

# The Impact of Proposition 36 on California's Three Strikes Law: *An Unwise Initiative*

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Proposition 36, which has qualified for the November 2012 ballot, seeks to change the long-standing Three Strikes law that California voters approved in 1994.<sup>1</sup> After almost 18 years on the books, the question Proposition 36 poses for voters is “Does the Three Strikes law need to change?” The proponents of Proposition 36 suggest that too many criminals are serving life sentences for petty crimes, leading to unacceptable costs to the taxpayer and dangerous prison overcrowding.<sup>2</sup> The purpose of this position paper is to demonstrate that the current law is working successfully and the changes proposed by Proposition 36 are not needed.

First, we explore a brief description of the existing Three Strikes law as it is applied by district attorneys and judges in current practice. Second, we analyze how Proposition 36 will change the law if it is approved in November. Third, we demonstrate why **the changes proposed by Proposition 36 are unwise and would create serious risks to public safety; and, thus, the measure should be rejected by voters.** Lastly, a brief recollection of the many failed attempts to change the Three Strikes law in the Legislature and via the ballot will support our contention that the law needs no changes. **The current Three Strikes law is used appropriately to achieve successfully the objectives the voters of California intended it to achieve.**

## Executive Summary

### Current Three Strikes Law

With respect to a defendant convicted of **any** new felony who has two or more serious (per Penal Code section 1192.7) or violent (per Penal Code section 667.5) prior felonies, the law mandates an indeterminate life sentence of no less than 25 years to life.

### What Proposition 36 Proposes

1. Proposition 36 does **not** apply to second-strikers, i.e., those with only **one** prior serious or violent felony; nor does it change the list of those felonies, i.e., what qualifies as a strike prior. It only concerns third-strikers.
2. If a defendant with **two or more** strike priors is convicted of a new serious or violent felony, then that defendant is sentenced as under current law.
3. Certain classes or types of strike priors—mostly homicides, forcible sex crimes, and some sexual offenses with minors—will disqualify a defendant from Proposition 36 treatment and subject that defendant to sentencing as under the current law. (See Section II.B.1. at pages 6–7 for details.)

4. If the defendant's new felony conviction is for certain drug crimes with weight enhancements (see Section II.B.2. at page 7); specified sex offenses (see Section II.B.3. at page 7); or involved a firearm/deadly weapon/intent to cause GBI (see Section II.B.4. at page 8), the defendant will be disqualified from Proposition 36 treatment and subject to sentencing as under the current law.
5. If the defendant's new conviction is **any other non-serious or non-violent felony**, i.e., not a strike offense, Proposition 36 subjects that defendant to sentencing as a second-striker by doubling the base term for the new felony rather than imposing the 25 years to life mandated by current law. (See Section II.B.5. at page 8.)
6. Proposition 36 establishes a two-year window for filing a petition for re-sentencing by any inmate currently incarcerated as a third-striker under the circumstances addressed by #5 above. This petition is filed with the sentencing trial court, which determines if the defendant qualifies and, if so, re-sentences the defendant to a double-the-base-term determinate sentence, unless to do so "would pose an unreasonable risk of danger to public safety." (See Section II.B.6. at page 9.)

### Why Proposition 36 Is Unwise

1. Crime in California has declined since the adoption of the Three Strikes law in 1994; and that downward trend has continued in the period from 2005–2010, as demonstrated by statistics produced by the Attorney General's Office.
  - Violent Crime declined by 17.6 percent and Homicides by 30.9 percent.
  - Property Crimes, 22.8 percent; Larceny-Theft, 16.9 percent; Arson, 38.9 percent.(See Section III.A.1. at pages 10–11 for details.)
2. Proposition 36 seems directed at large influxes of defendants un-deserving of life sentences into overcrowded prisons, but CDCR statistics belie that suggestion.
  - Total prison population in California is 134,868.
  - Third-striker population is 8,873; or 6.6 percent of total.
  - 83 percent of third-strikers were sentenced before the last decade.
  - The **maximum** number of third-striker inmates potentially eligible for resentencing is 4,388.
  - Over the last three years, only 91 such inmates have been added to the CDCR population, an average of **less than eight** new inmates per calendar quarter with a non-serious, non-violent commitment offense.
  - The 327 inmates serving a three-strikes sentence for petty theft with a prior represent less than 4 percent of all third-strikers.(See Section III.A.2. at pages 11–14 for details.)
3. Profiles of seven third-strikers potentially eligible for Proposition 36 re-sentencing who all have horrific criminal histories show the danger to public safety if the initiative is adopted. (See Section III.A.3. at pages 15–19 for these profiles.)

4. The current law is working well because district attorneys use their discretion appropriately in charging Three Strikes cases and in moving to dismiss strike priors for particular defendants. (See Section III.B.1. at 19–22 for details.)
5. The current law is also working because judges use their discretion to reduce felony “wobblers” to misdemeanors and to dismiss strike priors in furtherance of justice, as authorized by the *Romero* decision, pursuant to Penal Code section 1385. (See Section III.B.2. at pages 22–25 for details.)

### **Every Attempt to Weaken Three Strikes Through Legislation or Initiative Over the Past 18 Years Has Failed or Were Abandoned**

Twelve separate bills that sought to undermine the current law have failed or were abandoned in various stages of the Legislative process. After the rejection of Proposition 66 by the electorate in November 2004, four more proposed initiatives designed to “reform” the current law—from requiring the third strike to be serious or violent, up to repealing the entire law altogether—failed to qualify for the ballot. (See Section IV. at pages 27–28 for details.)

## I. A Brief Description of the Current Three Strikes Law

The Three Strikes law establishes a sentencing structure for career criminals. Its stated intent is “to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.”<sup>3</sup> Simply put, the law is aimed at those criminals who are not deterred by serial re-incarceration from re-offending; and who have not benefited from the rehabilitation efforts extended to them. The law, while generally referred to as Three Strikes, actually contains provisions designed to carry out its stated intent with respect to those recidivists with a second strike and those with three or more. As Proposition 36 proposes no alteration to the second-strike aspects of the current law, we will focus on those applying only to the Three Strikes provisions.<sup>4</sup>

Our 10-year retrospective on the Three Strikes law, published in 2004, aptly describes how the Three Strikes provisions operate:

The three-strikes provision imposes a sentence of life with a minimum term of at least 25 years in state prison, or a minimum term that is triple the normal sentence, whichever is greater, on those convicted of any current felony if they have two or more prior convictions for violent or serious felonies. This sentencing structure is commonly referred to as “25 years to life” in prison, and these defendants are referred to as “third strikers.” In both of the provisions, the prior felony conviction must be serious or violent to qualify as a “strike,” but the current or instant offense can be any felony offense. Also, most criminals qualifying pursuant to either provision are not eligible for probation and must serve a prison term.<sup>5</sup>

For the defendant to be sentenced under the Three Strikes provision, he or she must first be convicted of a felony offense. The prosecutor must also have alleged the prior strike convictions and proven beyond a reasonable doubt that they occurred. The trier of fact, having convicted the defendant of any felony and having found that he or she suffered at least two strike convictions, the trial court may then sentence the defendant pursuant to the Three Strikes law. But as we shall see in a later discussion, judges have some discretion in applying that law.

Our 2004 *Retrospective* sets forth the nature of a strike prior:

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

An out-of-state adult felony conviction qualifies as a strike if it contains the same elements as a qualifying prior conviction in California. [Citation omitted.] A juvenile adjudication may qualify as a strike prior if the juvenile was 16 years or older at the time of the commission of the offense, the juvenile was eligible to be tried as an adult, and the offense is a serious or violent felony. The list of offenses

that qualify as strikes if committed by a juvenile is very similar to the adult list. [Citation omitted.]

A qualifying prior conviction can be charged as a strike forever. That is, there is no “washout period” (the length of time between the prior felony conviction and the current felony) as there is for some penalty enhancements.<sup>6</sup>

Nothing in Proposition 36 proposes to change the nature of a strike prior or the types of felonies that qualify as strikes.

Finally, the Three Strikes law imposes a different custody credit regime on inmates. Most inmates who remain trouble-free in prison receive 50 percent work-time credit. In other words, such inmates can halve their term of imprisonment.<sup>7</sup> In contrast, those who are sentenced under the Three Strikes provision of the current law, just as with any other defendant sentenced to a life term, do not earn any custody credits against the indeterminate life term imposed under the Three Strikes law.<sup>8</sup> Again, Proposition 36 does not propose any changes to this custody-credit regime.

## II. How Proposition 36 Would Change the Current Three Strikes Law If Passed<sup>9</sup>

### A. What Remains the Same

It is helpful to set forth what would remain the same in the event Proposition 36 is approved by the electorate in November 2012.

1. As noted above, there would be no changes to which crimes qualify as strikes. Anything that is a strike under current law will remain a strike under Proposition 36.
2. There will be no change to how defendants with **one** prior strike would be sentenced. Proposition 36 does nothing to alter the circumstances of anyone convicted of *any* felony offense who is also found to have one qualifying strike prior. They will continue to serve a term double that typically provided for the current felony.
3. If a defendant with **two or more** prior strikes is convicted of a new serious or violent felony, i.e., the current conviction is also for a strike, then that defendant would be sentenced in the aftermath of Proposition 36 the same as under current law.
4. Nothing in the initiative will change the discretion a prosecutor has to dismiss or strike a prior strike allegation pursuant to Penal Code section 1385 or for lack of evidence.
5. Similarly, Proposition 36 does nothing to alter the discretion a court currently has to dismiss or strike a prior “strike” allegation.

Proposition 36 does nothing to add to or take away from the discretion currently afforded prosecutors and judges by Penal Code sections 667(f)(2) and 1170.12(d)(2) to ameliorate the impact of the three-strikes provision of current law. As we shall see, this existing ability to ensure that less than a 25-years-to-life sentence is imposed on a potential Three Strikes defendant is the primary reason that the changes proposed by Proposition 36 are so unnecessary.

## B. Proposed Changes to Current Law

Proposition 36 is intended to change how defendants with two or more strike priors would be sentenced. It acts both prospectively on those convicted of a new felony offense after the intended changes go into effect, as well as retrospectively with respect to some defendants currently serving a Three Strikes sentence.

The first change is actually no change, in the sense that defendants with certain types of **prior** serious or violent felony convictions will continue to be sentenced in the same manner as under current Three Strikes law.

### 1. Certain Prior Strikes Exempt Defendant From the Application of Proposition 36<sup>10</sup>

There are 10 classes or types of prior strikes that will subject a defendant to the current sentencing law rather than that proposed by Proposition 36 if he or she has at least one such prior strike:

1. Any “sexually violent offense,” as that crime is defined by Welfare and Institutions Code section 6600(a);
2. Oral copulation with a child under 14 years old and more than 10 years younger than the defendant;<sup>11</sup>
3. Sodomy with a child under 14 years old and more than 10 years younger than the defendant;<sup>12</sup>
4. Sexual penetration with a child under 14 years old and more than 10 years younger than the defendant;<sup>13</sup>
5. A lewd and lascivious act involving a child under 14 years of age;<sup>14</sup>
6. Any homicide offense, including attempted homicide;<sup>15</sup>
7. Solicitation to commit murder;<sup>16</sup>
8. Assault with a machine gun on a peace officer or firefighter;<sup>17</sup>
9. Possession of a weapon of mass destruction;<sup>18</sup>
10. Any serious or violent felony punishable in California by life imprisonment or death.<sup>19</sup>

The impact of this change that is not a change is fairly straightforward. Any defendant with one of these strike priors who is currently serving a 25-years-to-life sentence will not be able to petition for the proposed re-sentencing hearing that Section 6 of Proposition 36 creates (discussed below). Nor will such a defendant, if convicted of **any** felony in the future, benefit from the general provision of Proposition 36 that the triggering felony for a prospective Three Strikes sentence must also be, with some exceptions, a serious or violent felony. For this class

of defendants, Proposition 36 will have absolutely no impact; and it will certainly not create shorter sentences for those defendants, with the implied reductions to costs or overcrowding that are meant to benefit all Californians.

The second change proposed by Proposition 36 is also a change that is not a change. Here the initiative shifts its focus to the nature of the current felony offense.

## 2. If the Current Offense is a Drug Charge with a Weight Enhancement

In those situations where a defendant with two or more strike priors is newly convicted of a felony controlled-substance offense, and a weight-enhancement allegation pursuant to Health and Safety Code section 11370.4 or 11379.8 is also proven true beyond a reasonable doubt, that defendant will be subject to sentencing under the current Three Strikes law.<sup>20</sup> Again, such a defendant will have no opportunity to “benefit” from Proposition 36’s reduction in sentence lengths. There will be no impact relative to current law.

Likewise, the third change proposed by Proposition 36 is not really a change. If the defendant’s **current** offense is a certain type of sex offense, he or she will be sentenced just as under the current Three Strikes law.

## 3. If the Current Offense is a Specified Sex Offense

Proposition 36 specifies a list of certain sex offenses for which a new conviction of a defendant with two or more strike priors will subject that defendant to a sentence no different than that he or she would face under current law.<sup>21</sup>

1. Unlawful felony sexual intercourse where the defendant is 21 years of age or older and the victim is under 16 year of age;<sup>22</sup>
2. Rape of a spouse;<sup>23</sup>
3. Any felony resulting in mandatory sex offender registration under Penal Code section 290(c), **EXCEPT** one of the following:
  - Enticing an unmarried female under 18 years old for prostitution or to have illicit sexual intercourse;<sup>24</sup>
  - Incest;<sup>25</sup>
  - Sodomy with a person under 18 years old;<sup>26</sup>
  - Sodomy while in state prison;<sup>27</sup>
  - Oral copulation with a person under 18 years old;<sup>28</sup>
  - Oral copulation while in state prison;<sup>29</sup>
  - Indecent exposure;<sup>30</sup> or
  - Possession of material depicting a child under 18 years old engaging in or simulating sexual conduct.<sup>31</sup>

Finally, Proposition 36 treats defendants who commit **current** offenses, coupled with certain circumstances involving weapons, just as if under the existing Three Strikes law. We still have yet to see any change to the status quo if the initiative were to be approved by voters.

#### 4. If the Current Offense Involves a Firearm, Deadly Weapon, or Intent to Cause GBI

Proposition 36 establishes four circumstances under which a defendant with two or more prior strikes would nevertheless be subject to the same sentencing outcome as under the current Three Strikes law, regardless of the current felony, provided he or she:

1. Used a firearm;
2. Was armed with a firearm;
3. Was armed with a deadly weapon; or
4. Intended to cause great bodily injury to another person.<sup>32</sup>

It is noteworthy that none of these four circumstances is defined by the initiative; and therefore each will be governed by existing statutory and case law. Yet another instance in which the status quo is preserved unchanged. So far, nothing offered by Proposition 36 compels its adoption.

Now we come to an actual change to the current Three Strikes law that Proposition 36 proposes. The general intent of the initiative is for a Three Strikes sentence to be triggered only by conviction of a current serious or violent felony. Everything discussed heretofore has operated as an exception to that general intent. Now the focus shifts to the consideration of current offenses that are neither serious nor violent, i.e., that are not strikes themselves.

#### 5. If the Current Offense is Any Other Non-Serious or Non-Violent Felony

In the event that the defendant is convicted of a new felony that is neither a serious or violent felony offense, nor one of the felonies described in Sections B.2.-4. above, and furthermore, that none of the defendant's prior strikes are from the listed exceptions discussed in Section B.1. above; then the defendant is sentenced as if he or she had only one prior strike.<sup>33</sup> He or she would receive a sentence equivalent to that under the two-strike provisions of current Three Strikes law, double the term ordinarily applied to the new felony rather than 25 years to life. **This would be so without regard to the number of the defendant's prior strikes. He or she could have two or fifteen. The results would be the same in either case.**

By shifting the focus from the defendant's prior criminal history to the nature of the current felony offense, it is difficult to see how the proponents of Proposition 36 can maintain that they aim "to restore the original intent of California's Three Strikes law."<sup>34</sup> As we have seen, the original intent of the law was to address the impact of habitual criminals on the public safety of California. That necessarily requires a focus on recidivism and the entire criminal history of a particular defendant. Proposition 36 misaligns that focus by basing the sentencing outcome almost exclusively on the nature of the most recent offense committed by the defendant. Too little weight is given to the past serious or violent felonies that each of these defendants must have committed in order to be subject to the Three Strikes law. We will turn to the unfortunate consequences that can flow from such shortsightedness, but first we consider what Proposition 36 will mean for those currently serving a 25-years-to-life (or longer) sentence for an offense that is neither serious nor violent nor one of the excepted felonies discussed above.

## 6. Petitions for Re-sentencing for Inmates Currently Serving Indeterminate Terms as Three-Strikers

Proposition 36 would allow some inmates serving indeterminate terms as a consequence of the current Three Strikes law to petition the court for a recall of their sentence pursuant to proposed new Penal Code section 1170.126.<sup>35</sup> To qualify, an inmate must satisfy both of two requirements: first, the inmate must be serving the indeterminate term for the conviction of a felony that is not defined as serious or violent under Penal Code sections 667.5 and 1192.7; and second, the inmate must be someone who would have otherwise qualified for the more lenient sentence provided by Proposition 36, i.e., the current offense is not one of the excepted felonies and none of the strike priors are those disqualified by the initiative.

Inmates who satisfy these two requirements may file a petition for recall of sentence within two years of the effective date of Proposition 36, or later upon a showing of good cause. This petition is filed with the trial court that imposed the defendant's sentence. The trial court shall determine whether the petitioner satisfies the criteria for more lenient sentencing under Proposition 36. If so, the court shall re-sentence the petitioner pursuant to the initiative, unless the court, in its discretion, determines that the petitioner "would pose an unreasonable risk of danger to public safety."<sup>36</sup>

In exercising this discretion, the trial court may consider: (1) the petitioner's criminal conviction history (types of crimes, injuries to victims, lengths of prior prison terms, and the remoteness of crimes); (2) the petitioner's disciplinary and rehabilitation records while incarcerated; and (3) any other evidence the court deems relevant.<sup>37</sup>

So if Proposition 36 is approved by voters in November, some dangerous criminals will be eligible to petition for re-sentencing to obtain a much shorter term of imprisonment. While not all defendants who petition for the relief provided by Proposition 36 will ultimately benefit, the fact that the exact nature of the evidence to be considered in these hearings and the procedure by which it is to be introduced and evaluated are left undefined, means that these re-sentencing hearings will introduce increased demands on the already strained time commitments and financial resources of courts, district attorneys, and attorneys that may be appointed on behalf of the petitioners. **These provisions of the initiative are potentially detrimental to public safety.**

### III. Why Proposition 36 Is Unwise

The proponents of Proposition 36 want the electorate to believe that this initiative is needed to spare California "hundreds of millions of taxpayer dollars" and to prevent "the early release of dangerous criminals who are currently released early because jails and prisons are overcrowded with low-risk, non-violent inmates serving life sentences for petty crimes."<sup>38</sup> While we defy the supporters of Proposition 36 to identify one dangerous criminal released early because of the current Three Strikes law, what cannot be contravened is that the **passage of Proposition 36 will potentially result in the release of thousands of criminals with long histories of committing serious or violent crime, including residential burglaries, armed robberies, and vehicular homicides.** In suggesting that Proposition 36 is needed to make more room in our prisons for the murders and rapists, the proponents imply that the current Three Strikes law has been sentencing large numbers of

defendants to indeterminate life terms for relatively minor offenses. “Overcrowding” in our prisons is an illusory problem; a straw man created to bolster artificially the purported need for Proposition 36’s solution. In fact, evidence will show that the current Three Strikes law is working just fine and is in no need of change.

**A. Current Three Strikes Law Is Working and Poses No Problems**

**1. Crime in California Has Declined Since the Adoption of Three Strikes in 1994**

As the 2004 *Retrospective* explored, the aftermath of the Three Strikes law in California has been correlated with a noticeable decline in crime. In the 10 years after passage of the law that is currently in operation, crime has decreased approximately 45 percent, to levels similar to those seen in 1965.<sup>39</sup> In 1993, immediately prior to the introduction of the law, the homicide rate in California was 13 per 100,000. In the period from 1994 to 2002, it declined approximately 40 percent to levels last recorded in the late 1960s and early 1970s (about 7 per 100,000).<sup>40</sup>

Looking at more recent data, from 2005–2010, the downward trend in crime continues. Table 1 shows the number of crimes and rate per 100,000 of population for each year from 2005 to 2010 for various classes of crimes.

*Table 1*  
**Crimes, 2005–2010<sup>41</sup>**

<b>Years</b>	<b>Violent Crimes</b>	<b>Property Crimes</b>	<b>Larceny-Theft</b>	<b>Arson</b>
2005	189,593	722,3333	688,820	12,272
2006	194,128*	707,607	666,869	12,687*
2007	191,493	681,235	654,481	11,400
2008	185,233	656,744	650,653	10,674
2009	174,579	595,813	613,614	9,233
2010	163,957	584,999	600,357	7,864
<b>Rate/100K</b>				
2005	512.3	1,952.0	1,861.4	33.2
2006	518.4*	1,889.8	1,781.0	33.9*
2007	507.0	1,803.6	1,732.7	30.2
2008	485.6	1,721.5	1,705.6	28.0
2009	453.6	1,548.1	1,594.3	24.0
2010	422.3	1,506.7	1,546.2	20.3

*\*Indicates increase from prior year.*

As the data indicate, violent crime declined by 17.6 percent from 2005 to 2010. Homicide, which is included in this category, declined by 30.9 percent for the same period. Property crimes declined by 22.8 percent, larceny-theft crimes by 16.9 percent, and arson by 38.9 percent.<sup>42</sup>

We certainly do not attribute the entire decline in crime rates in California since 1994 to the influence of the current Three Strikes law. But it would be equally misguided to maintain that the law has had no contribution. Crimes have been prevented and lives have been spared. And if the law has been contributing to the decline in crime, calls to reject it in its present form should be rejected.

## **2. Use of the Current Three Strikes Law Has Not Led to Significant Increases in the Three-Striker Population Housed by CDCR**

The proponents of Proposition 36 would have the electorate believe that the current Three Strikes law has led to the incarceration of significant numbers of inmates serving indeterminate life sentences. Such an implication grossly overstates the problem of prison overcrowding and misleadingly lays it at the feet of the current law. But statistics from the California Department of Corrections and Rehabilitation [hereinafter CDCR] suggest the exact opposite. **When we look at the number of third-strike inmates relative to the total prison population, and at the rate of incarceration for third-strikers over the past few years, the numbers show that the notion that thousands upon thousands of defendants are serving life terms for non-serious, non-violent crimes is preposterous.**

When we look at the three-striker population housed by CDCR, we need first to establish some perspective to understand the real magnitude of the issue. As of June 30, 2012, there were a total of 8,873 inmates classified by CDCR as Third Strikers.<sup>43</sup> On June 27, 2012, the entire CDCR population was 134,868 total inmates.<sup>44</sup> So we can see that third-striker inmates represent 6.6 percent of the entire inmate population in California prisons. In reality, those serving a sentence under the current Three Strikes law make up a small fraction of all criminals serving prison sentences in our state.

Table 2

**Third-Strikers in Total CDCR Population, 2003-2011**

As of Dec. 31	Total CDCR Population	Number of Third-Strikers	% of Total CDCR Population	Increase in Third-Strikers from Previous Year
2003	161,798	7,335	4.5%	n/a
2004	163,634	7,574	4.6%	239 (3.3%)
2005	168,055	7,813	4.7%	239 (3.2%)
2006	172,379	7,978	4.6%	165 (2.1%)
2007	171,568	8,230	4.8%	252 (3.2%)
2008	171,161	8,409	4.9%	179 (2.2%)
2009	168,905	8,570	5.1%	161 (1.9%)
2010	162,976	8,727	5.4%	157 (1.8%)
2011	184,807	8,848*	4.8%	121 (1.4%)

\* As of June 30, 2012, there were 8,873 third-strikers, an increase of 25 inmates (0.3%) over the previous six months.

Based on CDCR Table 1, *Prison Census Data Total Institution Population*,<sup>45</sup> and CDCR Table 1, *Second and Third Striker Felons in the Adult Institution Population*.<sup>46</sup>

These third-strikers have **not** been streaming into CDCR at alarming rates. Table 2 shows the third-striker population relative to the CDCR census from December 31, 2003, to December 31, 2011. This period was chosen because beginning with the March 31, 2003, report CDCR excluded inmates who would have been serving an indeterminate life sentence even without the Three Strikes law.<sup>47</sup> Consider that the total third-striker population as of December 31, 2003, was 7,335 inmates. Over the past eight years there have been only an additional 1,493 third-striker incarcerations. That represents an increase of only 20.4 percent from the total third-striker population on December 31, 2003. In other words, more than 83 percent of third-strikers were sentenced before that date. And the rate of incarceration from 2009 to 2011 for **all** third-strikers, those who would be impacted by Proposition 36 as well as those who will not, has increased by less than 2 percent year-over-year. The vast majority of defendants sentenced under the current Three Strikes law—who are supposed to represent a significant problem according to the proponents of Proposition 36—received those sentences in the early years of the law’s existence, prior to the past decade.

**a. Too Many Third-Strikers with Non-Serious or Non-Violent Commitment Offenses Are Not Being Incarcerated Under the Current Three Strikes Law**

Looking at the quarterly data from CDCR on the third-striker population over the past three years, we can see that the inmates are categorized by offense categories: Crimes Against Persons, Property Crimes (including First-Degree Burglaries,<sup>48</sup> Drug Crimes,

and a catch-all Other Crimes.<sup>49)</sup> Using the numbers for Crimes Against Persons [CAP], plus the numbers for First-Degree Burglaries [459/first], minus the numbers for the offense groups “Other Assault/Battery” and “Other Sex Offenses,” we can develop a useful proxy for the number of third-striker inmates whose commitment offense was also a strike, and who would therefore not be eligible for resentencing if Proposition 36 is adopted.<sup>50</sup> Similarly, we can derive a useful approximation of the maximum number of inmates potentially eligible for re-sentencing by subtracting this adjusted-CAP proxy from the total number of third-strikers.

*Table 3*

**CDCR Third-Striker Population 6/30/09 to 6/30/12**

<b>As of:</b>	<b>6/30/12</b>	<b>3/31/12</b>	<b>12/31/11</b>	<b>9/30/11</b>
Total	8,873	8,828	8,848	8,813
<u>Offense Cat.</u>				
CAP	4,171	4,137	4,132	4,101
Less Other A/B	(543)	(534)	(530)	(526)
Less Other Sex	(193)	(188)	(186)	(185)
Plus 459/1 <sup>st</sup>	1,050	1,046	1,046	1,037
Adjusted CAP	4,485	4,461	4,462	4,427
Eligible for Re-Sentencing (upper bound)	4,388	4,367	4,386	4,416
Increas. Prev. Q	21	(19)	(30)	41

<b>As of:</b>	<b>6/30/11</b>	<b>3/31/11</b>	<b>12/31/10</b>	<b>9/30/10</b>
Total	8,783	8,764	8,727	8,686
<u>Offense Cat.</u>				
CAP	4,079	4,055	4,024	9,996
Less Other A/B	(519)	(514)	(510)	(508)
Less Other Sex	(185)	(182)	(181)	(182)
Plus 459/1 <sup>st</sup>	1,033	1,037	1,029	1,022
Adjusted CAP	4,408	4,396	4,362	4,328
Eligible for Re-Sentencing (upper bound)	4,375	4,368	4,365	4,358
Increas. Prev. Q	7	3	7	7

<b>As of:</b>	<b>6/30/10</b>	<b>3/31/10</b>	<b>12/31/09</b>	<b>9/30/09</b>	<b>6/30/09</b>
Total	8,647	8,613	8,570	8,532	8,487
<u>Offense Cat.</u>					
CAP	3,964	3,948	3,917	3,901	3,865
Less Other A/B	(506)	(502)	(494)	(494)	(487)
Less Other Sex	(183)	(185)	(184)	(182)	(182)
Plus 459/1 <sup>st</sup>	1,021	1,013	1,005	998	994
Adjusted CAP	4,296	4,274	4,244	4,223	4,190
Eligible for Re-Sentencing (upper bound)	4,351	4,339	4,326	4,309	4,297
Increas. Prev. Q	12	13	17	12	N/A

Based on CDCR Table 1, *Second and Third Striker Felons in the Adult Institutional Population*.<sup>51</sup>

Based on the data in Table 3, we can see that there are approximately 4,485 third-striker inmates as of June 30, 2012, who would not qualify for Proposition 36 re-sentencing either because of the nature of their prior strikes or because of the nature of their current commitment offense. Similarly, there are no more than 4,388 third-striker inmates as of June 30, 2012, who would be potentially eligible for Proposition 36 re-sentencing. And this number is a conservatively derived upper bound, meaning that the eligibility number is almost certainly lower.

Focusing on the item labeled “Increas. Prev. Q,” which stands for the increase in potentially eligible third-striker inmates sentenced under the current Three Strikes law since the previous calendar quarter, we can see that two of the most recent quarters actually feature decreases and that the highest increase, 41 inmates, occurred from June 30 to September 30, 2011. Over the past three-year period, the average quarterly increase in third-strike inmates who could potentially benefit from Proposition 36 is less than *eight* new inmates. This hardly qualifies as the deluge of third-striker convictions for non-serious and non-violent crimes under current Three Strikes law that the proponents of Proposition 36 intend to end. Indeed, the increase in such new third-striker Proposition 36 re-sentencing “eligibles” is less than 2.2 percent over the last three years for which we have data. The conclusion that should be drawn from the data is that the current Three Strikes law is being used judiciously and appropriately.

**b. There Will Not Be Too Many Elderly Third-Strikers**

Another problem implied in the findings set forth in Proposition 36 is the current law is resulting in far too many illness-prone, elderly third-striker inmates. But if we look at the June 30, 2012, data on third-strikers categorized by age, we see that the number of third-striker inmates between 60 and 64 years old is 592, the number between 65 and 69 years

old is 207, and the number 70 years old or older is 106.<sup>52</sup> From these numbers, and the total third-striker population of 8,873 inmates as of June 30, 2012; it is easy to determine that less than 10.2 percent of the entire third-striker population is over the age of 60. Similarly, less than 3.6 percent are over the age of 65. With respect to the larger cohorts of younger third-strikers, those who were sentenced to indeterminate life terms in their 20s and 30s will have the opportunity for release on parole before their 65th birthday. Indeed, every third-striker will eventually have a parole hearing at which evidence similar in nature to that considered relevant at the hearing on the petition for re-sentencing authorized by Proposition 36, will be considered by the parole board. Those third-strikers whom the board determines are no longer dangerous recidivists have the potential to be released on parole. Again, these numbers do not compel the conclusion that proponents of Proposition 36 want the electorate to believe. Proposition 36 is not needed to quell rising numbers of ill and aged prison inmates.

**c. The Current Three Strikes Law Is Not Condemning Too Many Petty Criminals to Life Sentences**

Finally, contrary to the notion that legions of pizza thieves, video-tape thieves, golf-club thieves, and their ilk are being swept up by the current Three Strikes law; the data show that there are currently (as of June 30, 2012) 327 inmates serving a third-striker sentence for a petty theft with a prior, representing less than 4 percent of all third-strikers.<sup>53</sup>

Compare this small cohort to the 4,485 adjusted-CAP third-strikers, who represent **over half** of all third-striker inmates, and stand as a proxy for the number of third-strikers whom even the proponents of Proposition 36 believe should remain incarcerated for an indeterminate term of life. The argument that the current Three Strikes law unfairly targets petty criminals simply is not supported by the data.

**3. Proposition 36 Makes Dangerous Criminals Eligible for Re-sentencing and Earlier Release**

As we have seen from the data just considered, the recent history of the manner in which the current Three Strikes law is used shows that relatively few new third-strikers are receiving indeterminate life terms for non-serious or non-violent offenses. Proposition 36 clearly overstates the need for reducing the future flow of such inmates into California's prisons. But the initiative also extends an opportunity to as many as 4,300 inmates who are currently serving life sentences as third-strikers to petition for re-sentencing. A successful petitioner will find his or her sentence reduced from a minimum of 25-years-to-life under current law to double the term for the felony that resulted in imprisonment. To take a hypothetical example, a third-striker who was convicted of a single felony count of possession of cocaine<sup>54</sup> or petty theft with a prior<sup>55</sup> would face a new maximum sentence of six years in state prison. In actuality, the reduction in sentence would be even more drastic because that former third-striker, no longer serving an indefinite life term, would now be entitled to custody credits on the new determinate term.

Let's consider some examples of actual third-strikers for whom Proposition 36 holds the real probability of any early release if the initiative is approved in November. Each of these men would be eligible to petition for re-sentencing pursuant to Proposition 36.

### **ERVIN COLE<sup>56</sup>**

In 1984, Cole was convicted of robbery using a firearm. In 1991 he was convicted of burglary. A year later, Cole was convicted of assault with a deadly weapon. Cole was sentenced to prison for each of these convictions. After his release, he violated parole five times from 1989 through 1997. During this same time, Cole was also convicted of two misdemeanors.

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

Cole pled guilty to felony evading arrest, car theft, and felony hit-and-run. He admitted two strike priors, and was sentenced to prison for 25 years to life.

If Cole were re-sentenced pursuant to Proposition 36, his new maximum potential sentence would be no more than eight years and eight months in state prison, reduced further by custody credits since it would be a determinate-term sentence.

### **LEANDRO ANDRADE<sup>57</sup>**

Andrade has been addiction to heroin since 1977, and he stole to support his habit. Andrade has been in and out of state and federal prison since 1982. During a 13-year period, Andrade suffered nine convictions, including five felony residential burglaries and several drug-trafficking offenses. In 1991 he was incarcerated for escaping from federal prison.

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

If Andrade, whose current indeterminate life sentence was approved by the highest court in the land, were to be re-sentenced pursuant to Proposition 36, his new maximum potential sentence would be no more than seven years and four months in state prison, reduced further by custody credits since it would be a determinate-term sentence.

### **KIM GAMBLE<sup>58</sup>**

Gamble was convicted in 1980, of felony burglary and grand theft. In 1981 he was convicted of assault with a deadly weapon and sentenced to four years in state prison. Gamble was paroled in October 1982; and less than one year later, he was convicted of his second strike for a residential burglary and sentenced to six years in state prison. Following his release, Gamble suffered three violations of parole in 1989 and 1990. In March 1990, he was convicted of robbery and sentenced to 12 years in state prison. Paroled in the late 1990s, Gamble suffered four violations of parole from 1998 to 2000.

In October 2002, Gamble left a retail clothing store with a “large amount” of clothing without paying for it. The clothing was valued at more than \$400. He was identified and arrested approximately one week later. Gamble was charged with second-degree burglary and petty theft with priors. During the trial, Gamble pled to the charges and admitted the theft and strike priors. After a motion to withdraw the plea was denied, he was sentenced to 28-years-to-life.

If Gamble, who has spent 26 of the last 32 years in penal institutions, were re-sentenced pursuant to Proposition 36, his new maximum potential sentence would be no more than seven years and six months in state prison, reduced further by custody credits since it would be a determinate-term sentence.

### **HARRY CRIST<sup>59</sup>**

Crist admitted selling drugs for 13 years to support his own habit, but his criminal history spanned at least 25 years before he was sentenced as a third striker. Crist was first arrested for narcotics use in 1972, the prelude to a long and increasingly serious and violent history of crime. He began with numerous petty thefts, moved on to commercial burglary, and continued a pattern of substance abuse. In 1982 Crist committed two robberies at knife point. In the first incident, he slashed the drunk and cooperative victim’s face and cut the victim’s chest just below the throat, in an apparent attempt to kill the victim. Crist was released on bail, failed to appear for court, and was therefore a fugitive when he committed the second robbery against three teenagers in their home. Crist held a knife to the back of one young victim, threatening to kill him if the other victims did not cooperate. After serving his sentence of nine years and four months, Crist returned to a life of crime.

In 1996, Crist was arrested and charged with two counts of sales and one count of possession of heroin. He pled guilty to the possession case, but agreed the court could consider the sales charges in determining his sentence. Based on Crist’s two strike priors for armed robbery and his third strike for residential burglary, he was sentenced to serve 25 years to life in state prison.

If Crist were re-sentenced pursuant to Proposition 36, his new maximum potential sentence would be no more than six years in state prison, reduced further by custody credits since it would be a determinate-term sentence.

### **LUPE ESCOBEDO<sup>60</sup>**

Escobedo was been convicted of 17 robberies he committed in 1986 and 1987. Fifteen of those robberies were accomplished while he was armed with either a handgun or a knife. During several of these robberies Escobedo and his accomplices threatened to kill the grocery store employees he was robbing. Escobedo was sentenced to prison for these robberies; but his life of crime continued after his release, with convictions for resisting an officer, possession of controlled substances, and driving under the influence.

Prior to his commitment offense, Escobedo was arrested for felony child abuse. He was released pending further investigation. Next, he was arrested and charged with possession of stolen property, but his 17 priors were undiscovered. Escobedo was released on his own recognizance and failed to appear. Thus he was a fugitive when Escobedo was spotted in a

stolen vehicle parked in front of a motel. He resisted arrest, fighting and threatening the officers who apprehended him. In his motel room officers found a sawed off shotgun. When Escobedo was informed that his shotgun had been located, he stated: “It’s good that I didn’t make it back to the room. ... I’m going to be doing 150 years, what difference would it be to take out a cop.”

Escobedo was convicted of a felony failure to appear, receiving stolen property, and resisting or delaying an officer. Based on his numerous strike priors for robbery, he was sentenced to 50 years to life in state prison.

If Escobedo were re-sentenced pursuant to Proposition 36, his new maximum potential sentence would be no more than seven years and six months in state prison, reduced further by custody credits since it would be a determinate-term sentence.

### **JOSE ESPINOZA<sup>61</sup>**

Espinoza made a 31-year-long career of being a thief. His first theft was at age 12 and since then he evidenced addictions to drug and alcohol and no regard for other’s property, stealing to support his habits. Espinoza has 31 misdemeanor convictions, eight of which he committed after his strike priors. Espinoza has been convicted of eight felonies, five of which are for residential burglary (though he was identified as the perpetrator of at least seven residential burglaries). He went to prison five times before his final offense and has too many violations of parole and probation to count. Espinoza has rarely spent any time out of the custody or supervision of state and local authorities.

His commitment offense, commercial burglary, evidenced planning and premeditation. Espinoza entered the store with empty gift bags and, working with an accomplice, carefully selected merchandise that would fit easily inside, and which he could later sell for beer money. He was apprehended before he filled the largest bag. Based on his numerous strike priors for burglary, Espinoza is serving 25 years to life in state prison for the commercial burglary.

If Espinoza were re-sentenced pursuant to Proposition 36, his new maximum potential sentence would be no more than six years in state prison, reduced further by custody credits since it would be a determinate-term sentence.

### **DOUGLAS HALL<sup>62</sup>**

Hall’s strike priors were noted by the appellate court as “particularly violent.” His strikes consisted of a robbery in Oregon, where he fired a rifle at the victims, and an involuntary manslaughter in which he stabbed the victim 11 times. Hall’s long criminal history includes burglary, receiving stolen property, driving under the influence of alcohol, battery on a peace officer, possession of a deadly weapon, and being under the influence of a controlled substance. Hall’s commitment offense, for which he is serving a sentence of 25 years to life in state prison, was for possession of tar heroin. He was found with the drug after shooting up in the restroom of a restaurant.

If Hall were re-sentenced pursuant to Proposition 36, his new maximum potential sentence would be no more than seven years and six months in state prison, reduced further by custody credits since it would be a determinate-term sentence.

What is strikingly evident from these profiles of real third-strikers is that the current Three Strikes law is protecting Californians from habitual criminals with long histories of committing multiple residential burglaries, invading the sanctity of citizens' homes, and multiple violent robberies armed with guns or other dangerous weapons. Few would welcome these recidivists into their communities and neighborhoods; but Proposition 36 narrowly focuses on the commitment offense, which for each of these seven men was a non-serious or non-violent offense—in some cases, relatively minor theft or drug-possession crimes. If Proposition 36 were to pass, it would make entirely possible a drastic reduction in sentence and the prospect of an early release for each of these men.

## **B. The Reasons the Current Three Strikes Law Is Working So Well**

### **1. District Attorneys Use Their Discretion in Charging and Dismissing Strikes Appropriately**

A criminal who is convicted of any felony offense and who has suffered two or more prior convictions for serious or violent felonies qualifies to be sentenced to an indeterminate life term pursuant to the current Three Strikes law. But not every defendant with two or more strike priors finds him- or herself in this situation. In deciding whether the application of the current Three Strikes law is appropriate in any given case, district attorneys have two opportunities to divert a defendant from the sentencing scheme.

First, at the outset of a criminal case, prosecutors consider what crimes, if any, a defendant should be charged with. The 2004 *Retrospective* sets out the general charging process:

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

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

If the determination is made that a defendant's crime is worthy of felony punishment, or that the particular crime committed is punishable only as a felony, then a defendant's prior criminal record is further scrutinized for

prior convictions that may serve as enhancements to lengthen the ultimate sentence.<sup>63</sup>

So, if appropriate, the prosecutor can charge a “wobbler” offense as a misdemeanor and remove Three Strikes from application to that defendant. If, however, the defendant is charged with a felony, each qualifying prior strike conviction must be pled and proved by the prosecution.<sup>64</sup>

Even though plea bargaining of strike priors is expressly forbidden,<sup>65</sup> prosecutors have a second opportunity to exercise discretion regarding the application of the Three Strikes law to a particular defendant. The prosecution may request that the court dismiss a felony strike prior under two circumstances: (1) in the furtherance of justice pursuant to Penal Code section 1385; or (2) if there is insufficient evidence to prove the prior strike conviction.<sup>66</sup>

Many of California’s district attorneys have approved internal policies that govern the exercise of a prosecutor’s discretion in moving the trial court to dismiss strike priors in the furtherance of justice.<sup>67</sup> In deciding whether or not to exercise that discretion, prosecutors evaluate many factors, including: (1) Is the current offense a serious or violent felony? (2) Did the previous strikes occur within a single criminal incident? (3) Has the defendant remained crime and custody free for a reasonable period of time prior to the current offense? (4) Does the defendant have a record of weapons use or violence?<sup>68</sup>

In a study published in the Summer 2007 *Journal of the Institute for the Advancement of Criminal Justice*, Professor Jennifer Walsh surveyed the 58 elected district attorneys of California serving at that time regarding their use of discretion in Three Strikes cases.<sup>69</sup> She received useable responses from 25 of the district attorneys, including those representing three-quarters of California counties with a population greater than 1 million and 86 percent of counties with a population between 500,000 and 1 million.<sup>70</sup> This is significant because the vast majority of third-striker convictions are produced in the large, urban counties of California.

The results of Professor Walsh’s survey showed that 92 percent of district attorneys had used the discretion to dismiss a strike prior. Only two small-county district attorneys had never used such discretion; but at the time of the survey, one had no third-striker serving an indeterminate life term in CDCR and the other had produced only two third-striker inmates.<sup>71</sup>

Sixty percent of responding district attorneys had implemented policies to guide the decision-making process with respect to Three Strikes cases, two-thirds of whom represented counties of more than 500,000 people. Those with no such policy were from counties of less than 100,000 people.<sup>72</sup>

The following table sets forth the variety of factors that district attorneys consider in making the decision to use their discretion to dismiss a strike prior.

Table 4<sup>73</sup>

**Reasons Cited by District Attorneys as Justification for Exercising Discretion in Three Strikes Cases**

<b>Reasons for Dismissing a Prior Strike</b>	<b>Percent of DAs</b>
Current offense is trivial in nature	74
Prior strikes are remote in time	65
Defendant has no recent criminal history	65
Prior strikes from singular incident	65
Defendant has no history of violence	57
Defendant has never been to prison	48
Defendant has no history of weapons use	39
Defendant has history of mental illness	39
Proof problems with prior strikes	65
Evidence problems with current case	48
Other	4

In evaluating the factors indicated in Table 4, many responding district attorneys emphasized that they look at the entire record rather than any one factor in isolation.<sup>74</sup>

In contrast, this next table sets forth the factors district attorneys consider in deciding not to exercise their discretion to dismiss a strike prior.

Table 5<sup>75</sup>

**Reasons Cited by District Attorneys as Justification for Withholding Discretion in Three Strikes Cases**

<b>Reasons for Withholding Discretion</b>	<b>Percent of DAs</b>
Current offense is serious in nature	95
Defendant has history of violence	90
Defendant has lengthy criminal record	86
Defendant likely to re-offend	86
Prior strikes are recent in time	76
Defendant has history of weapon use	71
Priors strikes accumulated separately	62
Defendant has been to prison	52
Other	14

The “Other” category in Table 5 included such factors as (1) whether the strike priors had been obtained as a juvenile or adult offender; (2) whether the defendant had a history as a sex offender; and (3) whether the prior strikes were violent in nature.<sup>76</sup>

**The problem with Proposition 36 is that in focusing solely on the nature of the defendant’s current felony, i.e., the conviction that triggered the application of Three Strikes, it renders these other factors related to defendant’s history of criminality meaningless. It essentially rejects the concept of discretion to distinguish between those recidivists for whom Three Strikes is appropriate and those who may merit a mitigated approach.** In light of this attack on the use of discretion by California’s district attorneys, Professor Walsh’s survey speaks as accurately to today as it did when it was first conducted. In seeking the attitude of the responding district attorneys to the Three Strikes law, she found the following:

Over two-thirds of the district attorneys responding to the survey strongly agreed that the Three Strikes law is a useful tool in the fight against crime. A majority also believed that the policy promotes justice. Four out of five felt that the Three Strikes law metes out the appropriate punishment for serious offenders and most were strongly opposed to efforts that would amend the law to make it less severe. ... [Eighty-four] percent of the respondents rejected the idea of reforming the law to disqualify low-level felony offenses like “wobblers” as third strikes.<sup>77</sup>

District attorneys are justifiably concerned about using their discretion appropriately in a manner that is ethical and promotes justice. In the aftermath of the November 2004 defeat of Proposition 66, which threatened to weaken the Three Strikes law, many district attorneys recognized that wisest way to prevent future attacks on the law was to work collectively through the California District Attorneys Association to develop a guide for the exercise of their discretion in applying Three Strikes to particular cases. That guide, approved by the Board of Directors of CDAA and offered for the consideration of each district attorney in the state, can be found as Appendix A at the end of this paper.

## **2. Judges Also Use Discretion On Behalf of Some Third-Strikers**

In addition to the discretion exercised by the district attorney to dismiss a strike prior, trial courts in California also have discretion in their sentencing choices that permit them to fashion appropriate outcomes on behalf of a particular third-strike defendant. Judges exercise this discretion in two ways, either by reducing a “wobbler” offense from a felony to a misdemeanor or by dismissing one or more of the defendant’s strike priors.

### **a. Reducing a Felony to a Misdemeanor**

A trial court judge may exercise his or her discretion by reducing certain charged felony offenses to misdemeanors pursuant to Penal Code section 17(b). In *People v. Superior Court (Alvarez)*,<sup>78</sup> the California Supreme Court discussed this mechanism that may be used to realize an appropriate sentence for a defendant with serious or violent prior convictions that would otherwise subject him or her to punishment under the current

Three Strikes law. The *Alvarez* court ruled that trial courts retain discretion to reduce current felony “wobbler” offenses<sup>79</sup> to misdemeanor offenses. As we have seen in the discussion of a district attorney’s charging discretion above, “wobblers” are those crimes that can be charged alternatively as either misdemeanors or as felonies. Since current misdemeanor convictions do not trigger sentencing under the Three Strikes law, an exercise of judicial discretion to reduce the felony to a misdemeanor prevents a defendant from being sentenced as a third-striker to an indeterminate life term.

What is critical to understanding how courts exercise this discretion is the process enjoined on them by the California Supreme Court in *Alvarez*. The exercise of that discretion pursuant to Penal Code section 17(b) is reviewable on appeal for abuse of discretion.<sup>80</sup> While recognizing that the fact a “wobbler” offense originated in the context of a Three Strikes case would be given considerable weight, the court admonished that the trial court’s decision “should reflect a thoughtful and conscientious assessment of all relevant factors including the defendant’s criminal history.”<sup>81</sup> The court went on to state that “any exercise of [Penal Code section 17(b)] authority must be an intensely fact bound inquiry taking all relevant factors, including the defendant’s criminal past and public safety into due consideration.”<sup>82</sup>

So as the current Three Strikes law is used today, trial courts are using the same sorts of factors that district attorneys use to evaluate whether to exercise discretion on behalf of third-striker defendants.

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

The second way that judges exercise their discretion on behalf of third-striker defendants is to dismiss one or more of that defendant’s strike priors. The authority to exercise this discretion was recognized in the 1996 California Supreme Court case of *People v. Superior Court (Romero)*.<sup>83</sup> The *Romero* court interpreted the Three Strikes law to allow for judicial discretion to dismiss serious or violent felony convictions on the court’s own motion for the purposes of two-strike and three-strike sentencing. The authority to dismiss strike priors on the court’s own motion in furtherance of justice is found in Penal Code section 1385.<sup>84</sup> Later, in *People v. Garcia*, the court held that the exercise of this discretion applied either to a single prior conviction or to every prior conviction relevant to the current case.<sup>85</sup> Furthermore, it could be exercised as to one current charge and withheld with regard to another current charge.<sup>86</sup>

In explaining why this should be so, the court stated:

[A] defendant’s sentence is also a relevant consideration when deciding whether to strike a prior conviction allegation; in fact, it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences. [Citation omitted.] A trial judge, applying the factors we enumerated in *Romero* and *Williams*, may find adequate justification for striking one or more prior conviction allegations, but may deem appropriate the sentence that results from striking the prior conviction allegations as to only some counts. When a

proper basis exists for a court to strike prior conviction allegations as to at least one current conviction, the law does not require the court to treat the other current convictions with perfect symmetry if symmetrical treatment would result in an unjust sentence.<sup>87</sup>

The standard for exercising the court's discretionary power to dismiss a strike is set forth in *People v. Williams*.<sup>88</sup> A trial court should give "no weight whatsoever ... to factors extrinsic" to the sentencing scheme of the Three Strikes law.<sup>89</sup>

We therefore believe that, in ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.<sup>90</sup>

As should be obvious from these California Supreme Court cases, the exercise of judicial discretion on behalf of a third-striker defendant involves an evaluative process that takes into consideration far more than merely the nature of the current felony conviction. The decision to dismiss a prior conviction is reviewable for abuse of discretion by an appellate court,<sup>91</sup> and the trial court must enter the basis for the dismissal of a strike prior in the clerk's minutes to facilitate appellate review.<sup>92</sup>

### c. **This Judicial Discretion Has Been Exercised**

What is beyond argument is that all third-striker defendants since the late 1990s have had an opportunity to avail themselves of this judicial discretion. Consider two defendants profiled in the 2004 *Retrospective* who benefited from the exercise of judicial discretion to dismiss strike priors:<sup>93</sup>

#### **MICHAEL CEPEDA**<sup>94</sup>

Cepeda burglarized two homes and broke into a car in the early 1980s. He was convicted of two counts of residential burglary and sentenced to state prison. He violated parole in 1989 by being under the influence of drugs. That same year he was convicted of robbery and sentenced to seven years in prison.

In 1994, Long Beach police officers stopped Cepeda and others in an alley. Cepeda allowed the officers to search him, and they found two rocks of cocaine and a cocaine pipe. Cepeda was charged with possession of cocaine, and it was alleged that he had three prior-strike convictions. Cepeda pleaded guilty to possession of cocaine, and the trial court exercised discretion to strike two of his strike priors. Cepeda was sentenced under the two-strikes provision of the Three Strikes law, receiving a total of eight years in prison.

## MANUEL MORALES<sup>95</sup>

In 1993, Morales was convicted of two counts of felony child molestation. The first victim was four years old at the time of the molestation. The second victim testified that she was molested by Morales for a six-year period. The victim said, “Everything you could imagine that could be done to a person was done to me by (Morales).”<sup>96</sup> Morales admitted to having a relationship when this second victim was 13 years old, and stated that he “felt in love with her,” and that “she was a nice, young girl.”<sup>97</sup>

In 2001, Morales approached four pre-teen girls on two separate occasions and showed them pornographic magazines. Asking the girls on the first occasion if they knew “somebody who wants to do this,”<sup>98</sup> and on the second if they knew “where to find these pictures.”<sup>99</sup>

A jury convicted Morales of three counts of annoying or molesting a child; and also found that he had previously been convicted of two strike convictions. At sentencing, the trial court exercised discretion and dismissed one of the strike priors in furtherance of justice. Morales received 12 years in state prison, double the standard prison term, pursuant to the two-strikes provision of the Three Strikes law.

What is worth noting is that had Morales been serving an indeterminate life term as a third-striker, he would **not** be eligible for re-sentencing pursuant to Proposition 36 because his two strike priors are sex crimes that disqualify him. In Morales’ case, judicial discretion served him better than the changes sought by Proposition 36 would have had they been available to him.

In considering the impact of judicial discretion as a significant safeguard to unjust outcomes in Three Strikes cases, proponents of Proposition 36 might argue that the fact-based inquiry that underpins the exercise of that discretion will similarly be available to courts when they consider re-sentencing petitions. Whatever the merits of such an argument, it does nothing to speak to the discretion lost with respect to any prospective defendants because in the aftermath of the initiative’s adoption certain felonies simply will not qualify the defendant for sentencing as a third-striker regardless of that defendant’s past criminal history or future danger to public safety. For the sake of no more than about 4,000 currently incarcerated third-strikers, judicial discretion will be abandoned in every future case that otherwise would have been subject to the current Three Strikes law.

### 3. Other Safeguards Currently Available to Third-Striker Defendants

As the 2004 *Retrospective* pointed out, third-striker defendants are also protected from unjust sentencing outcomes by additional safeguards within the criminal justice system. First, since July 2001, certain defendants with two or more strike priors who are currently convicted of a non-violent drug offense, can qualify under certain circumstances for probation and drug treatment pursuant to a *former* Proposition 36, passed in November 2000 and codified as Penal Code section 1210.1. A Three Strikes candidate qualifies for drug treatment if he or she has been out of prison for the past five years and during that period has remained free

of (1) parole or probation, (2) a felony conviction other than narcotics possession, and (3) a misdemeanor conviction involving physical injury or the threat of physical injury.<sup>100</sup>

Second, at trial a third-striker defendant is allowed twice as many peremptory challenges to dismiss potential jurors, 20 instead of 10, in the jury selection process. This is a consequence of the potential life sentence if he or she is convicted. The additional challenges help ensure that the defendant's case is decided by a fair and impartial jury.<sup>101</sup>

Third, the third-striker defendant may resort to appellate court review of his or her sentence.

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

As a last resort, the defendant may also argue that the sentence imposed was unconstitutionally cruel and unusual. Should the defendant's appeal be unsuccessful or should the defendant become aware of additional facts outside of the record on appeal, he or she may seek additional review beyond an appeal by means of a petition for writ of habeas corpus. [Citations omitted.]<sup>102</sup>

Finally, as inmates serving an indeterminate life term, incarcerated third-strikers will eventually come before the Board of Parole Hearings (BPH) for a hearing on their suitability for release from state prison to parole supervision.<sup>103</sup> The hearing is conducted by a Commissioner, appointed by the Governor, and a Deputy Commissioner who is a civil servant; and the defendant is entitled to legal representation.<sup>104</sup>

As the BPH notes, it has "extremely broad" discretion in parole matters:

The California Supreme Court has issued decisions arising from parole suitability hearings. In 2002, the court found the Board's discretion in parole matters to be extremely broad and articulated the "some evidence" test as applied to findings of unsuitability. In 2005, the court held that the Board of Parole Hearings is authorized to find an inmate who poses a continuing danger to public safety, as indicated by the gravity of the inmate's offense, to be unsuitable for parole. In 2008, the court addressed the standard for the judicial review of life prisoner parole suitability decisions which is to be applied by the courts which review challenges to parole decisions. The court observed that every prisoner presents some measure of risk of danger to society if released and therefore, the question of suitability turns on whether the facts and circumstances of the particular case indicate that the inmate presents a current, unreasonable risk of danger. [Citations omitted.]<sup>105</sup>

If one concludes from the statistical evidence related to the third-striker population of CDCR that the current Three Strikes law is being used appropriately to protect the public

from recidivist criminals, and that conclusion is merited; then the reason for this state of affairs is the combined influence of prosecutorial discretion, judicial discretion, and the other safeguards afforded each and every third-striker defendant in California today. The panacea offered by Proposition 36 seeks to cure a condition that is already more than adequately addressed by the current Three Strikes law. Proposition 36 is an unneeded solution to an illusory problem that forecloses on the very prosecutorial and judicial discretion that have so wisely guided the use of the Three Strikes sentencing law in California for many years.

#### **IV. Attempts to Reform the Current Three Strikes Law Have Consistently Failed**

Proposition 36 is the latest in a long line of attempts to reform the current Three Strikes law through either the legislative or the initiative process. Yet the California Legislature has never passed a bill that would weaken the current law; and every proposed initiative has either failed to qualify for the ballot or has been rejected by the electorate. The 2004 *Retrospective* exhaustively documented the nine failed legislative attempts to weaken or undermine the Three Strikes law between 1994 and 2004.<sup>106</sup>

In the years since the *Retrospective*, there have been more failed legislative attempts. In 2006, SB 1642 (Romero) proposed to re-sentence third-strikers whose commitment offense was non-serious or non-violent to a double-the-base-term sentence like that of second-strikers. The bill passed out of the Senate Public Safety Committee (4–1) and the Senate Appropriations Committee (8–5), but died before a third reading in the Senate.<sup>107</sup>

In 2010, AB 1751 (Ammiano) attempted to weaken the Three Strikes law by removing juvenile adjudications from qualifying as strike priors. The measure barely passed out of the Assembly Public Safety Committee (4–3), passed out of the Assembly Appropriations Committee (12–4); but failed passage on the Assembly floor (27–37).<sup>108</sup>

Also in 2010, then Speaker of the California State Assembly, Karen Bass, authored yet another study bill intended to demonstrate that the Three Strikes law was not working. AB 2715 (Bass) directed the California Legislative Analyst's Office to determine the fiscal cost and impact on public safety of Three Strikes. It passed out of the Assembly Public Safety Committee, but died in the Assembly Appropriations Committee.<sup>109</sup>

Finally, AB 327 (Davis), a bill dealing with hazardous waste that was introduced in 2011, was gutted and amended in January 2012 to once again attempt to weaken the Three Strikes law. It proposed a ballot measure that, if approved by the voters, would require the third strike be a serious or violent felony in order to impose an indeterminate life term on any convicted felon with two or more strike priors. The bill has a somewhat checkered history, passing out of the Assembly Public Safety Committee (4–2) and barely passing out of the Assembly Appropriations Committee (9–8). It then failed passage in the Assembly (33–35); and the first motion to reconsider also failed (28–45). A second motion for reconsideration passed the next day (44–26) and the bill then passed on the Assembly floor (41–34). It is currently being held in the Senate Public Safety Committee, where, as most recently amended on May 17, 2012, the proposed ballot measure is scheduled for the November 2014 statewide election and made contingent on the outcome of Proposition 36.<sup>110</sup>

Turning to ballot initiatives aimed at weakening the Three Strikes law, Proposition 66, titled *Limitations on "Three Strikes" Law*, was rejected by 52.7 percent of voters in the November 2004

election. Proposition 66 would have required the third strike to be a serious or violent felony in order to impose an indeterminate life term. But it would also have reduced the number of felonies that qualified as serious or violent; and it would have limited the number of strikes by permitting only one strike prior per incident.<sup>111</sup>

The *Three Strikes Reform Act of 2006*, which mirrored SB 1642 (Romero), and the *Repeat Criminal Offender/Three Strikes Fair Sentencing Act of 2006* both failed to qualify for the ballot in the November 2006 election. The latter initiative offered a cynical twist. In some regards it made the Three Strikes law tougher “by requiring only two felony strikes before rapists, child molesters, and murderers [were] given life sentences. For other strikes, however, the proposed measure [broadened] judicial discretion by allowing the judge the choice of imposing third-strike sentences of 15 years to life, nine years to life, or a fixed nine-year term.”<sup>112</sup>

Finally, the two most recent attempt to change the current Three Strikes law prior to Proposition 36, *The Three Strikes Reform Act of 2008* and the *California Prison Population Reduction Act of 2008*, both failed to qualify for the ballot in the November 2008 election.<sup>113</sup>

The latter proposal would have repealed the current Three Strikes law altogether. California voters could not even be persuaded to provide enough signatures for any of these initiatives to be tested by the electorate.

## V. California Voters Understood the Current Three Strikes Law When They Voted For It

As the 2004 *Retrospective* stated so forcefully, the California electorate knew exactly how the Three Strikes law would be applied so that **any** new felony would trigger an indeterminate life sentence for criminals with two or more serious or violent felony priors; and they voted overwhelmingly to adopt this sentencing scheme.

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

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

Indeed, the 1994 California Ballot Pamphlet described a more severe version of the Three Strikes law than the current law allows because it described Three Strikes sentencing as mandatory. In 1996 the California Supreme Court held in *Romero* that a judge has the discretion on the court’s own motion inter alia to dismiss a prior-strike allegation in certain mitigating situations so that a defendant may not be sent

to prison for 25 years to life. The voters, however, passed the law based on the idea that this would be a mandatory penalty without review by a judge. Thus, the voters believed that they passed into law a more stringent version of the Three Strikes law than what we have today.

Further, the 1994 California Ballot Pamphlet emphasized the fact that “any new felony conviction (not just a serious or violent felony)” would subject a three striker to 25 years to life in prison. Opponents of Proposition 184 also emphasized this fact in their arguments against Three Strikes contained in the California Ballot Pamphlet: “The third strike does not have to be violent or serious—it can be any felony at all.” The pamphlet even used a “wobbler” crime—receiving stolen property—as the example of a crime for which a Three Strikes defendant could get a sentence of 25 years to life. It specifically pointed out that, without Three Strikes, a defendant convicted of receiving stolen property would otherwise only be sentenced to two years in state prison. Yet the electorate overwhelmingly passed Proposition 184.

Moreover, eight months prior to the election, the California Legislature passed nearly identical legislation in a separate effort to address the problem of recidivism in California. Thus, Californians and the criminal justice system had been using the Three Strikes law for eight months when they passed Proposition 184. The fact that Three Strikes passed in a landslide by ballot proposition and was also drafted into law by a large majority in the state Legislature strongly demonstrated Californians’ knowing and intelligent adoption of the Three Strikes law. [Citations omitted.]<sup>114</sup>

In light of this history, it is completely disingenuous for the proponents of Proposition 36 to assert in their “Findings and Declarations” that the Reform Act of 2012 “restore[s] the **original** intent of California’s Three Strikes law—imposing life sentences for dangerous criminals like rapists, murderers, and child molesters.”<sup>115</sup> In seeking to change the current Three Strikes law, it is they who wish to reject the original intent of that law to protect all Californians from the predation of habitual criminals. **The voters approved getting habitual criminals off the streets.**

## VI. Conclusion

“There are many mysteries in life, the efficiency of ‘Three Strikes,’ however, is not one of them.”<sup>116</sup>

— former California Governor Pete Wilson

Almost two decades ago the citizens of California enacted Three Strikes into law to target those habitual criminals who were not deterred by previous convictions and punishments. They entrusted this law to California’s prosecutors and judges to use wisely for the benefit of public safety. And in the ensuing years, thousands of serious and violent felons have been removed from society to serve indeterminate life sentences as third-strikers, leaving millions of Californians more protected in their communities and neighborhoods.

The current Three Strikes law has directly and significantly acted to reduce crime in California. The proponents of Proposition 36 would have the public believe that the law needs changing because vast

numbers of defendants undeserving of life sentences for the commission of petty crimes are flowing into overcrowded prisons. But as we have demonstrated in this paper, that simply is not the case. The district attorneys of California have been exercising their discretion both in charging Three Strikes cases and in moving to dismiss strike priors in appropriate cases to ensure that only those criminals whose history of recidivism and violent behavior merit an indeterminate life sentence. And courts also safeguard the fairness of the sentencing process through judges' ability to reduce "wobblers" to misdemeanors and to strike one or more of a third-striker's serious or violent felony priors to craft a more lenient sentence when to do so serves justice.

The Three Strikes law is a valuable, essential, and proven tool in the fight against crime. Proposition 36 threatens to take this discretion away from judges and prosecutors; so that many criminals who commit a non-serious or non-violent crime in the future will be treated on the basis of that isolated incident rather than on their entire history of habitual serious or violent crime. The facts show that the current Three Strikes law works. This November, Proposition 36 should be rejected by the electorate as an unwise solution to an illusory problem.

## ENDNOTES

1. Seventy-two percent of voters supported Proposition 184, codified as Penal Code section 1170.12. Hastings Law Library, University of California, Hastings College of the Law, California Ballot Propositions Database <<http://holmes.uchastings.edu/cgi-bin/starfinder/0?path=calprop.txt&id=webber&pass=webber&OK=OK>> (accessed June 19, 2004). [Offline currently: <<http://library.uchastings.edu/library/guides/california-research/ca-ballot-measures.html>> (accessed Aug. 12, 2012).]
2. See *Proposition 36, section 1, Findings & Declarations*. <[http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i1000\\_11-0057\\_\(three\\_strikes\).pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i1000_11-0057_(three_strikes).pdf)> (accessed Aug. 12, 2012).
3. Pen. Code § 667(b).
4. Proposition 36 leaves unchanged the basic provision that a defendant with only one prior serious or violent felony conviction would receive "twice the term otherwise provided as punishment for the current felony conviction." (Pen. Code §§ 667(e)(1); 1170.12(c)(1).) This doubling of the sentence applies in all cases, no matter what the nature of the current felony conviction is.
5. *Prosecutors' Perspective on California's Three Strikes Law: A 10-Year Retrospective* (California District Attorneys Association, 2004) [hereafter 2004 *Retrospective*], section. I.B. <<http://www.cdaa.org/CDAA-Content/PublicationsNew/ThreeStrikes.pdf>> (accessed Aug. 12, 2012).
6. *Id.*
7. Pen. Code § 2931(b).
8. Pen. Code § 667(c)(5). Unless a more restrictive credit-limitation statute applies, such as that applicable to current violent felonies (Pen. Code § 2933.1); *In re Cervera* (2001) 24 Cal.4th 1073.
9. This section of the whitepaper relies substantially on the excellent memorandum, *Three Strikes Initiative Analysis*, prepared on June 20, 2012, for the CDAA Board of Directors by the Hon. Tony Rackauckas, Orange County District Attorney.
10. These prior strikes are found in proposed amendments to Pen. Code §§ 667(e)(2)(C)(iv) [Section 2] and 1170.12(c)(2)(C)(iv) [Section 4] of Proposition 36.
11. Pen. Code § 288a.
12. Pen. Code § 286.
13. Pen. Code § 289.
14. Pen. Code § 288.
15. As defined in Pen. Code §§ 187–191.5, inclusive. But note that this exemption does not extend to manslaughter, as defined in Pen. Code § 192.
16. Pen. Code § 653f.
17. Pen. Code § 245(d)(3).

18. Pen. Code § 11418(a)(1).
19. A catch-all provision to be added by Proposition 36.
20. As found in proposed amendments to Pen. Code §§ 667(e)(2)(C)(i) [Section 2] and 1170.12(c)(2)(C)(i) [Section 4] of Proposition 36.
21. As found in proposed amendments to Pen. Code §§ 667(e)(2)(C)(ii) [Section 2] and 1170.12(c)(2)(C)(ii) [Section 4] of Proposition 36.
22. Pen. Code § 261.5(d).
23. Pen. Code § 262.
24. Pen. Code § 266.
25. Pen. Code § 285.
26. Pen. Code § 286(b)(1).
27. Pen. Code § 286(e).
28. Pen. Code § 288a(b)(1).
29. Pen. Code § 288a(e).
30. Pen. Code § 314.
31. Pen. Code § 311.11.
32. As found in proposed amendments to Pen. Code §§ 667(e)(2)(C)(iii) [Section 2] and 1170.12(c)(2)(C)(iii) [Section 4] of Proposition 36.
33. As found in proposed amendments to Pen. Code §§ 667(e)(2)(C) [Section 2] and 1170.12(c)(2)(C) [Section 4] of Proposition 36.
34. Prop. 36, § 1, Findings & Declarations.
35. See Prop. 36, § 6.
36. As found in proposed addition to Pen. Code § 1170.126(f), Prop. 36, § 6.
37. As found in proposed addition to Pen. Code § 1170.126(g), Prop. 36, § 6.
38. See Prop. 36, § 1, Findings & Declarations.
39. 2004 *Retrospective*, § IV.D.
40. *Id.*
41. Based on Attorney General's Report, August 24, 2011, *Crime in California—2010*, p. 7, Table 2: CRIMES, 2005-2010 <<http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/candd/cd10/preface.pdf>> (accessed Aug. 12, 2012).
42. *Id.*
43. *Second and Third Striker Felons in the Adult Institutional Population as of June 30, 2012*, Department of Corrections and Rehabilitation, Offender Information Services Branch, Estimates and Statistical Analysis Section, Data Analysis Unit, Table 1, "Second and Third Striker Felons in the Adult Institutional Population by Offense Category, Offense Group, and Type of Conviction As of June 30, 2012." <[http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Quarterly/Strike1/STRIKE1d1206.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Quarterly/Strike1/STRIKE1d1206.pdf)> (accessed Aug. 20, 2012).
44. Weekly Report of Population as of Midnight June 27, 2012, Department of Corrections and Rehabilitation, Offender Information Services Branch, Estimates and Statistical Analysis Section, Data Analysis Unit <[http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/WeeklyWed/TPOP1A/TPOP1Ad120627.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad120627.pdf)> (accessed Sept. 4, 2012).
45. *Id.*
46. See note 43.
47. *Second and Third Strikers in the Institution Population, March 31, 2003*, Department of Corrections and Rehabilitation, Offender Information Services Branch, Estimates and Statistical Analysis Section, Data Analysis Unit, Table 1, "Second and Third Strikers in the Institution by Offense Category, Offense Group, and Admission or Return Status as of March 31, 2003." <[http://cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Quarterly/Strike1/STRIKE1d0203.pdf](http://cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Quarterly/Strike1/STRIKE1d0203.pdf)> (accessed Aug. 16, 2012).
48. Pen. Code §§ 459, 460. Also known as a "Residential Burglary" and one of the crimes that qualifies as a strike, as a serious felony pursuant to Pen. Code § 1192.7(c)(18), and, potentially, as a violent felony pursuant to Pen. Code § 667.5(c)(21), where the residence is occupied at the time of the burglary.
49. See, e.g., the table found through the link at note 43 above.
50. While these two groups of offenses can contain strike crimes, they are being excluded to arrive at the most conservative estimate of third-strikers unaffected by Proposition 36. We will similarly assume that the Property Crimes, less 459/Firsts, plus the Drug Crimes, and the Other Crimes, will serve as a useful proxy for third-strikers potentially eligible for re-sentencing if Proposition 36 passes. In reality, some unknown number of the inmates categorized as being committed for Drug Crimes will also have the disqualifying weight enhancement discussed above in section II.B.2. Also, the crime group Arson in Other Crimes includes some strikes; so the number of third strikers eligible for re-sentencing under Proposition 36 is again overstated using this proxy.

51. Data found at this link: <[http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Quarterly/Strike1Archive.html](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Quarterly/Strike1Archive.html)> (accessed Aug. 20, 2012).
52. *Second and Third Striker Felons in the Adult Institutional Population as of June 30, 2012*, Department of Corrections and Rehabilitation, Offender Information Services Branch, Estimates and Statistical Analysis Section, Data Analysis Unit, Table 6, “Second and Third Striker Felons in the Adult Institutional Population by Age and Type of Conviction As of June 30, 2012.” <[http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Quarterly/Strike1/STRIKE1d1206.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Quarterly/Strike1/STRIKE1d1206.pdf)>(accessed Aug. 20, 2012).
53. See Table 1 at note 43. But recall that in each case, the inmate has two or more serious or violent felony strike priors. Proposition 36 chooses to focus on the commitment felony, rather than on the recidivist criminal history of these petty thieves.
54. Health & Saf. Code § 11350.
55. Pen. Code § 666.
56. *People v. Cole* (2001) 88 Cal.App.4th 850.
57. *Lockyer v. Andrade* (2003) 538 U.S. 63.
58. E-mail from Chief Deputy District Attorney Gerald J. Begen, Stanislaus County District Attorney’s Office, to CDAA, August 3, 2012.
59. From a Memorandum prepared by Deputy District Attorney Michelle Contois, Ventura County District Attorney’s Office, for CDAA, August 2012.
60. *Id.*
61. *Id.*
62. *Id.*
63. 2004 *Restrospective*, § III.A.
64. Pen. Code § 667(f)–(g).
65. Pen. Code §§ 667(g); 1170.12(e).
66. Pen. Code §§ 667(f)(2); 1170.12(d)(2); 1385(a); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527–528.
67. Jennifer Edwards Walsh, *Dismissing Strikes “In the Furtherance of Justice”: An Analysis of Prosecutorial and Judicial Discretion Under California’s Three-Strikes Law*, pp. 9–10, Ph.D Dissertation, Claremont Graduate University (2000).
68. Jennifer Edwards Walsh, *Tough For Whom? How Prosecutors and Judges Use Their Discretion to Promote Justice Under the California Three Strikes Law*, p. 28 (Henry Salvatori Center Monograph, New Series No. 4, 2004).
69. Jennifer Edwards Walsh, “Defining the Strike Zone: Discretion and California’s Three Strikes Law,” pp. 17–21 (*Journal of the Institute for the Advancement of Criminal Justice*, Issue #1, Summer 2007).
70. *Id.* at 18.
71. *Id.*
72. *Id.*
73. *Id.* at Table 1, p. 18.
74. *Id.* at 18.
75. *Id.* at Table 2, p. 19.
76. *Id.* at 19.
77. *Id.* at 19–20.
78. *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968.
79. *Id.* at 980–981.
80. *Id.* at 976–977.
81. *Id.* at 979.
82. *Id.* at 981–982.
83. *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 517.
84. *Id.* at 529–530.
85. *People v. Garcia* (1999) 20 Cal.4th 490, 500.
86. *Id.* at 499–500.
87. *Id.* at 500.
88. *People v. Williams* (1998) 17 Cal.4th 148.
89. *Id.* at 161.
90. *Id.*
91. *Romero, supra*, at 504.
92. *Id.* at 530–531.
93. 2004 *Retrospective*, § II.
94. *People v. Cepeda* (1996) 49 Cal.App.4th 1235, abrogated on a procedural issue by *People v. Mendez* (1999) 19 Cal.4th 1084.

95. *People v. Morales* (2003) 106 Cal.App.4th 445.
96. *Id.* at 453.
97. *Id.* at 454.
98. *Id.* at 448.
99. *Id.*
100. Pen. Code § 1210.1(b)(1).
101. 2004 *Retrospective*, § III.E.
102. *Id.* at § III.F.
103. Pen. Code §§ 3040 et seq.
104. California Department of Corrections and Rehabilitation, Board of Parole Hearings, Lifer Hearing Process <[http://www.cdcr.ca.gov/BOPH/lifer\\_parole\\_process.html](http://www.cdcr.ca.gov/BOPH/lifer_parole_process.html)> (accessed Aug. 13, 2012).
105. *Id.*
106. 2004 *Retrospective*, § V.I.
107. SB 1642 (Romero) <[http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=sb\\_1642&sess=0506&house=B&author=rome](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_1642&sess=0506&house=B&author=rome)> (accessed Aug. 13, 2012).
108. AB 1751 (Ammiano) <[http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=ab\\_1751&sess=PREV&house=B&author=ammiano](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_1751&sess=PREV&house=B&author=ammiano)> (accessed Aug. 13, 2012).
109. AB 2715 (Bass) <[http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=ab\\_2715&sess=PREV&house=B&author=bass](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_2715&sess=PREV&house=B&author=bass)> (accessed Aug. 13, 2012).
110. AB 327 (Davis) <[http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=ab\\_327&sess=CUR&house=B&author=davis](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_327&sess=CUR&house=B&author=davis)> (accessed Aug. 13, 2012).
111. California Secretary of State, Initiatives by Title and Summary Year 1912 to March 2012. <<http://www.sos.ca.gov/elections/ballot-measures/pdf/initiatives-by-title-and-summary-1912-march-2012.pdf>> (accessed Aug. 14, 2014); Naomi Harlin Goodno, "Career Criminals Targeted: The Verdict Is In, California's Three Strikes Law Proves Effective," p. 14 (*Journal of the Institute for the Advancement of Criminal Justice*, Issue #1, Summer 2007).
112. *Id.*
113. California Secretary of State, Initiatives by Title and Summary Year 1912 to March 2012. <<http://www.sos.ca.gov/elections/ballot-measures/pdf/initiatives-by-title-and-summary-1912-march-2012.pdf>> (accessed Aug. 14, 2014).
114. 2004 *Retrospective*, § V.H.
115. Prop. 36, § 1, Findings & Declarations. (Emphasis added.)
116. Official California Legislative Information, Veto Message for SB 2048 (Vasconcellos, 1998) <[www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_2001-2050/sb\\_2048\\_vt\\_19980913.html](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_2001-2050/sb_2048_vt_19980913.html)> (accessed Aug. 14, 2012).

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## Appendix A

# The Factors a District Attorney Uses to Decide Whether to Pursue a Three Strikes Case

In 2004, the California District Attorneys Association led the successful opposition to Proposition 66. After the election, CDAA created a Three Strikes Committee to educate the public about the Three Strikes law and its application. Under the leadership of Contra Costa District Attorney Robert Kochly (now retired) and San Bernardino County Deputy District Attorney Dwight Moore (now retired), the committee surveyed all 58 district attorney offices in California and solicited input from all counties on how Three Strikes cases were prosecuted across the state. The following list of suggested guidelines for filing a Three Strikes case were developed from the information gathered and approved by the Board of Directors.

The following “interest of justice” factors are considered in deciding whether to pursue a case under the Three Strikes law:

- I. The nature and circumstances of the present offense, including, but not limited to:**
  - A. Seriousness of present offense
    1. Serious or violent felony
    2. Extent of injury
    3. Weapon involvement
  - B. Extent of defendant’s involvement
  - C. Whether defendant was on probation or parole or in prison at time of offense
  - D. Other facts relating to the crime(s) in either aggravation or mitigation under California Rules of Court 4.421(a) and 4.423(a)
  
- II. The particulars of the defendant’s background, character, and prospects, including, but not limited to:**
  - A. Defendant’s age and history or pattern of criminality
  - B. Facts of strike priors
  - C. Age/remoteness of strike priors
  - D. Length of time between criminal acts and custodial status during that time
  - E. Dangerousness to community
  - F. History of violence
  - G. History of weapons possession or use
  - H. Number of prior prison commitments
  - I. Other facts in aggravation or mitigation relating to the defendant under California Rules of Court 4.421(b) and 4.423(b)
  
- III. After consideration of these factors, does the defendant and/or the defendant’s conduct fall outside the spirit of the Three Strikes law, either in whole or in part? (See *People v. Williams* (1998) 17 Cal.4th 148.)**

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