

**ANALYSIS OF
THE THREE STRIKES AND
CHILD PROTECTION ACT OF 2004
INITIATIVE MEASURE**

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Petitions are now circulating in an effort to qualify an initiative measure for the November 2004 general election ballot. This initiative measure is entitled "Three Strikes and Child Protection Act of 2004." The passage by the electorate of this initiative would constitute the most serious and damaging rollback of California's efforts to punish and incarcerate serious and violent felons in more than 30 years. For this reason, this initiative constitutes the most dangerous piece of criminal justice legislation that the above author has analyzed in more than 3 decades as a California prosecutor.

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The passage of the "Three Strikes and Child Protection Act of 2004" initiative measure would unload back into society tens of thousands of felons who have committed serious and violent felonies and would thereby expose the citizens of California once again to the recidivist criminal conduct of these hordes of convicted felons. Defeat of this initiative, therefore, should be the single highest priority of law enforcement and all law-abiding citizens of this state.

This paper will discuss four subjects. First, it will identify the groups and people who have drafted and who are sponsoring the "Three Strikes and Child Protection Act of 2004" initiative. Second, the paper will describe the provisions of the initiative measure. Third, the paper will set forth the drastic consequences that would result from the passage of this initiative. Fourth, and finally, the paper will identify what appears to be a clear constitutional infirmity of the initiative that could cause it to be stricken from the ballot even if it qualifies with signatures.

I. The Sponsors of the Initiative.

The sponsors of the "Three Strikes and Child Protection Act of 2004" have named themselves "Citizens Against Violent Crime." This title is a false and misleading title that masks the true identity of the group of people who are bringing and promoting this initiative measure.

The real name of the group sponsoring this initiative is "Families to Amend California's Three-Strikes" (FACTS). FACTS is located at 3982 So Figueroa Street, #207A, Los Angeles, California.

The stated purpose of FACTS, as articulated on its own web site, www.facts1.com, is "to amend the 3-Strikes law in California so it is only applicable to violent felonies." FACTS also advocates that "Three Strikes" be amended in the following ways:

"(1) the law should not be applicable to crimes committed before its enactment in 1994;

(2) the law should not count multiple counts during a single act as multiple strikes;

(3) the law should include a "wash-out" period such that convictions older than ten years do not count as strikes;

(4) burglary of unoccupied dwellings should not count as "serious or violent" strikes; and

(5) the law should not be applicable to juvenile offenses." In the language they used to draft the initiative, the initiative proponents pretend to support the principles of California's "Three Strikes" statutes. But the language which these initiative proponents use on their own web site reveals their true beliefs: FACTS as an organization is

virulently opposed to "Three Strikes." On its own web site, FACTS describes "Three Strikes" as "barbaric," "brutal," "harsh," and an "assault to humanity." FACTS concludes its web site characterization of "Three Strikes" by stating that "Three-Strikes [is] a shameful and current blot on California history."

Does that language sound like somebody who supports "Three Strikes?" In light of their clearly-stated antipathy toward "Three Strikes," no one should be fooled into believing that the sponsors of this initiative are supportive of "Three Strikes." To the contrary, they are completely opposed to the "Three Strikes" statutes. The reason for their opposition to "Three Strikes" is made clear by knowing the identity of the groups and people who comprise FACTS. FACTS is composed of three groups of people:

(1) Families of the serious and violent felons who have been prevented from inflicting further violent and serious crimes upon law-abiding society by being sentenced to

prison for long prison terms under "Three Strikes."

(2) Social liberals who oppose incarceration of criminals generally as punishment for criminal conduct.

(3) The criminal defense bar who are the attorneys that represent these violent and serious felons.

The sponsors and proponents of the "Three Strikes and Child Protection Act of 2004" are not the unbiased supporters of "Three Strikes" that they pretend to be. Rather, the proponents of the initiative have a big axe to grind against everything for which "Three Strikes" stands.

II. The Provisions of the Initiative. The "Three Strikes and Child Protection Act of 2004" will make the following six significant changes to California's criminal justice laws. The initiative will:

(1) Reduce the serious felony list. The initiative will eliminate 6 crimes from the serious felony list.

1. Residential burglary, unless the prosecution has pled and proved that someone other than an accomplice was present in the residence at the time of the burglary.

2. Attempted residential burglary,

3. Arson of a structure, forest land or property.

4. Criminal threats.

5. Felony gang crimes.

6. Felonies in which great bodily injury is inflicted, unless the defendant specifically intends to inflict and personally inflicts great bodily injury.

(2) Reduce the violent felony list.

The initiative will eliminate from the violent felony list any felony in which great bodily injury is inflicted, unless the defendant specifically intends to inflict and personally inflicts great bodily injury.

(3) Reduce the Juvenile Adjudication "Strike" List.

The initiative will eliminate from the list of crimes which will constitute a juvenile

adjudication "strike" the following 2 crimes:

1. Kidnapping of an elderly or disabled person.
2. Assault with intent to commit rape of an elderly or disabled person.

(4) Reduce Cases Qualifying for "Three Strikes."

The initiative will limit "Three Strikes" prosecutions to cases in which the defendant's most recent felony (the current felony charge) is listed in the reduced serious or violent felony list.

The initiative thus requires that the current felony charge be a serious or violent crime before it may be prosecuted under "Three Strikes."

The drastic reduction in "strike" cases would be the result of two factors. First, the current offense would have to be serious or violent. About two thirds of our "two strike" state prison convicts are serving doubled determinate term sentences following their conviction of current felony offenses that are neither serious nor violent. Requiring that the current offense be serious or violent as a pre-requisite to a "strike" prosecution would in and of itself produce a huge (approximate two-thirds) reduction in "strike" prosecutions.

The second factor causing a drastic reduction in "strike" cases would be the initiative's reduction of the list of crimes that are serious or violent. This reduced list would mean that convictions for crimes deleted from the serious and violent felony list could no longer be counted as "felony strikes."

By greatly reducing the serious and violent felony lists, and by limiting "Three Strikes" prosecutions to cases in which the current charges are serious or violent felonies, the initiative will greatly reduce the cases that will qualify for "Three Strikes" prosecutions.

(5) Reduce Counting of "Felony Strikes."

The initiative will limit the counting of "felony strikes" to one "strike" per prosecution, instead of one "strike" per conviction. The "Three Strikes" statutes now in effect count "felony strikes" per prior conviction of a serious or violent felony. Thus, a defendant who commits and is convicted of 10 separate armed robberies that are prosecuted in one case, has 10 "felony strikes."

The initiative imposes for the first time a "brought and tried separately" rule that will limit the counting of "strikes" to one "strike" per case. The "brought and tried separately" rule would mean that the defendant who committed and was convicted of

10 separate armed robberies that were prosecuted in one case would have only 1 "felony strike" for those 10 armed robbery convictions.

(6) Apply Retroactively.

The penalty reductions described above would apply to new crimes committed after the effective date of the initiative (November 3, 2004). The penalty reductions of the initiative will also apply retroactively to felons whose current crime pre-dates the effective date of the initiative. Moreover, (and this is significant) the penalty reductions of the initiative will apply retroactively to felons who are now serving prison terms under "Three Strikes."

Any prisoner who is now serving a "Three Strikes" sentence would be entitled as a matter of right: (1) to be returned from prison to the commitment county; (2) to the appointment of an attorney at public expense; and (3) to be re-sentenced as if the penalty reductions of the initiative had been law when he or she was originally sentenced. This retroactive effect of the initiative will not be limited to "Three Strikes" prisoners serving life terms - it will apply to all prisoners serving "Three Strikes" sentences, including those who are serving doubled determinate "two strike" terms.

The initiative will apply retroactively to all existing "Three Strikes" prisoners, not just life term prisoners, because Section 11 of the initiative provides that "[a]ny individual sentenced under the prior three strikes law, including, but not limited to, Penal Code section 667, subdivision (e)(2), Penal Code section 1170.12, subdivision (c)(2), and/or section 707 of the welfare and institutions code for an enhanced conviction that would not qualify for enhancement under this statute, shall qualify for re-sentencing and be remanded to the court of origin for re-sentencing." [emphasis added]

Even though the initiative contains provisions that seem to limit the right to re-sentencing to life term prisoners, the "rule of lenity" that applies to construction of penal statutes requires that ambiguities in a statute be resolved in favor of criminal defendants. *Guillory v. Superior Court* (2003) 31 Cal4th 168, 177. Internal conflicts in a statute produce ambiguity in the meaning of the statute. Because of the "rule of lenity," courts would be required to interpret the language of Section 11 of the initiative to require that all "Three Strikes" prisoners be eligible for re-sentencing, even those who are serving doubled determinate terms as "two strikers."

III. Consequences of the Initiative.

Passage of this initiative will have drastic and profound impacts upon the enforcement of the law in this state. Here are the areas of impact that are immediately apparent to me.

(1) Large decrease in "Three Strikes" prosecutions. The most commonly committed felony in the current serious felony list is residential burglary. The amendment of the serious felony list to provide that residential burglary is a serious felony only when the prosecution pled and proved that a person other than an accomplice of the burglar was present in the residence at the time of the burglary will virtually wipe out all residential burglary convictions as "felony strikes." This is because until the year 2000, when residential burglary in which a person other than an accomplice was present in the residence was added to the violent felony list, prosecutors had no reason to plead this fact. Thus, virtually all residential burglaries prior to March 8, 2000, will not be useable as "strikes" in any future prosecution.

Moreover, since many residential burglaries are committed while the owner or occupants are not present in the residence, residential burglary would no longer be a current offense that triggers the application of the "Three Strikes" sentences. Experienced prosecutors estimate that upwards of 99% of all residential burglaries would no longer be serious felonies or "felony strikes."

Thus, when combined with the initiative's provision that only new serious or violent felonies can trigger application of the "Three Strikes" statutes, the shrinking of the list of crimes in the serious and violent felony lists and the juvenile wardship list will result in a large decrease in "Three Strikes" prosecutions.

(2) Evisceration of the Five-Year Serious Felony Conviction Enhancement.

One of the most significant provisions of Proposition 8, which was passed by the electorate in 1982, is the 5 year enhancement of Penal Code section 667(a)(1). This enhancement, which may not be dismissed or stricken by the court, adds a mandatory five year term in prison when the defendant is

convicted of a new serious felony. The enhancement may not be dismissed by the court even if the prosecutor moves the court to dismiss it.

The shrinking of the serious felony list will greatly reduce the cases in which the prosecution may allege the 5 year enhancement of Section 667(a)(1), because the six crimes that are eliminated from the serious felony list would no longer be useable either as the triggering crime or the prior serious felony. Since residential burglary as a serious felony is the most frequently-used serious felony in this 5 year enhancement, the elimination of residential burglary from the serious felony list will greatly reduce the usefulness of the 5 year serious felony prior conviction enhancement.

(3) Elimination of Drunk Driving with Great Bodily Injury as a Serious or Violent Felony.

In order for drunk driving to be a serious or violent felony under current law, the

prosecution does not have to prove that the defendant intended to produce the great bodily injury. It is sufficient for the prosecution to prove that the defendant intended to drive the vehicle while under the influence. By adding the requirement that the prosecution allege and prove that the defendant intended to produce the great bodily injury that resulted from the drunk driving, the initiative will eliminate virtually every charge of drunk driving producing great bodily injury as a serious or violent felony.

Eliminating drunk driving with great bodily injury as a serious or violent felony will not only prevent this crime from triggering "Three Strikes" punishments, it will greatly increase the conduct credits which the defendant may earn while in prison. As a violent felony, a conviction of drunk driving with great bodily injury restricts the defendant's prison credits to no more than 15%. By making proof of the defendant's intent to cause the great bodily injury an element of the serious and violent felony list, a defendant convicted of drunk driving causing great bodily injury and sentenced to state prison will be entitled to 50% conduct credits. Thus, these defendants will serve far less prison time than they serve under existing law.

(4) The Release From State Prison of Tens of Thousands of "Strike" Convicts.

For the reasons discussed earlier in this paper, the changes to "Three Strikes" in the initiative will be extended to all prisoners of our state prison who are serving "strike" sentences. The immediate impact of this benefit, which the initiative provides may not be waived by the prisoner, will be the unloading of tens of thousands of state prison inmates into county jails for reconsideration of their sentences. That immediate impact will be followed by a second immediate impact of the appointment at public expense of thousands of criminal defense attorneys to represent these prison inmates on their re-sentencings. All of these returned prisoners will be entitled to obtain new probation reports - again at public expense.

The economic impact upon the county jails, the criminal justice system, and the taxpayers who pay for county jails and the judicial system will be horrendous.

But the most significant harm from this wholesale release will be the result of these re-sentencings. Every "strike" prisoner whose sentence would be affected by the initiative's penalty reductions discussed in Part II of this paper, will have his or her prison sentence reduced, and many of these prison sentences would be reduced so greatly that the courts will be obligated to immediately release these prisoners from custody. While I do not know the precise number of prisoners who would be entitled to immediate release by virtue of this initiative, it is safe to say that passage of the initiative will result in the immediate release of large numbers of "Three Strikes" prisoners and the drastic reduction in the sentences of many of those "Three Strikes" prisoners who will remain in prison after the initiative passes.

Because residential burglary is a major component of "strike" sentences, and the initiative would delete residential burglary from the serious felony list, and because almost two thirds of the two-strike prisoners are serving prison sentences for current crimes that are neither serious nor violent felonies, the number of "strike" defendants who would be immediately released from state prison would probably be in the tens of thousands.

The impact of the wholesale release from prison of tens of thousands of men and women who have committed serious and violent felonies in their long criminal careers is made clear when one understands just who these people are who are serving prison terms under "Three Strikes." They were best described by Justice Bedsworth in *People v. Edwards* (2002) 97

Cal.App4th 161, 165-166, as criminals who have "demonstrated an imperviousness to deterrence which it would be folly to ignore." The fact that these felons have been willing to engage in felonious conduct despite the greatly increased punishments of "Three Strikes" identifies these felons as among the most dangerous group of felons. Their continued felonious conduct has provided a rather "convincing demonstration that no consequence would deter [them] from crime."

These recidivist felons are incarcerated because of "Three Strikes" in our state prisons because they are active criminals who have resisted all forms of deterrence. This group of recidivist scoundrels have earned their "Three Strikes" sentences because they are the most thick-skulled and predictably wicked of felons. They hurt people, they hurt communities, and they hurt our economy, because they are statistically responsible for the largest percentage of felonious crimes committed in this state. The release of these tens of thousands of felons will endanger the safety of every resident of California and will cause our crime rate to reverse its downward spiral and to once again grow in the manner in which it grew prior to 1994.

(5) The loss of deterrence in the criminal law.

The "Three Strikes" laws have constituted the single greatest deterrence to felonious criminal activity in California in the past 30 years. "Three Strikes" was the first penal statute to actually frighten recidivist criminals. Parolees left the state in order to avoid its consequences. Many of those who remained in California changed their criminal behavior. They got jobs to earn a living rather than to steal from others or to engage in illegal criminal profiteering. Many of them actually stopped their felonious conduct because of their fear of the punishment consequences of "Three Strikes." The punishments of "Three Strikes" actually have deterred crime.

Reducing the punishments of "Three Strikes" will reduce its deterrent impact. Passing this initiative would constitute a public statement that California is once again more

tolerant of the felonious conduct of men and women who have committed violent and serious felonies. The damage to the deterrent effect of the criminal laws of this state cannot be overstated.

IV. Constitutional Infirmity of the Initiative.

The "Three Strikes and Child Protection Act of 2004" suffers from a fatal constitutional flaw - it violates the single-subject rule of the California Constitution.

The single-subject rule of Article II, section 8(d) of the California Constitution provides that "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." An initiative measure that violates the single-subject rule may be stricken from the ballot on order of the courts. *Senate of the State of California v. Jones* (1999) 21 Cal4th 1142. And an initiative measure that violates the single subject rule may be declared null and void even after it has been passed by the electorate.

This initiative violates the single-subject rule. The overwhelming purpose of the initiative is to reduce the punishments and scope of "Three Strikes." However, one section of the initiative has absolutely nothing to do with the "Three Strikes" laws. Section 4 of the initiative increases the punishments for sexual assaults on children. This section has no connection with "Three Strikes," and its change in the law (increasing punishments for sexual assaults on children) runs directly contrary to the thrust of rest of the -initiative, which is to decrease punishments in large numbers of felony cases.

The reason for the inclusion of Section 4 in the initiative is transparently clear - it allows the initiative proponents to claim that the initiative is a "Child Protection Act," and thereby increases its appeal to potential signatories on the initiative petitions and to voters at the general election. Section 4 finds its place in this initiative only as a mask to hide the true intent and effect of this initiative measure - to reduce punishments under "Three Strikes." Section 4 is "window dressing" that has no connection to anything else in the initiative measure.

Consequently, this initiative is constitutionally infirm as violating the single subject rule of the California Constitution. An action challenging its constitutionality should be filed in the courts of this state as soon as the Secretary of State announces that it has qualified for the general election of 2004.

CONCLUSION:

The sponsors and proponents of the "Three Strikes and Child Protection Act of 2004" do not have the public interest at heart. They harbor personal and biased agendas that

ignore the public interest in safe homes, safe schools, safe streets, and safe workplaces. Their initiative would greatly damage the people of this state, all in the furtherance of their selfish and biased agendas.

This is why I believe that this initiative constitutes the most dangerous piece of criminal justice legislation to confront the people of California in the past 30 years. And it is why I believe that the resounding defeat of this initiative should be the single highest priority of every law enforcement agency and officer and of all law-abiding citizens of California.

**TENS OF THOUSANDS OF
STATE PRISON INMATES
TO BE RELEASED BY
THE THREE STRIKES AND
CHILD PROTECTION ACT OF 2004
INITIATIVE MEASURE**

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The Offender Information Services Branch of the California Department of Corrections has released its quarterly report of Second and Third Strikers in the Institution Population by Offense Category as December 31, 2003. These figures, which are attached to this paper, show that of the 42,438 State prison inmates serving "Three Strikes" terms of imprisonment, at least 26,202 of them - 62% - would be released from prison immediately or within a short period of time from the passage of the "Three Strikes and Child Protection Act of 2004" initiative measure. Here is how that statistic has been calculated.

As of December 31, 2003, a total of 42,438 persons were serving state prison sentences under "Three Strikes." 7,335 of these prisoners are serving life terms as "three strikers." 35,103 of these prisoners are serving doubled determinate terms or indeterminate terms as "two strikers."

To determine how many of these prisoners would be eligible for substantial reductions in their sentences under the "Three Strikes and Child Protection Act of 2004" initiative measure, the author has identified the total number of state prison inmates who are serving prison terms by current offense category and group, as classified by the Department of Corrections. Only those offense groups which are comprised of non-

¹32,149 of these prisoners are serving "two strike" sentences. 2,057 prisoners have been returned to state prison custody on parole violations on "two strike" sentences. 897 prisoners are "second strikers" who are pending parole revocations. These numbers total 35,103 prisoners serving "two strike" sentences.

serious and non-violent offenses have been isolated. Categories that comprise clearly serious or violent offenses have been excluded. Categories which could include both serious and violent felonies, and also non-serious and non-violent felonies, have been excluded.² Here are the numbers:

STATE PRISON INMATES SERVING "THREE STRIKES" SENTENCES WHO WOULD BE RELEASED BECAUSE THEIR CURRENT OFFENSES WOULD BE NON-SERIOUS AND NON-VIOLENT UNDER THE "THREE STRIKES AND CHILD PROTECTION ACT OF 2004" INITIATIVE MEASURE

These 26,202 state prison inmates who are serving "Three Strikes" sentences - 58% of all third strikers" and 63% of all "second strikers" - would be eligible for either immediate release or release within a very short period of time if the "Three Strikes and Child Protection Act of 2004" is passed by the electorate.

²Some of the included offense groups could include small numbers of serious felonies. For example, grand theft could include grand theft involving a firearm, which is a serious felony. Likewise, sales of controlled substances could include sales of heroin, cocaine, PCP or methamphetamine to a minor, which is a serious felony. These offense groups are included in the list of non-serious offenses because the types of offenses included in them that are serious felonies are deemed to be so small as to not significantly affect the statistical calculations. Moreover, any distorting effect that including these offense groups might cause in calculating the total number of state prisoners who are serving "Three Strikes" prison sentences on current offenses which are not serious or violent - is more than offset by the exclusion of offense groups that must include many non-serious violent felonies - arson and "other offenses" in the "Other crimes" offense category - a total of 185 prisoners. Moreover, calculating the number of "Three Strikes" prisoners who would qualify for immediate or "near future" release because of the initiative does not take into account prisoners who are serving "Three Strikes" prison sentences for current serious or violent felonies whose prior convictions would no longer be "felony strikes" under the initiative, and who would also qualify for substantial reductions in their sentences. Therefore, the author is quite confident that a claim that at least 26,000 "Three Strikes" state prison inmates would qualify for Immediate or "near future" release is a conservative and baseline estimate. The actual figure of released inmates is likely to be even higher.