproportionate punishment and the interest of society to have a fair prosecution when the defendant is properly charged.⁴⁹ In *People v. Williams* (1998),⁵⁰ the court acknowledged that this standard was still too vague, and it identified further criteria to assist judges in their use of discretion. The court ruled that judges

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 presently not committed one or more felonies and/or had not previously been convicted of one or more “serious” and/or “violent” felonies.⁵¹

Thus, judges were told to evaluate the defendant’s entire record—not just the nature of the current offense—in order to determine whether discretion should be used to dismiss a prior strike conviction.

Prosecutors have not been formally instructed by the court on how to exercise their discretion, yet a 1998 survey of California District Attorneys revealed that many of the state’s district attorneys have adopted formal policies governing the use of discretion.⁵² Most district attorneys follow an evaluation process similar to the one described in the *Williams* case, in which they review the offender’s criminal history in addition to his current offense. Furthermore, a review of current policies in California’s most populous counties reveals that the criteria used by district attorneys in the evaluation process are remarkably similar.⁵³ According to their own policies, district attorneys are more likely to approve the use of discretion if the

current felony is “non-serious” and “non-violent;” if both of the previous strikes occurred within a single criminal incident; if the offender has remained in good standing for an extended period of time since being released from prison; or if the offender has no record of weapons use or violence. On the other hand, district attorneys appear to be in agreement that discretion should not be used if the offender’s current offense is either “serious” or “violent.”

They also appear unwilling to use discretion for offenders who have a violent criminal history, or who have numerous felony convictions, regardless of their current offense.

The Impact of Discretion on Individual Strike Offenders

The impact of the use of discretion in three-strike cases is observed initially in the outcome of individual cases. Discretion is designed to shield individual offenders who are deemed to be outside the spirit of the law from its full effects. When determining if an offender falls outside the spirit of the law, prosecutors and judges typically examine the offender’s entire criminal record on a case-by-case basis. Prosecutors and judges look at the number of offenses committed, the severity of past offenses committed, and the severity of the current strike offense. Whenever possible, they also look to the circumstances of the prior strikes to see if the behavior was as serious as the charges imply.

The following examples are actual three-strike cases that were adjudicated in San Diego County between 1995 and 1997. The information comes from case records maintained by the District Attorney’s office. All references to individual names have been removed to preserve the anonymity of the parties involved.

FACTS AT A GLANCE

How Discretion is Used

Judges Consider:

- Nature/circumstances of current felonies;
- Nature/circumstances of prior strikes;
- Offender’s background, character, and rehabilitation prospects.

Prosecutors Consider:

- Nature/circumstances of current felonies;
- Nature/circumstances of prior strikes;
- Whether prior strikes came from same incident;
- Number of prior convictions and time between them;
- History of violence or weapons use.

Figure 1: Cases Resulting in the Use of Discretion

Case A	Case B
<p><u>Prosecutor Dismisses Prior Strike</u></p> <p><i>Current Felony:</i></p> <ul style="list-style-type: none"> • Petty Theft with a Prior (1997) <p><i>Description of Current Felony:</i></p> <ul style="list-style-type: none"> • Defendant stole watch (\$40 value) <p><i>Prior Strike Convictions:</i></p> <ul style="list-style-type: none"> • Residential Burglary (1993) • Attempted Armed Robbery (1991) <p><i>Other Offenses:</i></p> <ul style="list-style-type: none"> • Possession of Controlled Substance <p><i>Decision:</i></p> <ul style="list-style-type: none"> • Prosecutor moved to dismiss a prior strike conviction and the defendant was sentenced as a two-striker. <p><i>Justification:</i></p> <p>Defendant's motivation for the prior strike convictions was to get money to support a drug habit. In the first prior strike offense, the defendant held up her grandmother at knifepoint and demanded money. In the second, the defendant reached into her mother's bedroom window and stole her purse containing money and a watch. The purse and money were returned, but the watch was not. In both cases, the victims were family members and the financial losses were minimal.</p>	<p><u>Judge Dismisses Prior Strike</u></p> <p><i>Current Felony:</i></p> <ul style="list-style-type: none"> • Sale of Controlled Substance (1997) <p><i>Description of Current Felony:</i></p> <ul style="list-style-type: none"> • Sale of .20 grams of rock cocaine <p><i>Prior Strike Convictions:</i></p> <ul style="list-style-type: none"> • Robbery (1985) • Robbery (1984) <p><i>Other Offenses:</i></p> <ul style="list-style-type: none"> • Two other unidentified "non-serious" felonies <p><i>Decision:</i></p> <ul style="list-style-type: none"> • Judge dismissed a prior strike conviction and the defendant was sentenced as a two-striker. <p><i>Justification:</i></p> <p>The current felony is a "non-serious" offense. Both of the defendant's prior strike convictions are over 10 years old. The defendant has no recent criminal activity.</p>

Cases A and B involve third strike offenders who committed "non-serious" felonies for their third strikes. The offender in Case A committed petty theft, which is considered to be an alternative felony misdemeanor—or "wobbler"—offense. This means that the offense can be charged either as a felony or a misdemeanor, depending on whether the offender had previously been convicted of a theft. In this case, the prosecutor was required to file felony theft charges because

the offender had a previous conviction for residential burglary. The offender in Case B was convicted of selling .20 grams of rock cocaine (crack), which is considered to be a “non-serious” offense. Although many may believe that selling crack is a dangerous crime, most narcotics offenses (possession, selling, manufacturing) are identified within the state penal code as “non-serious” crimes. Only drug activities that involve juvenile victims are “serious” offenses (see Appendix B).

The offender in Case A committed two previous strike offenses just a few years prior to the current offense. This is indicative of an active criminal career; therefore, the prosecutor often views it as an aggravating factor. However, in this case the prosecutor noted that the circumstances of those offenses—stealing from the offender’s mother and grandmother—were much less severe than their titles imply. He also noted that a drug addiction appeared to be driving the offender’s criminal behavior. There was also no record of the offender engaging in actual violence and the financial losses incurred by the victims were minimal. After weighing the different elements in the offender’s criminal record, the prosecutor decided to petition for the dismissal of one prior strike conviction. The defendant, who had previously faced a minimum sentence of 25-years-to-life as a three-striker, now faced a presumptive sentence of four years in state prison.⁵⁴

The offender in Case B had a lengthier criminal record—two strike convictions and two additional “non-serious” felony convictions—but the offenses were much older than the offender in Case A. Although the prosecutor chose not to petition the dismissal of any prior strike offenses, the judge decided to use his available discretion to dismiss one prior strike conviction. He noted that the offender was not a serious safety threat to society because he had demonstrated the ability to live within the boundaries of the law for an extended period of time. Furthermore, the judge noted that the offender’s most recent crime, a “non-serious” drug offense involving a minute amount of rock cocaine, was not severe.

Similar to the offenders in Cases A and B, the offenders in these examples also committed offenses that are defined as “non-serious” within the state penal code. However, the nature of the current offenses and the overall criminal histories of the defendants in Cases C

Figure 2: Cases Resulting in the Withholding of Discretion

Case C	Case D
<p style="text-align: center;"><u>Prosecutor Withholds Discretion</u></p> <p><i>Current Felonies:</i></p> <ul style="list-style-type: none"> • Commercial Burglary (1995) • Receipt of Stolen Property (1995) • Attempted Grand Theft (1995) • Possession of Check w/ Intent to Defraud (1995) <p><i>Description of Current Felonies:</i></p> <ul style="list-style-type: none"> • Defendant tried to cash a stolen check for \$400. He was on parole at the time of the current offense. <p><i>Prior Strike Convictions:</i></p> <ul style="list-style-type: none"> • Robbery (1985) • Robbery (1985) • Assault w/ Deadly Weapon (1985) • Assault w/ Deadly Weapon (1985) • Rape with Foreign Object (1985) • Assault w/ Intent to Commit Rape <p><i>Decision:</i></p> <ul style="list-style-type: none"> • Prosecutor refused to petition for the dismissal of any prior strikes. Defendant was sentenced as a three-striker. <p><i>Justification:</i></p> <p>Defendant had a total of six prior strikes from four separate incidents in 1985. The prosecutor noted that the defendant's criminal history was violent.</p>	<p style="text-align: center;"><u>Judge Withholds Discretion</u></p> <p><i>Current Felonies:</i></p> <ul style="list-style-type: none"> • Weapon Possession by a Felon (1995) • Possession of Prohibited Weapon (1995) <p><i>Description of Current Felonies:</i></p> <ul style="list-style-type: none"> • Defendant was caught riding in a car with two other felons in possession of a sawed-off shotgun. <p><i>Prior Strike Convictions:</i></p> <ul style="list-style-type: none"> • Assault with a Deadly Weapon; Use of Firearm (1989) • Robbery with a Firearm (1983) • Robbery with a Firearm (1983) <p><i>Other Offenses:</i></p> <ul style="list-style-type: none"> • One other unidentified "non-serious" felony <p><i>Decision:</i></p> <ul style="list-style-type: none"> • Judge refused to dismiss any prior strikes. Defendant was sentenced as a three-striker. <p><i>Justification:</i></p> <p>Defendant had three strike priors in which he personally used a weapon. The defendant was involved in a gang-related shooting in his last strike offense. The defendant was paroled on that offense only 19 days prior to being caught for the current offense.</p>

and D are much more severe than the ones in the previous two cases. Accordingly, neither the prosecutor nor the judge moved to dismiss a prior strike for either defendant.

A closer comparison of Case A with Case C reveals that although both involved "non-serious" property offenses for the current charge, the value of the theft in Case A (\$40) was minimal. In contrast, the defendant in Case C was charged with stealing ten times as much,

and the transaction involved much greater deception and sophistication. Similarly, the offender in Case B, charged with the selling of a small rock of cocaine, did not demonstrate violent behavior. The defendant in Case D, charged with two counts of weapon possession, was a gang member who had previously been involved in a gang-related shooting. His behavior in this latest offense would have likely produced further violence had the authorities not apprehended him.

Upon review of their entire criminal records, additional differences between these two cases and the first two cases become apparent. First, whereas the offenders in the first two cases had only committed a single current felony offense, the offenders in Cases C and D engaged in conduct that resulted in multiple felony charges. This makes their current offense record more severe, despite the fact that their felonies are “non-serious” offenses. Unlike the first two offenders, these offenders also had more than two prior strike convictions each: the defendant in Case C had six prior strike convictions; the defendant in Case D had three. This means that if the prosecutor wanted to see the offender in Case C sentenced as a two-striker, she would have had to petition the dismissal of **five** prior strike convictions. Similarly, the judge in Case D would have had to dismiss **two** strike convictions. Lastly, the prosecutor in Case C and the judge in Case D both point to factors within the entire criminal record that suggest that the offenders pose a continuing danger to the community. All of the strikes for the offender in Case C had been for violent offenses, and the offender in Case D, who had a prior gang affiliation, had been on parole less than three weeks before he was caught with an illegal weapon.

Although all the offenders in these four examples were eligible for the three-strikes sentencing enhancement, only two were considered by prosecutors and judges to be within “the spirit” of the law. A case-by-case examination reveals that the nature of their current offenses and the quality of their criminal records were much different. The discretion afforded to prosecutors and judges prevented an arbitrary application of the law because they were allowed the opportunity to review the nature of these cases before deciding that the defendants should receive the mandatory sentence.

Impact of Discretion on the Number of Strike Convictions

The regular use of discretion by prosecutors and judges should also make an impact on the total number of three-strike offenders

convicted by the state. If discretion is being used frequently, then there will be a noticeable difference between the number of offenders who are eligible as three-strikers and the number of offenders who have been sentenced as three-strikers. However, assessing the magnitude of this difference is problematic. Currently, there is no statewide mechanism in place that can accurately measure how many cases involve a dismissal of a prior strike. Furthermore, most district attorneys and superior courts do not have systems in place that can systematically track discretionary departures.

Nonetheless, there are a few self-reported statistics that can help to estimate the percentage of three-strike cases that have been reduced through the use of discretion. In a 1998 survey of California District Attorneys, 92% of the respondents indicated that they used discretion in three-strike cases.⁵⁵ Of those, nearly two-thirds estimated that they used discretion in more than 20% of the eligible cases, and almost one-third estimated that they dismissed prior strikes in at least 40% of their three-strike cases. Based upon responses from the state's most populous counties, it is possible to estimate conservatively that prosecutors use discretion in at least 25% of the eligible three-strikes cases and judges are responsible for dismissing prior strikes up to an additional 20% of the cases. When combined, the amount of discretion exercised in three-strike cases likely approximates 25 - 45%. Thus, one-fourth to nearly one-half of all three-strike offenders receive less than the mandatory minimum sentence of 25 years-to-life.

The Impact of Discretion on the Prison Population

When the law was enacted, three-strikes was expected to overflow the correctional system with thousands of new offenders each year. Not only did the law allow *any* felony to count as the last strike, thereby exposing a greater percentage of the population to possible incarceration, but it also eliminated non-prison sentence options for eligible offenders. Furthermore, the sentence provisions—double the usual sentence for second strikers and a minimum 25 years-to-life sentence for third strikers—meant that offenders would stay in prison for a greater period of time. As a result, analysts predicted that the number of inmates would rise dramatically in the first several years. The RAND Corporation, for example, anticipated that the prison population would double from approximately 125,000

inmates in 1994 to 250,000 inmates in 1998, and would reach 350,000 by 2004.⁵⁶

Although the prison population increased in the first five years that the law was in effect, the rate of growth was much lower than expected. State statistics indicate that between 1994–1999 more than 37,000 inmates were added to the system at an average rate of 7,500 inmates per year (see Table 3). Not only was this rate of growth much lower than predicted, but the prison population actually declined in the following three years. Since then, the population has increased slightly, but the California Department of Corrections estimates that population figures will stabilize at around 163,500 for the next six years.⁵⁷

Table 3: Prison Population by Year

Year*	Institution Population
1994	124,813
1995	131,342
1996	141,017
1997	152,506
1998	158,207
1999	162,064
2000	162,000
2001	161,497
2002	157,979
2003	160,931

*Year totals reflect the number of offenders incarcerated on June 30 of the given fiscal year.

Source: California State Department of Corrections, Population Projections Unit, *Population Projections 2004-2009* (Fall 2003).

It is likely that incarceration figures are lower than the original estimates because the overall amount of crime has dramatically decreased since 1994. However, crime reduction alone does not adequately explain why there are so few strike offenders relative to the prison population. Statistics from the state Department of Corrections indicate that of the approximately 160,000 offenders incarcerated in 2002-2003, 20% (31,723) were two-strikers and only 5% (7,626) were three-strikers.⁵⁸ Therefore, three-fourths of the inmates are not serving sentences under the three-strikes law.

The percentage of incarcerated strike offenders may be lower than expected because not all eligible offenders are fully prosecuted and fully sentenced. The predictions that three-strikes would cause the prison system to overflow with offenders was based upon the assumption that the law would be fully implemented. Prosecutors and judges have applied the law according its provisions, yet they have also taken advantage of the ability to bypass the lengthy sentences for less serious offenders. The result is that fewer offenders than anticipated have received a doubled sentence as two-strikers and even fewer have received the minimum sentence of 25 years-to-life. Thus, the consistent use of discretion has resulted in fewer strike offenders facing long prison sentences. Consequently, this may partially explain why the prison population figures are substantially below the predicted levels.

The Impact of Discretion on the Types of Strike Convictions

A final impact of discretion can be seen in the types of convictions recorded for two- and three-strike offenders. Data from the California Department of Corrections, shown in Tables 4 and 5, indicate that there are over four times as many two-strike offenders in prison (31,723) as three-strike offenders (7,626). The data also indicate that the third strike convictions on record for three-strikers are more serious than the second strike convictions recorded for two-strikers. To be more precise, since 1994, 48% of the state's third strikers have been convicted for "serious" felony offenses as compared to 39% for second strikers.⁵⁹ What is even more noteworthy is that this distribution pattern is found consistently throughout the state (see Table 6).

The statistics included in Tables 4 and 5 also reveal that the offending behavior perpetrated by both second and third strikers on their current (i.e., last strike) offense is significant. Since 1994, third strikers have been convicted and sentenced for 319 cases of murder, 467 sexual assaults, over 1,500 robberies, over 800 cases of residential burglary, 375 cases of assault with a deadly weapon, and over 450 other assaults. They have also committed nearly 600 other offenses involving danger to the community, such as driving under the influence and possession of a weapon. Second-strike offenders were responsible for an additional 10,500 "serious offenses,"

Table 4: Comparison of Incarcerated Strike Offenders by Offense Type*
(Current Conviction: "Serious" Felony Offense)

Category	Current Conviction	Third Strikers		Second Strikers	
		No.	%	No.	%
"Serious" Felony Offenses	Murder – 1 st Degree	181	2.37	0	0.00
	Murder – 2 nd Degree	138	1.81	263	0.83
	Vehicular Manslaughter	7	0.09	59	0.18
	Robbery	1,548	20.30	4,380	13.81
	Assault – Deadly Weapon	375	4.92	2,128	6.71
	Rape	140	1.84	205	0.65
	Lewd act with child	262	3.43	671	2.11
	Oral copulation	49	0.64	56	0.18
	Sodomy	16	0.21	17	0.05
	Kidnapping	90	1.18	150	0.47
	Burglary – 1 st Degree	826	10.83	2,525	7.96
	Arson	28	0.37	104	0.33
	TOTAL	3,660	47.99	10,558	33.28

* Totals reflect data for all strike offenders incarcerated on December 31, 2002.

Source: California State Department of Corrections, Data Analysis Unit, *Second and Third Strikers in the Institution Population* (December 31, 2002).

including 4,380 robberies, 949 sexual assaults, over 2,500 residential burglaries, and 2,128 assaults with a deadly weapon.

Critics of California’s three-strikes law argue that the mandatory sentencing measure targets offenders for minor offenses, such as petty theft and marijuana possession, yet the statistics presented in Tables 4 and 5 contradict this assertion. Fewer than 5% of three-strikers have been sentenced on their third strike for felony petty theft, and less than 20% have been sentenced for “non-serious” property crimes. Marijuana offenses accounted for only 0.5% of all third strike convictions and only 17% of three-strikers were sentenced for drug crimes.

Overall, of the 7,626 three-strike offenders in California prisons in 2002:

- 3,321 (43.5%) had been convicted of a violent offense;
- 1,292 (16.9%) of burglary;
- 1,274 (16.7%) of a drug offense
- 963 (12.6%) of a property offense other than burglary;
- 393 (5.2%) of illegal possession of a weapon; and
- 383 (5.0%) of another crime.

Table 5: Comparison of Incarcerated Strike Offenders by Offense Type*
 (Current Conviction: "Non-Serious" and Unclassified Felony Offenses)

Category	Offense Type	Third Strikers		Second Strikers	
		No.	%	No.	%
Property Offenses ("Non-Serious" Felonies)	Burglary – 2 nd Degree	466	6.11	1,792	5.65
	Grand Theft	120	1.58	697	2.20
	Petty Theft with Prior Receiving Stolen Property	353	4.63	1,974	6.22
	Vehicle Theft	168	2.20	714	2.25
	Forgery/Fraud	222	2.91	1,121	3.53
		64	0.84	584	1.84
	Other Property Offenses	36	0.47	133	0.42
	TOTAL	1,429	18.74	7,015	22.11
Drug Offenses ("Non-Serious" Felonies)	Possession	673	8.83	4,365	13.76
	Possession for Sale	295	3.87	2,101	6.62
	Sales	199	2.61	1,222	3.85
	Manufacturing	27	0.35	221	0.70
	Hashish Possession	0	0.00	4	0.01
	Marij. Possess. for Sale	4	0.05	196	0.62
	Marijuana Sales	29	0.38	115	0.36
	Other Marij. Offenses	2	0.03	24	0.08
TOTAL	1,229	16.12	8,248	26.00	
Other ("Non-Serious" Felonies)	Escape	14	0.18	53	0.17
	Other Sex Offenses	147	1.93	783	2.47
	Driving under the Influence	42	0.55	333	1.05
	Possession of Weapon	393	5.15	1,436	4.52
	TOTAL	596	7.81	2,605	8.21
Unclassified Felony Offenses	Manslaughter	40	0.52	234	0.74
	Other Assault/Battery	453	5.94	2,004	6.31
	Penetration with object	22	0.29	38	0.12
	Controlled Substances: Other	45	0.59	170	0.54
	Other Offenses	152	1.99	851	2.68
	TOTAL	712	9.33	3,297	10.39

* Totals reflect data for all strike offenders incarcerated on December 31, 2002.

Source: California State Department of Corrections, Data Analysis Unit, *Second and Third Strikers in the Institution Population* (December 31, 2002).

Overall Impact of Discretion on the Three-Strikes Law

By assessing how discretion has affected the decisions in individual cases, the number of strike convictions across the state and within each county, the growth of the prison population, and the types of convictions that are attributed to second and third strikers, three conclusions become evident. First, prosecutors and

Table 6: Comparison of Incarcerated Strike Offenders by County and Offense Type (Counties with a Population Greater than 1,000,000)

County	Offense Type	Third Strikers		Second Strikers	
		No.	%	No.	%
Los Angeles (9,979,600)	“Serious”	1452	47.7	4441	33.1
	“Non-Serious”	1333	43.8	7721	57.7
	Unclassified	261	8.6	1231	9.2
	Total	3046	100.1	13413	100.0
Orange (2,978,800)	“Serious”	153	41.8	423	26.5
	“Non-Serious”	175	47.8	1055	66.1
	Unclassified	38	10.4	119	7.5
	Total	366	100.0	1597	100.1
San Diego (2,961,600)	“Serious”	296	46.3	1009	30.4
	“Non-Serious”	288	45.0	1996	60.2
	Unclassified	55	8.6	310	9.4
	Total	639	99.9	3315	100.0
San Bernardino (1,833,000)	“Serious”	182	38.5	449	29.3
	“Non-Serious”	247	52.2	873	57.0
	Unclassified	44	9.3	209	13.7
	Total	473	100.0	1531	100.0
Santa Clara (1,729,900)	“Serious”	173	43.4	346	29.1
	“Non-Serious”	182	45.6	695	58.4
	Unclassified	44	11.0	149	12.5
	Total	399	100.0	1190	100.0
Riverside (1,705,500)	“Serious”	141	45.3	538	31.5
	“Non-Serious”	139	44.7	992	58.1
	Unclassified	31	10.0	178	10.4
	Total	311	100.0	1708	100.0

**Table 6: Comparison of Incarcerated Strike Offenders
(continued)**

County	Offense Type	Third Strikers		Second Strikers	
		No.	%	No.	%
Alameda (1,496,200)	“Serious”	105	86.0	364	75.8
	“Non-Serious”	8	6.6	91	19.0
	Unclassified	9	7.4	25	5.2
	Total	122	100.0	480	100.0
Sacramento (1,309,600)	“Serious”	244	52.5	485	35.7
	“Non-Serious”	168	36.1	724	53.2
	Unclassified	53	11.4	151	11.1
	Total	465	100.0	1360	100.0

Source: Population Statistics: California State Department of Finance, *E-1 City/County Population Estimates, with Annual Percent Change, Jan. 1, 2002 and 2003*; Strike Offender Statistics: California State Department of Corrections, Data Analysis Unit, *Second and Third Strikers in the Institution Population* (December 31, 2002).

judges apply the three-strikes law on a case-by-case basis in order to take into consideration unique and/or individual circumstances. Most prosecutors (and judges) thoroughly review the entire record—including prior convictions and current offense—before deciding whether an offender falls within the spirit of the three-strikes law. Second, the availability of discretion is effective in screening out offenders who fall outside the spirit of the law. Offenders who have committed lesser “non-serious” felony offenses and who have no record of violence are often considered appropriate candidates for a reduced sentence. Third, the option to forgo the use of discretion allows prosecutors and judges to apply the full force of the law to those offenders who represent a threat to public safety.

The offender in “Case D,” discussed previously in this section, provides an example of why full prosecution and sentencing can be important. This offender, an active gang member, discovered by police officers riding in a car with other ex-felons with a loaded sawed-off shotgun just 19 days after being released on parole, represented a tangible threat to public safety. Even though his current offense of weapon possession was considered to be “non-serious” according to the state penal code, his lengthy criminal record, history of violence, and rapid return to a criminal lifestyle indicated to both

the prosecutor and the judge that this offender posed a serious long-term threat to the community. Eliminating all “non-serious” felonies as possible third strikes—which is the suggestion incorporated into the November 2004 ballot initiative to amend three-strikes—would prevent prosecutors and judges from applying the three-strikes law to offenders like this one who have a committed a “non-serious” offense but who have a violent past or who present a continuous threat to others.

PART V: PROSECUTORIAL POLICIES

Since the three-strikes law was enacted in 1994, district attorneys across the state have implemented formal policies to aid them in their exercise of discretion. Most of the policies establish a specific procedure that must be followed before discretion may be used and many of the state's district attorneys also require deputies to seek approval from a supervisor before recommending that a prior strike conviction be dismissed. Of the six urban jurisdictions recently contacted for this study, only Los Angeles County allows deputies to dismiss prior strike convictions without first obtaining approval from a supervisor. Many jurisdictions also require deputies to justify their use of discretion in writing. This documentation is usually kept in the offender's case file or in a central location, such as in a master file or central database.

Prosecutorial policies also typically describe the allowable circumstances that can justify the dismissal of a prior strike conviction. All counties take into account the severity of the current offense when deciding whether to use discretion. Many counties consider a "non-serious" current offense to be appropriate justification for the exercise of discretion while others automatically preclude the use of discretion for offenders who are charged with a "serious" current offense or who have a history of violence or weapons use. Furthermore, most district attorneys instruct their deputies to also consider the severity of the offender's entire criminal history before dismissing a prior strike offense.

Included in this section are descriptions of prosecutorial policies that have been implemented in six of the twelve largest counties in the state. Some counties have had more than one policy, either because a newly elected district attorney made changes to the existing policy, or because the incumbent district attorney felt the need to adjust the current policy. For these jurisdictions that have had more than one three-strikes policy, both the old guidelines and the new guidelines are discussed.

Los Angeles County

Los Angeles is by far the largest county in the state. It not only has the greatest number of people but it also has the highest

number of three-strike offenders. In fact, statistics from the state Department of Corrections reveal that nearly half of California's three-strike convictions originate from Los Angeles County. Consequently, the county's policy on discretion affects a substantial percentage of the state's three-strike offenders.

FACTS AT A GLANCE	
Los Angeles County	
<i>District Attorney:</i>	STEVE COOLEY (2000 – Present)
<i>Population:</i>	9,979,600 (Largest county in CA)
<i>Three-Strike Convictions:</i>	3,046 (Highest in CA)

The Garcetti Administration (1992-2000)

When three-strikes was enacted in 1994, Los Angeles County was under the administration of District Attorney Gil Garcetti, who had been elected two years earlier. Garcetti appointed his senior management to a “Three-Strikes Committee” and charged them with the responsibility of creating an internal policy on the prosecution of three-strike cases. In May 1997, the District Attorney’s Office issued a special directive describing the new policy guidelines.⁶⁰ The policy commanded deputies to file all alleged prior strikes in every eligible case as required by the language of the three-strikes law. Deputies were also instructed to file nearly all “wobblers” as felony offenses, as the policy indicated that misdemeanor filings for strike defendants were to be a “rare exception.” Deviations from either of these rules would have to be approved by the Head Deputy in charge of that unit.

Deputies were authorized to petition for the dismissal of prior strikes when there was insufficient evidence to prove that the previous offenses were “strikes,” but this motion was subject to approval from the Head Deputy. Deputies could also recommend the dismissal of a prior strike “in the furtherance of justice,” but they were instructed to do so only after carefully considering the criteria established by the District Attorney’s office. The policy also emphasized that deputies could not justify the use of discretion based solely upon the current offense. The severity of the current offense could be considered as a factor, but it could not be the *only* factor driving the decision. According to the special directive, “a defendant whose prior criminal

history is sufficiently egregious...warrants the maximum possible punishment even if the present offense is a felony such as possession of a small amount of narcotics or petty theft.”⁶¹

The policy also explained that in cases in which the current charge was “non-serious,” a prior strike could be dismissed if warranted by the circumstances of the prior record and the current offense. Specific factors that deputies were to consider included the number and nature of the prior convictions; the length of time between convictions; the length of time that the defendant had been out of prison and off parole or probation; whether the defendant used a weapon; whether the strikes arose from a single incident or were from multiple incidents; the number of times the offender had been to prison; and whether the offender had been on probation or parole at the time of the current offense. When reviewing the circumstances surrounding the current offense, deputies were instructed to evaluate the degree to which the defendant was involved in the offense; whether the defendant used a weapon, engaged in violence, or threatened violence; the number of new offenses and whether they arose from a single incident or multiple incidents; the amount and type of drug possessed by the defendant and his intentions to sell; and, in theft cases, the amount and value of property taken.

The Cooley Administration (2000 – present)

In Fall 2000, District Attorney Gil Garcetti lost his reelection bid to veteran prosecutor Steve Cooley. As part of his political campaign, Cooley promised to modify the department’s policy on three-strikes so that no offender would be charged with a third-strike if the offense was “non-violent” or “non-serious.” In keeping this promise, he issued a change in policy on December 19, 2000, shortly after taking office. In his memorandum to all deputy district attorneys, Cooley noted that the three-strikes law “has the potential for injustice and abuse in the form of disproportionately harsh sentences for relatively minor crimes.”⁶² He added that “proper exercise of prosecutorial discretion protects society and preserves confidence in and respect for the criminal justice system.”⁶³

In his new policy, Cooley instructed deputies to assign three-strike offenders to one of two groups based upon the nature of their current offense. Offenders who have been charged with a “serious” offense are identified as “presumed third strikers,” whereas

offenders who have been charged with a “non-serious” offense are known as “presumed second strikers.” *Presumed third strikers* are to be fully prosecuted and fully sentenced; deputies are not allowed to use discretion in these cases. In contrast, deputies are to use their discretion to move for the dismissal of prior strikes for *presumed second strikers*. As the name implies, these offenders are to have their status reduced to that of two-strikers through the use of prosecutorial discretion.

Head Deputies are given the authority to seek a change in either presumed statuses if the circumstances of the case suggest that different treatment is warranted. However, in the case of presumed third strikers, the Head Deputy must justify any request to move to dismiss a prior strike on the basis of such mitigating factors as a lack of violence or weapons use, the remoteness of the prior strikes, whether the strikes arose from a single incident, or other mitigating factors specified in the California Rules of Court. Similarly, for presumed second strikers, the Head Deputy may seek to decline the automatic use of discretion if the current offense involves the use or possession of a firearm or other deadly weapon, violence or threat of violence, or injury to a victim.

Under Cooley’s revised policy, Head Deputies are to continue to file disposition reports in all cases that are initially eligible as three-strike cases. If the use of discretion deviates from the presumptive guidelines described in the policy, Head Deputies are to discuss the reasons for the deviation in the disposition report.

The impact of these new guidelines on the conviction of three-strike offenders is potentially substantial, but no study has yet to determine if Cooley’s policy has dramatically decreased the number of strike offenders who receive the full mandatory penalty. His office has recently adopted changes in its database system that can facilitate the tracking of all strike offenders — “true third strikers” as well as “presumed second strikers” — so that sufficient data can be generated to facilitate a future analysis.

San Diego County

The Pfingst Administration (1994-2002)

Although District Attorney Paul Pfingst publicly opposed the three-strikes initiative during his 1994 campaign for office, he nonetheless pledged to uphold the law if he was elected. Pfingst

acted on this commitment by establishing a formal Three-Strikes Unit that operated from mid-1995 through the end of 1997. The unit included eight deputies, a full-time priors clerk in the issuing division, two investigators, and two investigative specialists. It was formally disbanded in 1997, but his office informally maintained a group of deputies that primarily handled three-strike cases.⁶⁴

When the Three-Strikes Unit was established in 1995, a set of criteria was drawn up outlining the circumstances that would warrant a motion to dismiss a prior strike conviction. Similar to the criterion established in other counties, the factors involved an evaluation of both the current and prior

strike offenses. A current offense that was considered to be *de minimis*, or trivial, in nature served as justification for recommending the dismissal of a prior strike. Other factors included the length of time between the prior strikes and the current offense, whether the defendant had any recent criminal history, if the defendant had never been sent to prison, if the defendant had no history of violence or weapons use, or if the underlying facts of the prior strikes were less severe than the criminal behavior usually associated with the charges.

Once deputies had evaluated their cases against these factors they were required to obtain approval for dismissing a strike from the Head Deputy in charge of the Three-Strikes Unit. The unit maintained a system of documentation wherein each deputy had to identify the relevant conditions that justified the use of discretion before seeking supervisory approval. This justification was included as a permanent part of the case file. After the unit was disbanded, deputies still reviewed their cases against the criteria and continued to get approval from the Head Deputy before moving to dismiss a prior strike. However, deputies were no longer required to formally document their use of discretion in the case file.

In some instances, the decision to strike a prior strike was made at a higher supervisory level. While the Head Deputy had

FACTS AT A GLANCE	
San Diego County	
<i>District Attorney:</i>	BONNIE DUMANIS (2003 – Present)
<i>Population:</i>	2,961,600 (3 rd largest in CA)
<i>Three-Strike Convictions:</i>	639 (2 nd highest in CA)

approval authority over most three-strikes cases, either the Assistant District Attorney or the District Attorney handled decisions that had policy implications. For example, one case involved the charging of a fourth Driving Under the Influence (DUI) offense as a felony third strike. The Assistant District Attorney vetoed the use of discretion because he was reportedly concerned that if the office dismissed a prior strike in one DUI case then they would create a precedent for other DUI cases. Because recidivist drunk drivers pose a substantial threat to public safety, he concluded that it was best to fully prosecute these offenders. When other borderline cases arose, administration officials indicated that they typically approved the use of discretion, especially if the third strike charge was a property or drug offense.

The Dumanis Administration (2003 – present)

The three-strikes policy in San Diego did not undergo substantial revision after the inauguration of Bonnie Dumanis as District Attorney in 2003. However, according to a key administrator within the office, she did usher in changes that were “tangible, yet subtle.” Prosecutors now have more latitude in deciding when to use discretion; supervisory oversight, while still present, is not conducted in a strict, hierarchical fashion. Most of the prosecutors handling three-strike cases are supervisors themselves; therefore, they are given the authority to petition the dismissal of a prior strike without approval from high-ranking administrators. As a result of these changes, fewer eligible cases are being fully prosecuted.

Although the specific criteria used to evaluate three-strikes cases have not changed, the decisionmaking process is tempered by an element of “realism.” According to a chief prosecutor within the District Attorney’s office, prosecutors are more willing to dismiss prior strikes in cases that they previously would not have because they realize that if they refuse to use discretion, judges will do so anyway. Nonetheless, prosecutors are still willing to stand firm in cases they believe to be deserving of the full mandatory sentence. Prosecutors will not move to dismiss a prior strike for an offender who has a lengthy and/or violent prior record, even if the third strike offense is “non-serious” and even if they believe that the judge is likely to dismiss a prior strike anyway.

San Bernardino County

The Stout Administration (1995-2002)

Voters in San Bernardino County recently elected a new District Attorney in November 2002. Dennis Stout, who had been serving as the county's top prosecutor since 1995, lost his re-election bid to veteran prosecutor, Michael Ramos. Stout, who had previously served as President of the California District Attorney's Association, was the presiding District Attorney when the U.S. Supreme Court case *Lockyer v. Andrade* (2003) challenging the constitutionality of the three-strikes law first went to trial.

The three-strikes policy established by Stout required deputies to evaluate several factors related to the defendant's potential for recidivism before deciding whether to petition for the dismissal of a prior strike conviction. The severity of the current offense was identified as

being important: a "trivial" current offense was one reason to use discretion and a "serious" current offense was justification for not using discretion. Any defendant with recent criminal activity was unlikely to have any prior strikes dismissed, but a defendant who had strikes that were remote in time, or from a single incident, and who had no recent criminal history, was more likely to have one or more strikes dismissed through the use of discretion.

Unlike other counties at the time, Stout's policy did not instruct deputies to consider certain personal mitigating characteristics in their decisionmaking process. For example, offenders who had never been to prison or had no history of weapons use were not treated more favorably than other three-strike offenders. However, offenders with aggravating characteristics, such as a history of violence or weapons use, were targeted for full prosecution under the three-strikes law.

FACTS AT A GLANCE

San Bernardino County

District Attorney:

MICHAEL RAMOS (2003 – Present)

Population:

1,833,000 (4th largest county in CA)

Three-Strike Convictions:

473 (3rd highest in CA)

The Ramos Administration (2003 – present)

Although the Ramos Administration is still relatively new, there have already been some changes to the office's three-strikes policy. The new District Attorney is reportedly committed to enforcing the law that the voters overwhelmingly enacted. However, Ramos has also indicated that he favors an approach that looks at the individual circumstances of each case and encourages a case-by-case evaluation on whether discretion should be used. If the case involves a defendant who ought to be incapacitated, then no discretion should be used. If the three-strikes sentence is potentially unjust because the defendant does not fit the profile of a three-striker, then discretion should be used to reduce the case to a second strike (or lower) case.

Ramos does not support a blanket policy that petitions the dismissal of strikes for all “non-serious” third strike offenses. However, the nature of the current offense can act as a mitigating factor if it is minor or “trivial” in nature. A defendant who has refrained from any recent criminal activity, or has no documented history of violence, may have a prior strike dismissed.

The most significant change in policy under the Ramos administration has to do with the level of supervisorial oversight required for discretionary decisions under the three-strikes law. Previously, the decision to petition the court for a dismissal of a prior strike had to be approved at the Assistant District Attorney level or above; however, under the Ramos Administration, line deputy supervisors are authorized to make those decisions. Neither the Assistant District Attorneys, nor the District Attorney, are likely to get involved in the review of these decisions. The expectation is for supervising attorneys to handle this decisionmaking on their own, unless there is some controversy or element of concern that requires involvement by higher administration.

The department does not currently have a written three-strikes policy—nor are there intentions to produce one. According to high-ranking administrative personnel, Ramos feels that a written policy describing the conditions upon which discretion may be exercised is too confining. Instead, he prefers a flexible approach on these matters so that individual circumstances can be fully examined.

Riverside County

For the past two decades, the Riverside County District Attorney's Office has been under the leadership of veteran prosecutor Grover Trask. First elected in 1984, Trask has previously served two terms as the President of the California District Attorneys Association and has played an influential role in the shaping of prosecutorial policy across the state. Trask's strong personal support for the California three-strikes law is reflected in his administration's three-strikes policy, which is designed to uphold the "intent and spirit of the law." The written instructions on how the three-strikes law should be implemented are included in the department's policy manual for all deputy district attorneys.

Although the overall substance of his policy has remained the same since three-strikes was enacted in 1994, the specifics of the policy have gone through several modifications within the intervening period. Initially, the Riverside County District Attorney's

formal policy on three-strikes was brief and resolute, stating simply: "the district attorney will prosecute defendants according to the letter and the spirit [of the law]." Deputies were instructed to plead all qualifying felony prior(s) at arraignment and were prohibited from using any discretion that would reduce the sentence for a habitual violent offender. Both the filing of three-strike allegations and the disposition of all habitual criminal cases required the approval of a supervising attorney.

The initial policy was silent on the individual factors that could be used to guide the use of discretion; however, supervisors within the department regularly evaluated several conditions before deciding to dismiss a prior strike. They looked at when the original strikes were committed, noting if there was a substantial gap in time between the first two strikes and the current offense and if the strikes stemmed from a single criminal event. Supervisors also took into consideration

FACTS AT A GLANCE

Riverside County

District Attorney:

GROVER TRASK (1984 – Present)

Population:

1,705,500 (6th largest county in CA)

Three-Strike Convictions:

311 (8th highest in CA)

the quality of the defendant's past conduct, justifying their use of discretion when the defendant had no history of violence or weapons use, or no previous terms in prison. They also reported considering the use of discretion when the current offense was "trivial."

The Riverside County District Attorney's office also identified several aggravating conditions that would preclude the use of discretion. Cases that involved third-strike offenses that were characterized by the state as "serious" would be fully prosecuted without any use of discretion. Also, cases involving a defendant who had a history of violence, a previous commitment to state prison, or who continued to pose a threat to the community would not receive any discretionary action to reduce the number of prior strikes. Similarly, a defendant who had a lengthy offending record, or who was involved in recent criminal activity, was considered to be ineligible for any type of discretionary leniency.

Since the inception of the original policy, the District Attorney's office reportedly has had to amend and reissue the policy at least three times—about once every three years—in order to address a variety of issues. Office administrators recently expressed a concern that prosecutors within the county had been interpreting the department's policy on the use of discretion differently, which created the potential for unfair or unequal treatment of strike offenders. The current revised policy addresses this problem by including explicit language about what deputies should and should not consider when using their discretion to petition the court for the dismissal of prior strike offenses. The policy also explains that discretion may not be used for any new offense that is "serious" in nature and it instructs deputies to carefully consider certain factors in lesser felonies, such as the weight of any controlled substance involved in a narcotics possession case, the value of stolen items involved in a theft case, or the existence of domestic violence or elder abuse in assault cases. When reviewing the circumstances of prior strikes, deputies are also directed to evaluate the age of the prior strikes and the defendant's criminal contacts since conviction, whether the strike can be proven as a prior, and whether the defendant was on parole or probation at the time of the new offense.

A key procedural change included in the most recent policy gives deputies the sole authority to use discretion to dismiss a prior

strike in two-strike cases when the current charge is “non-serious.” However, they are expected to follow the expanded guidelines and conditions for the use of discretion as described in the revised policy for three-strike offenders and are directed to take the aggravating factors for lesser felonies into consideration. However, they are no longer required to obtain approval from a supervisor before exercising that discretion. Deputies assigned to three-strike cases are also expected to follow the appropriate policy guidelines before recommending the dismissal of a prior strike, but they must still obtain supervisory approval before acting.

The Riverside District Attorney’s Office has acknowledged that the tension that exists between procedural due process—making sure that defendants are treated equally—and substantive due process—making sure that individual circumstances are appropriately considered—is difficult to negotiate with policy alone. Therefore, in addition to revising the written policy, administrators have begun requiring deputies to undergo frequent training in order to keep their treatment of strike offenders uniform.

Sacramento County

Like many of its urban counterparts, Sacramento County has developed a policy for the use of discretion that focuses both on the nature of the current offense and the quality of the defendant’s prior strike history. Strike priors are petitioned for dismissal only when there is insufficient evidence to prove them in court, or when the District Attorney’s office determines that dismissal would be in the furtherance of justice. The initial determination to dismiss a prior strike is made by the deputy assigned to the case, but before action can be taken, the team supervisor must independently review the case as well. After the supervisor makes his or her recommendation, the case is reviewed once more by the Assistant Chief Deputy in charge of the unit. Only the Chief Deputy or two designated Assistant Chief Deputies have the authority to approve a motion for a strike dismissal.

When considering whether to dismiss a prior strike, the Sacramento County District Attorney’s office takes several pre-determined factors into consideration. Ultimately, supervisors are trying to assess if the punishment that would otherwise be imposed

is disproportionate based upon the circumstances of the current offense and the background of the defendant. Some of the individual items that are evaluated include whether the nature of the current offense is *de minimis*; whether the defendant's prior strike(s) are remote in time; whether the de-

fendant is a career or "revolving door" criminal; whether the prior strikes stem from a single event; or whether the defendant's criminal history includes actual violence, weapons use, or weapon possession. The District Attorney's office also considers whether the nature of the current offense is less serious than the charge might suggest. Finally, supervisors will consider the possible influences of drug addiction and/or mental illness on offending behavior, although they note that this may not carry much weight in the decision to use discretion because either many of their strike offenders have a history of drug abuse or because mental illness often causes individuals to react violently and/or dangerously.

For the most part, the current policy is the same one that the Sacramento District Attorney's Office implemented shortly after the law was enacted. In the early stages of the law's implementation, it was unclear in Sacramento—as it was in many counties across the state—just how much discretion was available and when it was appropriate to use. Sacramento realized early on that it would have to create a policy to handle cases that fit the technical definition of three-strikes but were vastly different in character than the dangerous career criminal that the law was designed to incapacitate.

Today, Sacramento continues to operate under the leadership of District Attorney Jan Scully, who was initially elected in 1994. Since its initial inception, her policy on the use of discretion has not undergone any significant changes. However, the practical application of the strike policy has evolved over time in response to various judicial rulings and as supervisors have cultivated a better

FACTS AT A GLANCE	
Sacramento County	
<i>District Attorney:</i>	JAN SCULLY (1994 – Present)
<i>Population:</i>	1,309,600 (8 th largest county in CA)
<i>Three-Strike Convictions:</i>	465 (4 th highest in CA)

understanding of offenders who match the three-strikes profile. In a county that reviews several hundred three-strike cases each year, prosecutors and their supervisors have developed their own vocabulary to help them quickly identify the cases that qualify for prosecutorial discretion. Someone with “prospects” describes a strike offender who is likely to conform to social norms in the future and therefore should have a prior strike dismissed, whereas a “revolving door criminal” or someone who falls “within the spirit of the three-strikes law” refers to someone who should face full prosecution. For those offenders who fall somewhere in the middle, supervisors rely upon both the formal written guidelines and the accompanying wealth of institutional knowledge when making their decisions.

Ventura County

Shortly after voters approved the three-strikes initiative, Ventura County District Attorney Michael Bradbury issued a written memorandum to deputies describing the office policy on the prosecution of strike cases. Bradbury’s policy instructed deputies on how they were to review the defendant’s criminal history in order to determine eligibility for the three-strikes enhancement. In addition, it established procedures on how the three-strikes enhancement was to be applied. In his memo Bradbury also labeled three-strike cases as “special interest” cases, which meant that they would receive additional review by the immediate supervisor and the Chief Deputy District Attorney.

Bradbury, who served as District Attorney until 2002, chose not to run for re-election and was succeeded by his Chief Assistant, Gregory Totten. As a key administrator, Totten had the responsibility of drafting internal policy on significant issues. Not surprisingly, he chose not to alter the office’s three-strikes policy when he assumed the top position. Today, Ventura County’s policy on petitioning the

FACTS AT A GLANCE	
Ventura County	
<i>District Attorney:</i>	GREGORY TOTTEN (2002 – Present)
<i>Population:</i>	791,300 (12 th largest county in CA)
<i>Three-Strike Convictions:</i>	72 (17 th highest in CA)

dismissal of strike priors is virtually identical to the policy established by Bradbury in 1994.

According to Ventura County's policy, deputies are required to prepare a preliminary examination memorandum as soon as the initial complaint has been filed. It should describe the defendant's criminal history, with particular attention given to the facts and circumstances surrounding the prior strike offenses. In the memorandum, the deputy is also to offer a recommendation and corresponding reasoning as to whether a three-strikes sentence should be pursued. The memo is then to be forwarded to an information review committee, which reviews all three-strike cases and decides whether to move forward with the three-strikes allegation or to move for a dismissal of a prior strike.

If the committee decides to petition for a dismissal of a prior strike, then members of the committee are to offer justification as to why this would be in the interest of justice. Even with a committee recommendation, however, the final decision to strike prior strikes requires written approval of either the District Attorney or the Chief Assistant. If approval is granted, the District Attorney's office will file a written motion with the court indicating its reasons for dismissing a prior strike. A copy of this motion is kept with the case file.

During the review process, the District Attorney or Chief Assistant will evaluate both the current offense and the prior criminal record. Prior violent crimes, use of firearms, and great bodily injury to the victim are aggravating factors that would preclude the use of discretion. The length of time between the prior strikes and the current offense, the defendant's criminal behavior in the intervening period, and whether the current offense is the same type of criminal behavior as the prior strikes, are also considered. Although all of these circumstances are considered in the decision to dismiss a prior strike, the factor that has the most influence on the decision to exercise discretion is the presence of violence in the defendant's criminal background. If the defendant has no history of violence, then discretion may be used. However, if the defendant has demonstrated a proclivity toward violence in the past, then it is unlikely that a prior strike dismissal will be approved.

Ventura County is one of the few jurisdictions that tracks how many cases are affected by the use of prosecutorial discretion.

According to its internal records, in the first year the law was enacted, the District Attorney's office filed three-strike allegations against 11 defendants, 5 (45%) of which were later reduced through an act of discretion. In 1995, the three-strike charges were filed in 30 cases; 8 cases (27%) were later reduced through a motion filed by prosecutors. Thirty three-strike cases were filed in 1996, with 12 of them (40%) later reduced upon recommendation from the District Attorney's office. Thirty-eight three-strike cases were filed in 1997, and prosecutors used discretion in 14 cases (37%). And, in 1998, the last year for which data was provided, the District Attorney's office filed three-strike charges against 22 defendants; 8 defendants (36%) later had their cases reduced by prosecutors.⁶⁵

PART VI: CONCLUSION

At first glance, the California three-strikes law appears to be one of the toughest—if not *the* toughest—mandatory sentencing law in the nation. It requires an automatic doubling of the usual sentence for felons with one prior strike and a tripling of the prison term—or a minimum term of 25 years-to-life—for felons with two prior strikes. Furthermore, for eligible offenders, *any* current felony conviction can trigger the automatic sentences. Moreover, prosecutors are restricted from plea bargaining and judges are prohibited from reducing sentence lengths. In short, the law has the potential to be harsh and unyielding—especially for offenders who are convicted of minor felonies, such as shoplifting or marijuana possession.

When the law was implemented, scholars estimated that the state's operating expenses would balloon dramatically as thousands of minor offenders clogged the courthouses and consumed all available prison spaces. Moreover, critics predicted that the law's broad third strike feature would result in unjust sentences being imposed on petty thieves, small-time drug users, and other minor offenders. They also envisaged a system of justice wherein prosecutors and judges blindly and mechanically applied the law, indifferent to either the unique circumstances of the offense or the characteristics of the individual offender.

To date, none of these grim predictions has come true. This is because unbeknownst to many, the three-strikes law contains an “escape clause” that may be used to release many of the less serious offenders from the required minimum sentences. Under the law, prosecutors and judges may move to dismiss one or more of the offender's prior strikes if it is “in the furtherance of justice.” When this occurs, the offender's prior offenses are temporarily disregarded, and he is eligible to be sentenced to a shorter term than would otherwise be required by the three-strikes law.

This discretion to dismiss prior strikes in the furtherance of justice is used in at least 25%—and in as many as 45%—of all three-strike cases. This means that a substantial portion of the state's eligible strike population is being shielded from the effects of the law. This may be one reason why the costs associated with three-strikes are not nearly as high as many expected. Furthermore, this discretion

appears to be applied primarily on a case-by-case basis, which allows both the unique circumstances of the offense and/or the characteristics of the offender to be taken into consideration. Although prosecutorial policies sometimes differ on the specific factors to be considered, prosecutors generally evaluate three-strike cases on the severity of the current felony offense and the characteristics of the prior strike offenses. Offenders who have been convicted of less serious felony offenses, and who do not appear to impose a threat or danger to the community, often receive a reduced sentence through the exercise of discretion.

Some critics have suggested amending the law so that only those felonies that have been designated within the state penal code as being “serious” will qualify for the third strike. Yet, the statistics included in this study reveal that many of the state’s three-strikers sentenced for “non-serious” third-strike felonies committed offenses that posed potential harm to an individual or to a community. For example, 466 three-strikers were sentenced for commercial burglary — a “non-serious” offense. Another 393 offenders were sentenced for weapon possession; 222 offenders were sentenced for vehicle theft; 199 were sentenced for the sale of controlled substances (such as cocaine, PCP, and methamphetamine), and 147 three-strikers were sentenced for “non-serious” felony sex offenses. Many would characterize the criminal behavior represented by these felonies as serious, yet if the law was amended, these offenses — and many others — would no longer be eligible as third strike offenses.

Prior research has also shown that habitual offenders have high rates of recidivism and that the likelihood of an offender committing a violent crime increases with each subsequent offense. By not restricting the third strike to a particular category of felony offenses, the three-strikes measure facilitates the incapacitation of these habitual offenders at the first sign that they have resumed their criminal careers, often before they succeed in committing a violent offense.

The results of this study indicate that the previously expressed concerns about the California three-strikes law appear largely unwarranted. Prosecutors’ and judges’ ability to recommend the dismissal of prior strikes gives them the opportunity to shield less serious offenders from the full effects of the law. At the same time,

they are also able to utilize the law's incapacitative effects to remove dangerous offenders from the community. Therefore, this discretion allows an otherwise mandatory sentencing law to be flexible in its application, which can offer reassurance that repeat offenders are sentenced justly.

NOTES

¹ The California “three-strikes” law is codified in Penal Code §§667(b)-(i) and 1170.12. The statute version, which corresponds with PC §667(b)-(i), was first enacted by the legislature as AB 971 in March 1994. California voters passed a nearly identical measure as Proposition 184 in November 1994. This initiative, which is codified in PC §1170.12, supersedes the original legislation.

² A complete list of offenses designated as “serious” is included in Appendix B.

³ Lungren, Dan, *“Three-strikes and You’re Out” – Its Impact on the California Criminal Justice System After Four Years* (Sacramento: California Attorney General’s Office, 1998).

⁴ *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003).

⁵ SB 331.

⁶ AB 1076.

⁷ AB 2447.

⁸ AB 1790, SB 1517.

⁹ AB 112.

¹⁰ SB 2048.

¹¹ SB 873.

¹² http://www.ss.ca.gov/elections/elections_bpd_1104.htm

¹³ Finucane, Martin, “Breyer Criticizes Mandatory Minimum Sentences,” *washingtonpost.com*, 22 September 2003.

¹⁴ “Supreme Court Justice: Prison Terms Too Long,” *USAToday.com*, 10 August 2003.

¹⁵ Prosecutors are given the authority to move to dismiss prior strikes “in the furtherance of justice,” but according to PC §1385 this motion must be approved by the court.

¹⁶ Prosecutors and judges can move to dismiss prior strikes at any time after the charge has been filed up until the time of sentencing.

¹⁷ Walsh, Jennifer, “Dismissing Strikes ‘In the Furtherance of Justice’: An Analysis of Prosecutorial and Judicial Discretion Under the California Three-Strikes Law,” Ph.D. Dissertation, Claremont Graduate University, 2000.

¹⁸ Studies on California’s three-strikes law have typically addressed its perceived crime control benefits or its associated costs. Examples include: Greenwood, Peter, *et al.*, *Three-strikes and You’re Out: Estimated Benefits and Costs of California’s New Mandatory-Sentencing Law* (Santa Monica, CA: RAND, 1994); Shiraldi, Vincent and Tara-Jen Ambrosio, *Striking Out: The Crime Control Impact of “Three-strikes” Laws* (In Brief). (Washington, D.C.: The Justice Policy Institute, 1997); Stolzenberg, Lisa and Stewart J. D’Alessio, “‘Three-strikes and You’re Out:’ The Impact of California’s New Mandatory Sentencing Law on Serious Crime Rates,” *Crime & Delinquency*, 43 (1997): 457-69; Zimring, Franklin, *et al.*, *Punishment and Democracy: Three-Strikes and You’re Out in California* (New York: Oxford University Press, 2001).

¹⁹ Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983* (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, 1989).

²⁰ Balzar, John, “The Target: Repeat Offenders,” *Los Angeles Times*, 24 March 1994, p. A5.

²¹ AB 971.

²² *Los Angeles Times*, December 12, 1993.

²³ Hayward, Steven and Lance T. Izumi, *Crime and Punishment in California: Are We Too Tough or Not Tough Enough?* (San Francisco: Pacific Research Institute, 1996).

²⁴ Applegate, Brandon, *et al.* “Assessing Public Support for Three-Strikes-and-You’re-Out Laws: Global Versus Specific Attitudes,” *Crime & Delinquency*, 42 (1996): 517-534.

²⁵ State of the Union, January 25, 1994.

²⁶ Greenwood, *et al.*, *Three-strikes and You're Out: Estimated Benefits and Costs of California's New Mandatory-Sentencing Law*.

²⁷ *Ibid.*

²⁸ Balzar, 1994.

²⁹ Lungren, 1998.

³⁰ *People v. Superior Court (Romero)*, 13 Cal.4th 497 (1996) at 504.

³¹ Proposition 184 is codified in the state Penal Code under Section 1170.12. Both versions (Penal Code §§667(b)-(i) and 1170.12) are valid and remain active in the state penal code. However, prosecutors and judges typically use the legislative penal code designation (PC §667(b)-(i)) when applying or referencing the three-strikes law.

³² PC §667(b).

³³ PC §667(e)(1).

³⁴ PC §667(e)(2)(A).

³⁵ PC §667(d)(3).

³⁶ *People v. Garcia*, 21 Cal. 4th 1 (1999).

³⁷ Stith, Kate and Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (Chicago: The University of Chicago Press, 1998).

³⁸ Martinson, Robert, "What Works? Questions and Answers About Prison Reform," *The Public Interest*, 35 (1974): 22-54. This article summarized a number of academic studies that raised doubt about the effectiveness of rehabilitative programs.

³⁹ For an overview of determinate sentencing reform in the United States, see VonHirsch, Andrew and K. Hanrahan, "Determinate Penalty Systems in America: An Overview," *Crime & Delinquency*, 27 (1981): 289-316.

⁴⁰ Davies, Malcolm, "Determinate Sentencing Reform in California and its Impact on the Penal System," *The British Journal of Criminology*, 25 (1985): 1-30.

⁴¹ PC §460, PC §490.

⁴² Clear, Todd, *et al.*, “Discretion and Determinate Sentence: Its Distribution, Control, and Effect on Time Served,” *Crime & Delinquency*, 25 (1987): 428-445; Miethe, Terance D., “Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion,” *Journal of Criminal Law and Criminology*, 78 (1987): 155-176.

⁴³ National Institute of Justice, *Mandatory Sentencing: The Experience of Two States* (Policy Brief) (Washington, D.C.: U.S. Department of Justice, 1982); Tonry, Michael, “Mandatory penalties,” in *Crime and Justice: A Review of Research*, vol. 16, ed. Michael Tonry (Chicago: The University of Chicago Press, 1992), pp. 243-273.

⁴⁴ A strike conviction that is dismissed by the court pursuant to PC §667(f)(2) is not permanently removed from the offender’s record, but instead is temporarily “overlooked” for the purpose of sentencing for the immediate offense.

⁴⁵ Bynum, Timothy S., “Prosecutorial Discretion and the Implementation of a Legislative Mandate,” and Zalman, Marvin, “Mandatory Sentencing Legislation: Myth and Reality,” in *Implementing Criminal Justice Policies*, v. 26, ed. Merry Morash (Beverly Hills, CA: Sage, 1982), pp. 47-59, 61-69. These articles describe the avoidance practices used by prosecutors in Michigan to get around the mandatory felony firearm law.

⁴⁶ In 2003, the California District Attorneys Association submitted a formal opposition against AB 112, the latest legislative attempt to amend the three-strikes law. It also submitted *amicus curiae* briefs urging the U.S. Supreme Court to uphold the constitutionality of the law in the cases *Lockyer v. Andrade* (2003) and *People v. Ewing* (2003).

⁴⁷ 13 Cal.4th 497 (1996).

⁴⁸ *People v. Superior Court (Romero)*, 13 Cal.4th 497 (1996).

⁴⁹ *Ibid.*, pp. 530-531.

⁵⁰ *People v. Williams*, 17 Cal. 4th 148, 161, 948 P. 2d 429 (1998).

⁵¹ *Ibid.*

⁵² Walsh, “Dismissing Strikes ‘n the Furtherance of Justice’: An Analysis of Prosecutorial and Judicial Discretion Under the California Three-Strikes Law”. Nearly two-thirds of the respondents indicated that they had established a formal policy on the use of discretion.

⁵³ Part V of this report contains an in depth look at district attorneys’ policies from selected jurisdictions.

⁵⁴ Petty theft with a prior conviction is a felony offense for which an offender may be sentenced to 16 months, two years, or three years in state prison. As a two-striker, the defendant would be sentenced to double the usual term. Thus, the maximum penalty imposed would be six years in state prison.

⁵⁵ Walsh, “Dismissing Strikes ‘In the Furtherance of Justice’ An Analysis of Prosecutorial and Judicial Discretion Under the California Three-Strikes Law”.

⁵⁶ Greenwood, Peter, *et al. Three-strikes and You’re Out: Estimated Benefits and Costs of California’s New Mandatory-Sentencing Law.*

⁵⁷ California State Department of Corrections, Population Projections Unit, *Population Projections 2004-2009* (Fall 2003).

⁵⁸ California State Department of Corrections, Data Analysis Unit, *Second and Third Strikers in the Institution Population* (December 31, 2002).

⁵⁹ The California State Department of Corrections, Data Analysis Unit publishes a quarterly report on the number of second and third strike offenders in the prison system. The data are reported by offense category, but some categories include both “serious” and “non-serious” offenses. For example, the “manslaughter” category includes voluntary manslaughter (a “serious” offense) and involuntary manslaughter (a “non-serious” offense). Data falling into these categories are included in Table 4 under the “Unclassified” category.

⁶⁰ Special Directive 97-04, May 12, 1997.

⁶¹ *Ibid.*

⁶² Memorandum by Steve Cooley, December 19, 2000.

⁶³ *Ibid.*

⁶⁴ The Three-Strikes Unit was disbanded at the end of 1997 because the number of three-strikes cases no longer warranted attention by a special prosecutorial team. The purpose of the establishing the unit was to speed up the case processing; however, with the decrease in the number of cases generated within the county, overtaxing of the normal resources was no longer a problem.

⁶⁵ Data were presented by Michael Bradbury, former District Attorney for Ventura County, at a Round Table Discussion sponsored by the RAND Corporation, August, 2001.

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The California Three-Strikes Statute

Penal Code §667(b)-(i)

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

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

- (1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.
- (2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.
- (3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.
- (4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.
- (5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

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

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

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

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

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

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

(B) The stay of execution of sentence.

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

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

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in

the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

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

(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

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

(2)

(A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

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

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

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

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

(f)

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

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

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

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

(i) If any provision of subdivisions (b) to (h), inclusive, or the application thereof to any person or circumstance is held invalid, that

invalidity shall not affect other provisions or applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

APPENDIX B: LIST OF “SERIOUS” OFFENSES

Offenses Designated as “Serious”

Penal Code §1192.7(c): As used in this section, “serious felony” means any of the following:

Homicide

- Murder, attempted murder, or voluntary manslaughter

Sexual Assault

- Rape;
- Sodomy by force, violence, duress, menace, threat of great bodily injury, or fear;
- Oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear;
- Sexual penetration 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;
- Lewd or lascivious act on a child under the age of 14 years;
- Continuous sexual abuse of a child
- Commission of rape or sexual penetration in concert with another person

Assault

- Assault with intent to commit rape or robbery;
- Assault with the intent to commit mayhem, rape, sodomy, or oral copulation
- Assault with a deadly weapon or instrument on a peace officer;
- Assault by a life prisoner on a noninmate;
- Assault with a deadly weapon by an inmate;
- Assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter
- Assault with a deadly weapon against a public transit employee, custodial officer, or school employee

Other Felonies

- Mayhem;

- Arson;
- Robbery or bank robbery;
- Kidnapping;
- Any burglary of the first degree (i.e., burglary of a residence);
- Grand theft involving a firearm;
- Carjacking;
- Holding of a hostage by a person confined in a state prison;
- Exploding a destructive device or any explosive with intent to injure or murder; or if causing bodily injury, great bodily injury, or mayhem;
- Throwing acid or flammable substances
- Discharge of a firearm at an inhabited dwelling, vehicle, or aircraft
- Shooting from a vehicle
- Intimidation of victims or witnesses
- Criminal threats
- 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

Miscellaneous

- Any felony (or attempt) punishable by death or imprisonment in the state prison for life;
- Any felony in which the defendant personally used a dangerous or deadly weapon;
- Any felony offense committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members;
- Any use or employment of a weapon of mass destruction in a form that may cause widespread, disabling illness or injury in human beings
- Any felony in which the defendant personally inflicts great bodily injury on any person (other than an accomplice);
- Any felony in which the defendant personally uses a firearm;
- Any attempt to commit a crime listed above other than an assault;
- Any conspiracy to commit an offense described above.