

Comments

One Strike and You're Out: "Double-Counting" and Dual Use Undermines the Purpose of California's Three Strikes Law

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THE CALIFORNIA PENAL Code contains two nearly identical statutory schemes popularly known as "Three Strikes."¹ Together they provide increased sentencing for repeat criminal offenders.² The California legislature and voters passed Three Strikes "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."³ Under Three Strikes, all prior serious or violent felony convictions, as defined by California law, count as "strikes."⁴ This Comment will examine how the "Three Strikes" law has become a misnomer in practice by frequently punishing two-time offenders as three-time offenders ("double-counting"), and allowing prior felony convictions to be used twice—once to increase a misdemeanor to a felony and once as a strike ("dual use").

Part I of this Comment details Three Strikes' statutory provisions. It also discusses two recent California Supreme Court cases, *People v.*

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1. See CAL. PENAL CODE § 667 (West 1999); CAL. PENAL CODE § 1170.12 (West Supp. 1999). For purposes of this Comment, all references to "Three Strikes" will be to Penal Code section 667. Sections 667 and 1170.12 are virtually identical. See Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 THOMAS JEFFERSON L. REV. 1, 9 n.68 (1998).

2. See CAL. PENAL CODE § 667; see also CAL. PENAL CODE § 1170.12.

3. CAL. PENAL CODE § 667(b).

4. See CAL. PENAL CODE § 667(d)(1); see also CAL. PENAL CODE § 667.5(c) (West 1999) (defining "violent felony"); CAL. PENAL CODE § 1192.7(c) (West Supp. 1999) (defining "serious felony").

*Fuhrman*⁵ and *People v. Benson*,⁶ to illustrate the real-life consequences of double-counting and dual use in the Three Strikes context.

Part II defines double-counting. It begins with a summary of California's law against multiple punishment and the process of staying felony convictions to avoid multiple punishment. Part II also discusses the California Supreme Court's decision in *Benson*, wherein the court disregarded precedent by allowing Benson's three-strikes life sentence to stand, despite the fact he was only a two-time offender. Part II then addresses the California Supreme Court's decision in *Fuhrman*. There the court allowed a defendant convicted of two serious or violent felonies during a single judicial proceeding to receive two strikes from that proceeding.⁷ Part II then criticizes the California Supreme Court's reasoning in the *Benson* and *Fuhrman* decisions and advocates a "brought and tried separately" requirement.⁸ This requirement would prohibit counting multiple strikes in a single judicial proceeding.

Part III defines dual use⁹ and suggests the California Supreme Court apply the rule it promulgated in *People v. Edwards*.¹⁰ *Edwards* prohibited the dual use of a prior felony conviction as an element of a charged offense and as a means to increase a criminal defendant's sentence.¹¹

Part IV analyzes the purpose of recidivist statutes and concludes that double-counting and dual use frustrate that purpose, often leading to arbitrary results.

5. 941 P.2d 1189 (Cal. 1997).

6. 954 P.2d 557 (Cal. 1998).

7. See *Fuhrman*, 941 P.2d at 1190, 1195.

8. See *id.* at 1190 (holding that prior felony convictions need not be brought and tried separately to count as separate strikes).

9. Dual use occurs in several instances: (1) using the same prior felony conviction as a "strike" and as a five-year enhancement under California Penal Code section 667(a); (2) using the same prior felony conviction as a "strike" and as a "sentence enhancing statute;" and (3) using the same prior felony conviction as a strike and as an element of a crime. See AL MENASTER & ALEX RICCIARDULLI, 3 STRIKES MANUAL 91 (1997). The focus of this Comment is with the third aspect of dual use—using the same prior felony conviction as a strike and as an element of the crime.

10. 557 P.2d 995 (Cal. 1976).

11. See *id.* at 999.

I. Background

A. The Statutory Provisions of Three Strikes

California has enacted two similar versions of the Three Strikes law. In March 1994, the California Legislature passed the Three Strikes legislation as Assembly Bill 971.¹² In November 1994, the voters overwhelmingly passed Proposition 184, the Three Strikes initiative.¹³ California Penal Code section 667, subdivisions (b) through (i),¹⁴ codified Assembly Bill 971. California Penal Code section 1170.12¹⁵ codified Proposition 184. The initiative measure cemented Three Strikes' longevity—a two-thirds vote by the legislature is required to modify or repeal a voter initiative, while a majority vote can alter a legislative amendment.¹⁶

Subdivision (b) of section 667 sets forth the legislative intent behind Three Strikes.¹⁷ It states, "the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, [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."¹⁸ Subdivision (c) limits courts' discretion in sentencing and incarcerating defendants with one or more prior qualifying felony convictions.¹⁹ Subdivisions (f)(1) and (g) reduce prosecutorial discre-

12. See CAL. PENAL CODE § 667 (West 1999); see also Luna, *supra* note 1, at 9.

13. See CAL. PENAL CODE § 667; see also CAL. PENAL CODE § 1170.12 (West Supp. 1999); Luna, *supra* note 1, at 9.

14. See CAL. PENAL CODE § 667.

15. See CAL. PENAL CODE § 1170.12.

16. See Luna, *supra* note 1, at 9–10 & n.70; see also CAL. PENAL CODE § 667(j).

17. See CAL. PENAL CODE § 667(b).

18. *Id.*

19. See CAL. PENAL CODE § 667(c). Section 667 provides:

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

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center

(5) The total amount of credits awarded . . . shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

tion,²⁰ and require prosecutors to apply Three Strikes by "plead[ing] and prov[ing] each prior felony conviction" whenever the situation warrants.²¹ For example, a defendant with one or two prior serious or violent felony convictions will automatically be treated as a two-strike or three-strike offender respectively.²² Prosecutors cannot choose to plea bargain or dismiss any prior felony convictions.²³

Subdivision (d) of section 667 defines a strike as a "violent" or "serious" felony under California Penal Code sections 667.5 and 1192.7.²⁴ Prior felony convictions are strikes even if the prior sentence was suspended, stayed, or the offender was committed to a mental health facility instead of incarceration.²⁵ A prior felony conviction committed outside of California may also count as a strike if the crime constitutes a violent or serious felony under California law.²⁶ Prior juvenile adjudications are strikes if (1) the juvenile was 16 years of age or older at the time he or she committed the prior offense; (2) the

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

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

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

Id.

20. See CAL. PENAL CODE § 667(f)(1) and (g).

21. *Id.* But see CAL. PENAL CODE § 667(f)(2) (allowing for limited prosecutorial discretion in the "furtherance of justice" or if there is insufficient evidence to prove a prior felony conviction); *People v. Romero*, 917 P.2d 628, 648 (Cal. 1996) (holding a trial court has limited discretion to strike a prior felony conviction under California Penal Code section 1385 in the "interests of justice").

22. See CAL. PENAL CODE § 667(f)(1); see also Luna, *supra* note 1, at 10–11 (stating that "[t]he prosecutor must 'plead and prove' all known prior serious or violent felony convictions. In other words, Three Strikes *must* be employed whenever it could be applicable to a defendant" (citing CAL. PENAL CODE § 667(f)(1))).

23. See CAL. PENAL CODE § 667(g); see also Luna, *supra* note 1, at 11.

24. See CAL. PENAL CODE § 667(d)(1); CAL. PENAL CODE § 667.5(c) (West 1999) (defining "violent" felonies); CAL. PENAL CODE § 1192.7(c) (West Supp. 1999) (defining "serious" felonies).

25. See CAL. PENAL CODE § 667(d)(1)(A)–(D). A suspended sentence is defined as: "A conviction of a crime followed by a sentence that is given formally, but not actually served. A suspended sentence in criminal law means in effect that defendant is not required at the time sentence is imposed to serve the sentence." BLACK'S LAW DICTIONARY 1446 (6th ed. 1990). To stay a sentence "means to hold it in abeyance, or refrain from enforcing it." *Id.* at 1413 (6th ed. 1990).

26. See CAL. PENAL CODE § 667(d)(2).

prior offense constitutes a violent or serious felony as defined under California Penal Code sections 667.5 and 1192.7 or Welfare and Institutions Code section 707; (3) the juvenile was subject to juvenile court law; and (4) the juvenile was declared a ward of the juvenile court.²⁷

Subdivision (e) sets forth the crucial substance of the Three Strikes law. A criminal defendant with one prior strike (a serious or violent felony conviction) will receive double the punishment for his second strike.²⁸ A criminal defendant with two prior strikes will receive the greater sentence of either three times the punishment for the third offense or twenty-five years to life for his third strike.²⁹

B. *People v. Benson*—Factual Background

In 1979, at the age of eighteen, Benson was involved in a single criminal incident that resulted in two felony convictions.³⁰ "According to the probation officer's report, Benson resided in the same apartment building as the female victim."³¹ Benson entered the victim's

27. See CAL. PENAL CODE § 667(d)(3)(A)–(D).

28. See Cal. Penal Code § 667(e)(1). Subdivision (e) states:

For purposes of subdivisions (b) to (i), . . . the following shall apply where a defendant has a prior felony conviction:

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

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

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

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

(iii) . . .

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

CAL. PENAL CODE § 667(e). For example, a defendant with a prior conviction for robbery has one "strike" on his record because robbery is a violent felony. See CAL. PENAL CODE § 667.5(c)(9). If the defendant commits any new felony, such as residential burglary, the sentencing court doubles the punishment appropriate for that offense. See CAL. PENAL CODE § 667(e)(1).

29. See Cal. Penal Code § 667(e)(2)(A).

30. See *People v. Benson*, 954 P.2d 557, 558 (Cal. 1998); see also *People v. Benson*, 62 Cal. Rptr. 2d 690, 692 (Ct. App. 1997), *superseded by* *People v. Benson*, 954 P.2d 557 (Cal. 1998).

31. *Benson*, 954 P.2d at 558.

apartment under the pretext of having left his keys in the apartment earlier.³² Once inside, Benson grabbed the victim from behind and stabbed her approximately twenty times.³³ The victim survived the attack and identified Benson as the assailant.³⁴ Benson turned himself in the next day and "was placed under arrest."³⁵ A jury convicted Benson of residential burglary and assault with intent to commit murder.³⁶ Both crimes qualified as strikes.³⁷ Benson served his sentence in state prison for the residential burglary charge.³⁸ The court stayed the assault conviction pursuant to section 654 of the California Penal Code.³⁹

Fifteen years later, in 1994, Benson "was arrested for shoplifting a carton of cigarettes worth [twenty dollars] (\$20)."⁴⁰ For this offense, Benson was charged with the crime of "petty theft with a prior," a felony because of his 1979 burglary conviction.⁴¹ A jury convicted Benson.⁴² The court determined that the "petty theft with a prior" felony conviction constituted his third "strike," sentencing Benson to state prison for twenty-five years to life.⁴³

32. *See id.*

33. *See id.*

34. *See id.*

35. *Id.*

36. *See id.* at 559. Benson was also charged with second degree robbery and burglary. *See Benson*, 62 Cal. Rptr. 2d at 692 n.4. "The jury found [Benson] not guilty of robbery and deadlocked on the charge of commercial burglary which was dismissed. *Id.*

37. *See* CAL. PENAL CODE § 1192.7(c)(18) (West Supp. 1999) (defining residential burglary as a "serious felony"); *see also* CAL. PENAL CODE § 667.5(c)(12) (West 1999) (defining attempted murder as a "violent felony"); CAL. PENAL CODE § 667(b)-(i) (West 1999) (stating violent felonies and serious felonies are considered strikes).

38. *See Benson*, 62 Cal. Rptr. 2d at 692.

39. *See id.* at 692 n.2.

40. *Benson*, 954 P.2d at 558.

41. *See id.*; *see also* CAL. PENAL CODE § 666 (West 1999). Section 666 provides:

Every person who, having been convicted of petit theft, grand theft, auto theft under Section 10851 of the Vehicle Code, *burglary*, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petit theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

Id. (emphasis added).

42. *See Benson*, 954 P.2d at 558.

43. *See id.*; *see also* CAL. PENAL CODE § 667(e)(2)(A)(ii) (West 1999).

C. *People v. Fuhrman*—Factual Background

Fuhrman's initial case involved a series of events arising out of a single course of criminal conduct in 1989.⁴⁴ While driving a stolen car, Fuhrman crashed into another car, assaulted the driver with a weapon, and then forced the driver of a nearby truck to drive him away from the scene, later stealing the truck from the driver.⁴⁵ For these actions, Fuhrman was charged with eleven crimes.⁴⁶ He plead guilty to two, robbery and assault with a firearm; the others were dismissed as part of a plea bargain.⁴⁷

In 1994, the police arrested Fuhrman again.⁴⁸ The District Attorney charged Fuhrman with robbery and unlawfully driving or taking an automobile.⁴⁹ A jury convicted him of both felonies.⁵⁰ The prosecutor pled and proved that Fuhrman had two prior felony convictions (strikes) from the earlier 1989 crimes.⁵¹ These two prior strikes required the trial court to sentence Fuhrman under Three Strikes on both counts.⁵² Fuhrman received a sentence of fifty-eight years to life in prison.⁵³

II. Double-Counting—Counting a Single Incident as Two Strikes

Double-counting occurs when an indivisible course of criminal conduct or bad act is counted twice. In the Three Strikes context, this translates into two prior felony convictions stemming from a single act, thereby constituting two "strikes" instead of one. As *Benson* and *Fuhrman* drastically illustrate, the possibility exists that a second-time offender will be sentenced as a three-strike offender, receiving not a double sentence for the current felony but a much harsher twenty-five years to life sentence.⁵⁴ Although each defendant's recidivism in-

44. See *People v. Fuhrman*, 941 P.2d 1189, 1192 (Cal. 1997).

45. See *id.*

46. See *id.*

47. See *id.*

48. See *id.* at 1191.

49. See *id.*

50. See *id.*

51. See *id.*

52. See *id.* On the robbery offense, the court imposed a sentence of twenty-five years to life and on count two, the vehicle-taking offense, the court also imposed a sentence of twenty-five years to life. See *id.*

53. See *id.* The court calculated the remaining eight years based on Fuhrman's weapon-use enhancement, prior serious felony, and prior prison terms. See *id.*

54. See *People v. Benson*, 954 P.2d 557, 570 (Cal. 1998) (Chin, J., dissenting). A defendant with one prior serious or violent felony conviction will receive a doubled sentence

volved only two separate bad acts ("crime one" resulting in two or more felony convictions and "crime two" resulting in one or more felony convictions), the trial court sentenced Benson and Fuhrman as third-strike recidivists.⁵⁵

California law provides precedential and statutory support for discontinuing the current practice of double-counting. For instance, California law prohibits a defendant *convicted* of several crimes based on a single act or indivisible course of conduct from being punished separately for each of those crimes ("multiple punishment").⁵⁶ Whenever a defendant contends that the trial court erroneously punished him for more than one conviction, the discussion at the appellate court level usually centers on issues concerning California's prohibition against multiple punishment and not double-counting per se. Nevertheless, in light of the California Supreme Court's decisions in *Fuhrman* and *Benson*, whether a defendant can obtain an appropriate sentence based on a double-counting argument seems unlikely.

A. California Penal Code Section 654—Prohibition Against Multiple Punishment

California Penal Code section 654, enacted in 1872, provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished . . . but in no case shall the act or omission be punished under more than one provision."⁵⁷ This section prohibits multiple sentences where a defendant commits an individual criminal act giving rise to multiple convictions and where a defendant engages in multiple acts or an indivisible course of conduct motivated by a single intent or objective.⁵⁸ For instance, if a defendant is convicted of two offenses arising out of one act, such as robbery and kidnapping for purposes of robbery, a court can only punish the defendant for one of the two offenses under section 654.⁵⁹

for his second felony conviction and a defendant with two prior serious or violent felony convictions will receive a sentence of twenty-five years to life for his third felony conviction. See CAL. PENAL CODE § 667(e)(1)–(2) (West 1999).

55. See *Benson*, 954 P.2d at 565 (Chin, J., dissenting); see also *Fuhrman*, 941 P.2d at 1192. Recidivist is defined as: "A habitual criminal; a criminal repeater. An incorrigible criminal. One who makes a trade of crime." BLACK'S LAW DICTIONARY 1269 (6th ed. 1990).

56. See CAL. PENAL CODE § 654 (West 1999).

57. CAL. PENAL CODE § 654(a).

58. See *People v. Pearson*, 721 P.2d 595, 599 (Cal. 1986); see also MENASTER & RICCIARDULLI, *supra* note 9, at 28–29.

59. See *People v. Norrell*, 913 P.2d 458, 461 (Cal. 1996). "[I]f multiple offenses committed by a defendant were 'incident to one objective,' the defendant 'may be punished

To comply with section 654, California courts have consistently stayed the sentence associated with all but one of the convictions, rather than setting aside all but one of the convictions.⁶⁰ The stay procedure "avoid[s] the potentially unfair consequences to the state of refusing to allow multiple convictions: 'if [a trial court] dismisses the count carrying the lesser penalty, and the conviction on the remaining count should be reversed on appeal, the defendant would stand with no conviction at all.'"⁶¹ Thus, the modern procedure of using a stay avoids multiple punishment and protects against injustice to the state by ensuring the defendant does not receive a windfall should a count be reversed.⁶² The stay procedure "affords the appellant the maximum protection to which section 654 entitles him and, *under no condition*, can operate to his prejudice."⁶³

B. *Pearson*—A Stayed Conviction May Not Be Used To Enhance a Defendant's Subsequent Sentence

In *People v. Pearson*,⁶⁴ the jury convicted the defendant of two counts of lewd conduct⁶⁵ and two counts of sodomy with a child under fourteen.⁶⁶ The trial court then imposed a sentence for the two lewd conduct convictions but stayed the two sodomy convictions to avoid double punishment for the same act under section 654.⁶⁷ On appeal, the California Supreme Court affirmed all four convictions.⁶⁸

The *Pearson* court considered a request by the defendant to "prohibit the use of more than one conviction based on each of his crimi-

for any one of such offenses but not for more than one.'" *Id.* (quoting *Neal v. State of California*, 357 P.2d 839, 844 (Cal. 1960)).

60. See *Pearson*, 721 P.2d at 600; see also *People v. Niles*, 39 Cal. Rptr. 11, 15 (Ct. App. 1964). In *Niles*, the California Court of Appeal was the first California appellate court to stay execution of sentence to avoid multiple punishment. See *Pearson*, 721 P.2d at 600. The California Supreme Court later indicated its approval of the stay procedure. See *In re Wright*, 422 P.2d 998, 1002 n.4 (Cal. 1967). See also *supra*, note 25 for the definition of a stayed sentence.

61. *Pearson*, 721 P.2d at 600 (quoting *Niles*, 39 Cal. Rptr. at 15) (alteration in original).

62. See *People v. Benson*, 954 P.2d 557, 566–68 (Cal. 1998) (Chin, J., dissenting).

63. *Niles*, 39 Cal. Rptr. at 15 (emphasis added).

64. 721 P.2d 595 (Cal. 1986).

65. See *Pearson*, 721 P.2d at 596; see also CAL. PENAL CODE § 288(a) (West 1999) (defining lewd conduct).

66. See *Pearson*, 721 P.2d at 596; see also CAL. PENAL CODE § 286(c) (West 1999).

67. See *Pearson*, 721 P.2d at 596.

68. See *id.* at 596. The defendant appealed his convictions for reasons unrelated to this Comment. The defendant argued for reversal on grounds that a "defendant may not be convicted of both a greater and lesser included offense" and that "statutory sodomy . . . includes the lesser offense of lewd conduct . . ." *Id.* The California Supreme Court rejected these contentions. See *id.* at 599.

nal acts for the purpose of enhancing any subsequent sentence he may receive.”⁶⁹ Having sustained four separate convictions for two acts (sodomy and lewd conduct), the defendant feared an enhancement of a *future* conviction on the basis of his four convictions and not the *two* acts.⁷⁰ The defendant contended such future enhancements based on all of his present convictions would violate section 654’s prohibition against multiple punishment.⁷¹

After conceding the prematurity of the request,⁷² the court held:

Any subsequent sentences imposed on defendant can be enhanced on the basis of the convictions for which he served a sentence; but convictions for which service of sentence was stayed may not be so used *unless the Legislature explicitly declares that subsequent penal or administrative action may be based on such stayed convictions*. Without such a declaration, it is clear that section 654 prohibits defendant from being disadvantaged in any way as a result of the stayed convictions.⁷³

The court relied on a series of decisions by the California appellate courts—*People v. Avila*,⁷⁴ *People v. Duarte*,⁷⁵ *People v. Conner*,⁷⁶ and *People v. Osuna*⁷⁷—and a California Supreme Court case, *In re Wright*.⁷⁸ In *Avila*, the trial court stayed execution of all but one of the defendant’s sentences and committed him to the California Youth Authority (“CYA”).⁷⁹ The CYA disqualified the defendant from commitment on grounds that one of his stayed felony convictions made him ineligible for the CYA.⁸⁰ After the CYA rejected the defendant, the trial court set

69. *Id.* at 599 (emphasis added).

70. *See id.* Enhancement statutes, such as California Penal Code sections 667(a), 667.51(a), and 667.6(a), compel five-year sentence enhancements on each *prior* conviction for certain offenses if a defendant is convicted in the future. *See id.*

71. *See id.*

72. *See id.* In Justice Lucas’ concurring opinion he called the majority opinion “advisory” because it chose to decide whether using the defendant’s convictions in the *future* constituted multiple punishment. *See id.* at 603 (Lucas, J., concurring). “That issue will not arise until defendant has committed, and suffered a conviction for, some future offense for which such an enhancement might be appropriate.” *Id.* (Lucas, J., concurring). Justice Lucas found no “valid purpose” in “assuring [the] defendant that, if he chooses to commit such an offense, his enhanced punishment will not be as severe as he might have feared[.]” *Id.* (Lucas, J., concurring).

73. *Pearson*, 721 P.2d at 600–01 (emphasis added).

74. 188 Cal. Rptr. 754 (Ct. App. 1982).

75. 207 Cal. Rptr. 615 (Ct. App. 1984).

76. 222 Cal. Rptr. 311 (Ct. App. 1986).

77. 207 Cal. Rptr. 641 (Ct. App. 1984).

78. 422 P.2d 998 (Cal. 1967).

79. *See Avila*, 188 Cal. Rptr. at 755.

80. *See id.* at 755–56.

aside the commitment and sentenced him to prison.⁸¹ On appeal, the court directed reinstatement of the commitment and explained that the stay procedure “was accepted as compatible with the prohibition against multiple punishment because it was assumed no incremental punishment can flow from the stayed sentences.”⁸² “If the stayed sentence . . . is construed to preclude a CYA commitment, the effect is the forbidden punishment.”⁸³ The California Supreme Court in *Pearson* agreed with the court of appeal’s reasoning in *Avila* and went on to explain that “if defendant here were subjected to future sentence enhancements based on his stayed convictions, this would also constitute the type of ‘incremental punishment’ that section 654 forbids.”⁸⁴

The *Pearson* court also relied on the appellate court’s decision in *Duarte* to restrict the potential application of enhancement statutes to stayed convictions.⁸⁵ In *Duarte*, the trial court convicted the defendant of two counts of driving under the influence for a single drunk driving act and stayed one of the convictions pursuant to section 654.⁸⁶ To avoid the possibility of the stayed conviction’s use as a prior conviction in a future proceeding under an enhancement statute, the court stayed the use of the conviction so that it could never count as a prior felony conviction for penal and administrative purposes.⁸⁷

The *Pearson* court then noted that the court of appeal in *Conner* followed *Duarte* by staying the use of a conviction to comply with section 654.⁸⁸ The court also relied on *Osuna*, in which the court of appeal went further than did the courts in *Avila*, *Duarte*, or *Conner*, by reversing one of the defendant’s lesser convictions out of fear that it would be used in a later proceeding to enhance a sentence he may receive.⁸⁹

In sum, the *Pearson* court and other California cases strongly admonish the use of stayed felony convictions to increase a defendant’s subsequent sentence when proof of a prior felony conviction becomes necessary for sentencing purposes. This line of decisions, coupled with section 654’s mandate against multiple punishment, prompts one to consider two questions. First, should a prior felony conviction that

81. See *id.* at 756.

82. *Id.* at 757.

83. *Id.*

84. *People v. Pearson*, 721 P.2d 595, 601 (Cal. 1986).

85. See *id.* at 601–02.

86. See *People v. Duarte*, 207 Cal. Rptr. 615, 617, 621 (Ct. App. 1984).

87. See *id.* at 622.

88. See *Pearson*, 721 P.2d at 602.

89. See *id.*

has been stayed count as a strike under Three Strikes? Second, assuming the stayed conviction counts as a strike, is there some other basis in the law for allowing multiple convictions stemming from an indivisible course of conduct to count as more than one strike? The defense lawyers in *Benson* and *Fuhrman* tried to answer these questions in the negative. To hold otherwise, the lawyers argued, would violate section 654, precedent, and the stated purpose of recidivist statutes like Three Strikes.⁹⁰

C. *Benson*—A Stayed Sentence on a Prior Felony Conviction Qualifies as a Strike

In *People v. Benson*, the specific issue before the California Supreme Court was whether a prior serious or violent felony, for which the sentence was stayed pursuant to California Penal Code section 654, qualified as a strike under Three Strikes.⁹¹ On appeal, Benson contended his two prior felony convictions should not have counted as separate strikes because the trial court determined they were committed as part of an indivisible transaction with a single intent against a single victim.⁹² Benson argued it would be irrational and against Three Strikes principles⁹³ to count his one “act” as two strikes, particularly because the crimes flowing from that act were punished as a *single* crime pursuant to section 654.⁹⁴

In rejecting Benson’s arguments, the majority distinguished Three Strikes from section 654 and focused on the legislature’s and electorate’s intent in enacting Three Strikes.⁹⁵ Section 654’s prohibition against multiple punishment for “‘an act or omission that is pun-

90. See *People v. Benson*, 954 P.2d 557, 559–62 (Cal. 1998); see also *People v. Fuhrman*, 941 P.2d 1189, 1195–96 (Cal. 1997).

91. See *Benson*, 954 P.2d at 558.

92. See *id.* at 559.

93. See *id.* at 563. Presumably, these principles include a consideration of the purpose for having a recidivist statute. See *infra* Part IV.A., for a discussion of the purpose behind recidivist statutes. Treating Benson as a three-time offender versus a two-time offender runs contrary to those principles. See Petitioner’s Brief on the Merits at 18, *People v. Benson*, 954 P.2d 557 (Cal. 1998) (No. S061678). “If the offender has committed [only] one prior ‘act’, he or she is eligible for enhanced sentencing as a ‘second striker.’ But that individual simply has not committed the *repeated* criminal acts required as a condition for the imposition of the harshest sentence provided by [Three Strikes].” *Id.* (emphasis added).

94. See *Benson*, 954 P.2d at 563; see also *supra* Part II.A, for a discussion of California Penal Code section 654. See also *supra* Part I.B. for a discussion of Benson’s 1979 criminal act.

95. See *id.*

ishable in different ways,'"⁹⁶ the majority reasoned, stood in stark contrast from Three Strikes' focus on a defendant's recidivism—i.e., whether the defendant committed another felony after having been convicted of one or more prior qualifying felonies.⁹⁷ The majority concluded that a rational basis existed for the electorate and the legislature to direct the courts to count each prior felony conviction as a strike, "in effect declining to extend the leniency previously afforded to [Benson] when [his] sentence on a prior felony conviction was stayed pursuant to section 654."⁹⁸ According to the majority, sentencing Benson as a Three Strikes offender was justified because Benson's two prior convictions involved a felony (residential burglary) with *additional violence* (assault with intent to commit murder).⁹⁹ The court concluded the legislature and the electorate had sound justification for sentencing someone in Benson's position harshly because his prior crimes demonstrated that he "posed a far greater threat to public safety than a defendant who has committed a residential burglary without committing such gratuitous violence."¹⁰⁰

In support of his contention that he should only receive one strike for the 1980 convictions, Benson argued that Three Strikes did not comply with the rule set forth in *People v. Pearson*.¹⁰¹ He argued the Legislature must explicitly declare that subsequent penal action can be based on stayed sentences; therefore, his stayed conviction should not count as a strike.¹⁰² The language in Three Strikes stated that a "stay of execution of sentence" on a prior felony conviction would not affect the determination by that court as whether or not it was a strike.¹⁰³ Benson argued that to comply with *Pearson*, a more

96. *Id.* (internal quotations omitted) (citation omitted).

97. *See Benson*, 954 P.2d at 563.

98. *Id.* at 563–64.

In the present case, defendant received the benefit of section 654 when he was sentenced for the felonies he committed in 1979; *it was only when the defendant reoffended after the enactment of the Three Strikes law that he faced the prolonged incarceration of which he now complains*. The Three Strikes law provided him with notice that he would be treated as a recidivist if he reoffended. [citation omitted] He chose to ignore that notice and commit a subsequent felony.

Id. at 564.

99. *See id.* at 564.

100. *Id.*

101. *See id.* at 559–61; *see also supra* Part II.B., for a discussion of the *Pearson* decision.

102. *See Benson*, 954 P.2d at 561.

103. *See* CAL. PENAL CODE § 667(d) (West 1999). Section 667(d) provides:

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

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in

adequate interpretation of the phrase "stay of execution of sentence" would be "stay of execution of sentence *except those stays mandated by section 654*."¹⁰⁴ Such a general use of the term "stay," Benson argued, did not adequately refer specifically to stays granted under section 654 and, therefore, it violated the *Pearson* rule.¹⁰⁵

The majority rejected this argument, claiming that it defied the rules of statutory construction to ignore the statute's plain language.¹⁰⁶ The court found "it difficult . . . to imagine language clearer, or more unequivocal" than that set forth in the statute and determined that the language clearly permitted a stayed felony conviction to be used as a strike.¹⁰⁷ The court added that the broad language of section 667(d) included *all* stays of execution, including those granted under section 654, because it "defies logic" to suggest the legislature and the electorate intended to reference only some stays, and not others, in drafting the exception.¹⁰⁸ The court interpreted the introductory clause "[n]otwithstanding any other law" to prohibit the *Pearson* rule from being applied. Therefore, the court held, a stayed sentence on a prior felony conviction qualifies as a strike.¹⁰⁹

D. *Fuhrman*—Prior Felony Convictions Need Not Be Brought and Tried Separately to Qualify as Strikes

In *People v. Fuhrman*, the issue before the California Supreme Court was whether prior felony convictions that were not "brought

this state None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivision (b) to (i), inclusive:

. . . .
(B) The stay of execution of sentence.

Id. (emphasis added).

104. *Benson*, 954 P.2d at 561.

105. *See id.* at 562.

106. *See id.* at 561–62.

107. *Id.* at 561. The court also examined the language contained in the ballot pamphlet and the Senate Judiciary Committee reports and determined it was not the intent of the legislature or the electorate to dismiss prior felony convictions that had been stayed pursuant to section 654 from a determination that they qualify as strikes. *See id.* at 562–63.

108. *Id.* at 562–63. The majority relied on judicial precedent which held that the legislature need not cite to section 654 specifically to create an exception to the prohibition against multiple punishment. *See id.*; *see also* *People v. Hicks*, 863 P.2d 714, 718–20 (Cal. 1993) (holding the phrase "whether or not committed during a single transaction" in the statute is sufficient to create an exception to section 654); *People v. Ramirez*, 39 Cal. Rptr. 2d 374, 382–83 (Ct. App. 1995) (finding "[a] statute which provides that a defendant shall receive a sentence enhancement in addition to any other authorized punishment constitutes an express exception to section 654"); *People v. Powell*, 281 Cal. Rptr. 568, 569 (Ct. App. 1991) (holding specific provisions prevail over general provisions).

109. *See Benson*, 954 P.2d at 561, 565.

and tried separately" count as separate strikes under the Three Strikes law.¹¹⁰ Brought and tried separately means "a prior conviction must have been brought and tried separately from another qualifying conviction in order to be counted as a separate strike."¹¹¹ On appeal, Fuhrman contended that his two prior 1989 felony convictions for robbery and assault with a firearm, arising from an earlier, single proceeding, should not qualify as strikes since they were not brought and tried separately from each other.¹¹² Fuhrman argued the two prior felony convictions constituted *one* strike for sentencing purposes under Three Strikes.¹¹³ In support of his contention, Fuhrman argued that section 667 of the California Penal Code used the term "prior conviction" ambiguously.¹¹⁴ Fuhrman pointed to subdivision (a)(1) of section 667,¹¹⁵ which specifically provided for a brought and tried separately requirement, while such language was absent in subdivisions (b) through (i) of section 667.¹¹⁶ Fuhrman further argued that the resulting doubt should be resolved in his favor, allowing the court to impose a brought and tried separately requirement.¹¹⁷

The majority rejected Fuhrman's arguments by relying on general rules of statutory construction.¹¹⁸ If the statute contains clear and unambiguous language, the majority noted, then the court should give effect to that language and not go beyond the statute's text.¹¹⁹ First, the majority found that because Three Strikes did not explicitly provide for a "brought and tried separately" requirement, the legislature must not have intended such a provision.¹²⁰ Secondly, the majority found no ambiguity between subdivision (a) of section 667, and

110. See *People v. Fuhrman*, 941 P.2d 1189, 1190 (Cal. 1997).

111. Luna, *supra*, note 1 at 49.

112. See *Fuhrman*, 941 P.2d at 1192.

113. See *id.*

114. See *id.* at 1193-94.

115. See *id.*; see also CAL. PENAL CODE § 667(a)(1) (West 1999). Section 667(a)(1) provides that:

[A]ny person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges *brought and tried separately*. The terms of the present offense and each enhancement shall run consecutively.

Id. (emphasis added).

116. See *Fuhrman*, 941 P.2d at 1193-94; see also CAL. PENAL CODE § 667(b)-(i) (West 1999).

117. See *Fuhrman*, 941 P.2d at 1194.

118. See *id.* at 1193-4.

119. See *id.* at 1193.

120. See *id.* at 1194-95.

subdivisions (b) through (i) of section 667.¹²¹ The majority reasoned that because subdivision (a) contains an explicit reference to a brought and tried separately requirement, the legislature purposely excluded such a requirement in the other subdivisions.¹²² Such an absence, the majority determined, indicated the legislature did not intend it as a requirement.¹²³ The majority then held that prior violent or serious felony convictions brought and tried together in a single proceeding qualified as separate strikes.¹²⁴ Thus Fuhrman's two prior felony convictions counted as two separate strikes.¹²⁵

E. Summary

Interpreting the Three Strikes law as allowing only one strike per act coincides with the purpose of Three Strikes generally,¹²⁶ with section 654, and the *Pearson* decision.¹²⁷ However, the California Supreme Court in *Benson* rejected this interpretation by finding that stayed sentences constitute strikes.¹²⁸ Justice Chin warned in his dissenting opinion about the "practical consequences" of the *Benson* decision, including the possibility of multiple strikes arising out of a single act.¹²⁹ When asked about this problem during oral argument, the Attorney General responded that the trial court could dismiss the "excess convictions" to avoid multiple strikes.¹³⁰ However, the Attorney General's solution defeats the purpose of the stay procedure be-

121. *See id.* at 1194.

122. *See id.*

123. *See id.*

124. *See id.* at 1195.

125. *See id.*

126. *See People v. Benson*, 954 P.2d 557, 565 (Cal. 1998) (Chin, J., dissenting). "The 'Three Strikes' law, designed to punish habitual criminals severely, provides much harsher penalties for the recidivist who has committed two or more previous serious or violent crimes, or 'strikes,' than for the recidivist who has committed only one previous qualifying crime." *Id.*

127. *See id.* at 565-66 (Chin, J., dissenting).

128. *See id.* at 558.

129. *See id.* at 570 (Chin, J., dissenting). Justice Chin posited an example:

[S]uppose a person stops a pedestrian at knifepoint and demands a watch. Based solely on that act, the person could conceivably be convicted of felony false imprisonment, assault with a deadly weapon, and attempted robbery. Because each conviction would involve personal use of a deadly weapon, each could, individually qualify as a strike.

Id.

130. *See id.*

cause dismissal of convictions causes the same problems the stay procedure was designed to remedy.¹³¹

By determining that criminal defendants who commit "additional violence" during a single act should later receive two strikes instead of one,¹³² the majority in *Benson* double counted the bad act.¹³³ Additionally, under the majority's logic, a defendant faced with his third strike who had two prior *non-violent* felony convictions stemming from an earlier single proceeding should receive only *one* strike and not two because there was no "additional act of violence."¹³⁴ The arbitrariness of double-counting the bad act based on the existence or nonexistence of violence belies the weakness of the majority's reasoning in *Benson*.

Similarly, the *Fuhrman* court incorrectly refused to find a brought and tried separately requirement in the Three Strikes law. This requirement would demand that a prior conviction be tried in a *separate* judicial proceeding in order for it to count as a separate strike.¹³⁵ Three Strikes and recidivist statutes punish more severely persons who persist in violating the law.¹³⁶ By prohibiting double-counting and imposing a brought and tried separately requirement, offenders like

131. See *id.*; see also *supra* Part II.A. and B., for a discussion regarding section 654 and the *Pearson* decision.

132. See *Benson*, 954 P.2d at 564.

133. In *Benson*, the defendant committed the burglary for the purpose of committing the assault. In contrast to the majority, Justice Chin argued that *Benson* did not commit an additional act of violence because he did not commit the burglary for a different purpose, such as theft. See *Benson*, 954 P.2d at 571 (Chin, J., dissenting); see also Dawn Philippus, Note, *California's Foul Strike: A Single Act Punished With Two Strikes*, 29 GOLDEN GATE U. L. REV. 579, 619 (1999) (stating "[u]nder California's single felonious purpose doctrine, when the entry would be non-felonious but for the intent to commit the assault, and the assault is an integral part of the burglary, the defendant has committed only a single act"). "Therefore, *Benson* had no criminal intent separate from the assault itself, and committed only one act of violence." See *id.* at 619.

134. See *Benson*, 954 P.2d at 564; see also *supra* text accompanying note 100.

135. See *Luna*, *supra* note 1, at 49.

136. See, e.g., *People v. Balderas*, 711 P.2d 480, 514 (Cal. 1985) (stating the rationale of recidivist laws "is that an offender undeterred by his *prior brushes with the law* deserves more severe criminal treatment"); *People v. Diaz*, 53 Cal. Rptr. 666, 668 n.1 (Ct. App. 1966) (finding "the reason for the infliction of severer punishment for a repetition of offenses is not so much that defendant has sinned more than once as that he is deemed incorrigible when he persists in violations of the law after conviction of previous infractions") (quoting Annotation, *Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes*, 24 A.L.R.2d 1247, 1248-49 (1952)).

Fuhrman and Benson would not be punished as harshly as someone with a stronger track record of prior, separate bad acts.¹³⁷

With fewer bad acts and less evidence of earlier, ineffective criminal sanctions, the decision to remove someone from society indefinitely on the basis of double-counting his or her bad act distorts the reason for having a recidivist statute in the first place.¹³⁸ By not finding a brought and tried separately requirement, and allowing stayed sentences to count as strikes, the California Supreme court did not reserve the harshest sanctions for the truly intractable offenders.¹³⁹ Instead, it allowed for more offenders to be caught in the "strike zone" of Three Strikes.¹⁴⁰

III. Dual Use—Counting a Prior Felony Conviction Twice

An example of dual use occurs when a prior felony conviction both ratchets a current misdemeanor to a felony (use one) *and* counts as a strike under Three Strikes (use two).¹⁴¹ For instance, in *Benson*, shoplifting a carton of cigarettes was charged as "petty theft with a prior," a felony.¹⁴² His misdemeanor offense, petty theft, became a felony because of his prior felony convictions, and also counted as his third strike.¹⁴³ While the California Supreme Court has prohibited dual use of a prior felony conviction,¹⁴⁴ whether California's Three Strikes law violates the rule against dual use has not yet been squarely decided by the California Supreme Court.¹⁴⁵

137. See Daniel Rogers, *People v. Fuhrman and Three Strikes: Have the Traditional Goals of Recidivist Sentencing Been Sacrificed at the Altar of Public Passion?*, 20 THOMAS JEFFERSON L. REV. 139, 152-53 (1998).

138. See *id.* at 156-57.

139. See, e.g., *People v. Goodwin*, 69 Cal. Rptr. 2d 576, 577 (Ct. App. 1997). The defendant received twenty-five years to life for stealing a pair of pants—his third strike under California Penal Code section 666—the two strike priors arose from residential burglaries in a single, prior proceeding.

140. See Rogers, *supra* note 1, at 152-54.

141. See *People v. Benson*, 954 P.2d 557, 558-59 (Cal. 1998). Benson's current misdemeanor offense, petty theft, became a felony of "petty theft with a prior" because he had a prior felony conviction; the prior felony conviction also counted as a "strike" within the Three Strikes' sentencing scheme. See *id.* at 558. See also *supra* text accompanying note 9.

142. See *supra* Parts I.B and II.C, for discussions of the *Benson* case.

143. See *id.*

144. See *People v. Edwards*, 557 P.2d 995, 999 (Cal. 1976).

145. See *People v. Tillman*, 83 Cal. Rptr. 2d 56, 65-66, 68 (Ct. App. 1999). The California Supreme Court has rejected challenges to the Three Strikes law as an improper dual use of facts under California Penal Code section 654; *People v. Coronado*, 906 P.2d 1232, 1238-40 (Cal. 1995); see also *supra* Part II.A., for a discussion of section 654.

A. *Edwards*—The Rule Against Dual Use of Prior Felony Convictions

Almost twenty years prior to the enactment of Three Strikes, the California Supreme Court's holding in *People v. Edwards*¹⁴⁶ prohibited the dual use of a prior felony conviction to prove an element of the charged offense and to increase a sentence.¹⁴⁷ For instance, if a district attorney charges a criminal defendant with the crime of "possession of a firearm by a felon," the defendant's prior felony conviction establishes the felon element of the crime. Since the definition of the crime takes into account the defendant's prior felony conviction already, presumably the legislature did not intend the same prior felony conviction to increase punishment under another statute.¹⁴⁸ In the Three Strikes context this would occur if the defendant's prior felony conviction was an element of the charged offense *and* counted as a strike. Such dual use of prior convictions, *Edwards* explained, "runs afoul of the established rule that when a prior conviction constitutes an element of criminal conduct which otherwise would be noncriminal [i.e., status of the offender], the minimum sentence may not be increased because of the indispensable prior conviction."¹⁴⁹

146. 557 P.2d 995 (Cal. 1976). In *Edwards*, the defendant was convicted of possession of a firearm by a felon and the prosecution subsequently proved that defendant had a prior felony conviction for selling marijuana. Edward's prior marijuana conviction was used to establish the felon element of the charged offense and was used under California Penal Code section 3024 to increase his sentence by two years because he had a prior felony conviction. The ultimate disposition of the case, under the holding set forth by the California Supreme Court, allowed Edwards' prior marijuana conviction to be used to establish the element of the charged crime but disallowed its use as a basis to increase his sentence under section 3024. See *id.* at 999.

147. See *id.*

148. See *People v. Baird*, 906 P.2d 1220, 1228 (Cal. 1995) (Kennard, J., dissenting) (citing *In re Shull*, 146 P.2d 417, 419 (Cal. 1944)).

[T]he "established rule" prohibiting use of a single fact to both establish an element of a crime and increase the punishment for the same crime is a rule of legislative intent. It is based on the commonsense idea that when a fact, such as defendant's prior felony conviction, is part of the definition of crime, the punishment specified for that crime already takes that fact into account.

Baird, 906 P.2d at 1228.

149. *Edwards*, 557 P.2d at 999. Cf. *People v. Yarborough*, 77 Cal. Rptr. 2d 402, 403-04 (Ct. App. 1999). In *Yarborough*, the defendant pled guilty for failing to register as a sex offender. See *id.* at 403. The defendant had earlier been convicted of child molestation. See *id.* This conviction constituted a prior serious felony within the Three Strikes law. See *id.* As it was the defendant's second strike, his prison term was doubled under Three Strikes. See *id.* On appeal, Yarborough contended the use of his prior child molestation conviction as an element of the offense for failing to register as a sex offender *and* to double his punishment under Three Strikes violated the *Edwards* rule. See *id.* The court distinguished the facts in *Edwards* from the facts in *Yarborough*. See *id.* at 404. In *Edwards*, the defendant had a

In *People v. Baird*,¹⁵⁰ Justice Kennard analogized this general rule to that of an accountant preparing a financial statement:

To accurately portray the client's financial position, the accountant must count each asset or liability once and only once. If an asset were to be counted more than once, the total on the credit side would be exaggerated and inaccurate. If a liability were counted more than once, the debit side of the statement would be similarly inaccurate and exaggerated. So also with the "accounting" that goes into a sentence calculation. Ideally, to accurately assess the defendant's culpability, each relevant aggravating and mitigating circumstance should be counted once, but only once. Any double counting, on either the aggravating or mitigating side, or any omission, will yield a distorted and inaccurate picture of the defendant's culpability.¹⁵¹

Edwards' applicability depends upon a determination of whether Three Strikes constitutes an enhancement and on whether the *Edwards'* rule remains good law after the adoption of determinate sentencing.

1. Whether *Edwards* Is an Enhancement or Alternative Sentencing Scheme

The *Edwards* rule, if applied to Three Strikes, would disallow a prior felony conviction from being used both as an element of a defendant's current felony and as a strike. The *Edwards* rule specifically prohibits dual use of a prior felony conviction as an element of an offense and as a means to *enhance* a defendant's sentence.¹⁵² *Edwards'* applicability to Three Strikes depends on a determination of whether the Three Strikes sentencing provisions constitute an enhancement¹⁵³ or merely a separate sentencing scheme for recidivists.

prior conviction for selling marijuana and was later convicted of being a felon in possession of a firearm. See *id.* Because possession of a firearm is not in and of itself a crime unless someone is an ex-felon, and because it is an "act," the court distinguished it from the facts in *Yarborough* because defendant's non-registry as a sex offender constituted an "omission" and is itself an illegal act. See *id.* The court concluded that the *Edwards* rule applies only in cases in which the new offense is not "inherently criminal." See *id.* Recently, the *Tillman* court expressed its disagreement with the reasoning of the *Yarborough* decision and concluded that the *Edwards* rule does not require the conduct constituting the current offense to be non-criminal but for the prior conviction. See *Tillman*, 83 Cal. Rptr. 2d at 66-67.

150. 906 P.2d 1220 (Cal. 1995).

151. See *Baird*, 906 P.2d at 1228 (Kennard, J., dissenting).

152. See *supra* Part III.A., for a discussion of the *Edwards* rule.

153. See CAL. R. CT. 405(c) (Deering 1999). An "'enhancement' is an additional term of imprisonment added to the base term." *Id.* A "'base term' is the determinate prison term selected from among three possible terms described by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed." CAL. R. CT. 405(b) (Deering 1999).

Since the passage of Three Strikes in 1994, California appellate courts confronted with the issue have determined that the sentencing provisions of Three Strikes¹⁵⁴ establish an alternate sentencing scheme and not an enhancement.¹⁵⁵ The implication of finding Three Strikes as an alternate sentencing scheme means the *Edwards* rule does not apply to Three Strikes.

The California Court of Appeal for the First District, Division Two, in *People v. Tillman*,¹⁵⁶ recently parted company with the earlier court of appeal decisions that found Three Strikes to be an alternate sentencing scheme and not an enhancement.¹⁵⁷ The *Tillman* court noted that the court of appeals' reliance on the definition of "enhancement," as defined by the California Rules of Court, ignored the factual and legal context in which the *Edwards* case was decided.¹⁵⁸ *Edwards* was simply concerned with "increasing punishment on the basis of the same fact used to convict a defendant."¹⁵⁹ The *Tillman* court found that only a semantic difference existed between the terms "enhancement" and "alternate sentencing scheme."¹⁶⁰ Setting aside the semantic differences, the court found the *Edwards*' rule applied to Three Strikes because "use of a single prior conviction as an element of a substantive offense and as a strike obviously *increases* the defendant's sentence on the basis of that prior conviction."¹⁶¹

In *People v. Hernandez*,¹⁶² the California Supreme Court echoed the *Tillman* court's view that the term "enhancement" has more meaning than the definition under the California Rules of Court would indicate.¹⁶³ According to the court,

Enhancements typically focus on an element of the commission of the crime or the criminal history of the defendant which is not

154. See CAL. PENAL CODE § 667(e) (West 1999); see also CAL. PENAL CODE § 1170.12(c) (West Supp. 1999).

155. See, e.g., *People v. White Eagle*, 56 Cal. Rptr. 2d 749, 752-53 (Ct. App. 1996); *People v. Anderson*, 41 Cal. Rptr. 2d 474, 478-79 (Ct. App. 1995); *People v. Ingram*, 48 Cal. Rptr. 2d 256, 266 (Ct. App. 1995); *People v. Martin*, 38 Cal. Rptr. 2d 776, 781-82 (Ct. App. 1995), *disapproved on other grounds by* *People v. Deloza*, 957 P.2d 945, 954 n.10 (Cal. 1998); *People v. McKee*, 42 Cal. Rptr. 2d 707, 711 (Ct. App. 1995) *People v. Nobleton*, 44 Cal. Rptr. 2d 611, 614 (Ct. App. 1995); *People v. Sipe*, 42 Cal. Rptr. 2d 266, 276 (Ct. App. 1995).

156. 83 Cal. Rptr. 2d 56 (Ct. App. 1999).

157. See *id.* at 68.

158. See *id.*; see also *supra* text accompanying note 154, defining enhancement.

159. *Tillman*, 83 Cal. Rptr. 2d at 68.

160. See *id.*

161. *Id.* (emphasis added).

162. 757 P.2d 1013 (Cal. 1988).

163. See *id.* at 1020-21.

present for all such crimes and perpetrators and which justifies a higher penalty than that prescribed for the offenses themselves. That is one of the very purposes of an enhancement's existence.¹⁶⁴

2. Whether *Edwards* Is Viable After the Adoption of Determinate Sentencing

*People v. Bruno*¹⁶⁵ was the first California court of appeal case to conclude that the *Edwards* rule, decided in 1976, did not survive the adoption of determinate sentencing in 1977.¹⁶⁶ Several other California courts of appeal decisions followed *Bruno*, reasoning that the Uniform Sentencing Act superseded *Edwards*.¹⁶⁷

The Uniform Sentencing Act, codified at California Penal Code section 1170,¹⁶⁸ originally included a sentence providing that "[i]n no event shall any fact be used twice to determine, aggravate, or enhance a sentence."¹⁶⁹ The *Bruno* court interpreted this sentence as codifying the *Edwards* rule.¹⁷⁰ Prior to the operative date of the Act, the Legislature deleted the sentence by amendment.¹⁷¹ *Bruno*, and the later cases that followed it, viewed the Legislature's action as "'eliminat[ing] the *Edwards* rule by first codifying it and then deleting the codification."¹⁷² Thus, the *Bruno* line of cases determined that the *Edwards*' rule no longer existed.

In *People v. Darwin*,¹⁷³ the California Court of Appeal for the First District, Division Five, rejected the reasoning behind the *Bruno* line of cases¹⁷⁴ on the grounds that the original version of California Penal Code section 1170 did not *in fact* codify the *Edwards* rule. Therefore, the legislative action in deleting the supposed rule did not abrogate the rule.¹⁷⁵ *Edwards* held that if a prior conviction is an "element" of

164. *Id.* at 1021.

165. 237 Cal. Rptr. 31 (Ct. App. 1987).

166. See *People v. Tillman*, 83 Cal. Rptr. 2d 56, 65 (Ct. App. 1999); see also CAL. PENAL CODE §1170 (West Supp. 1999) (the Uniform Sentencing Act).

167. See *People v. Nobleton*, 44 Cal. Rptr. 2d 611, 615-16 (Ct. App. 1995); See also *People v. Sipe*, 42 Cal. Rptr. 2d 266, 277 (Ct. App. 1995); *People v. Price*, 6 Cal. Rptr. 2d 263, 266 (Ct. App. 1992); *People v. Vega*, 273 Cal. Rptr. 684, 687 (Ct. App. 1990), *disapproved on other grounds in* *People v. McClanahan*, 838 P.2d 241, 249 n.6 (Cal. 1992); *People v. Levell*, 247 Cal. Rptr. 489, 491 (Ct. App. 1988).

168. See CAL. PENAL CODE §1170.

169. *Id.*

170. See *Tillman*, 83 Cal. Rptr. 2d at 65.

171. See *id.*

172. *Id.* (quoting *People v. Darwin*, 15 Cal. Rptr. 2d 894, 895 (Ct. App. 1993)).

173. 15 Cal. Rptr. 2d 894 (Ct. App. 1993).

174. See *id.* at 895; see also *supra* Part III.A.1.b., for a discussion of the *Bruno* decision.

175. See *Darwin*, 15 Cal. Rptr. 2d at 895.

an offense the prior may not be used for sentence enhancement, whereas the deleted sentence of section 1170 "did not address the dual use of a prior as an element of an offense and for sentence enhancement" ¹⁷⁶ Section 1170 "merely addressed sentencing, stating that a fact could not be used twice to 'determine, aggravate, or enhance as a sentence,' [therefore,] '[t]hese two points are not the same.'" ¹⁷⁷

Even more recently, the California Court of Appeal for the First District, Division Two, in *People v. Tillman* expressly noted its disapproval with the earlier cases that found *Edwards* had been legislatively overruled. ¹⁷⁸ The *Tillman* court sided with the *Darwin* case, finding that case "more persuasive." ¹⁷⁹

B. Critique

In *People v. Dotson*, ¹⁸⁰ the California Supreme Court stated that an indeterminate life sentence imposed under Three Strikes was not a sentence enhancement. ¹⁸¹ The court reasoned the particular subdivision of Three Strikes in question merely described a "method by which [a] defendant's minimum indeterminate life term is calculated." ¹⁸² In so doing, the California Supreme Court may have im-

176. *Id.*

177. *Id.*

178. See *People v. Tillman*, 83 Cal. Rptr. 2d 56, 66 (Ct. App. 1999).

179. *Id.* Without resolving the issue, the California Supreme Court noted the disagreement between the courts of appeal regarding *Edwards*' viability. See *People v. Baird*, 906 P.2d 1220, 1221-24 (Cal. 1995).

180. 941 P.2d 56 (Cal. 1995).

181. See *id.* at 61.

182. *Id.* The subdivision referred to by the California Supreme Court in *Dotson* was subdivision (c)(2)(A) of the initiative version of Three Strikes. See *id.*; see also CAL. PENAL CODE § 1170.12 (c)(2)(A) (West Supp. 1999). Section 1170.12 (c)(2)(A) provides:

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

. . . .
(2)(A) If a defendant has two or more prior felony convictions . . . the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

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

(ii) twenty-five years or

(iii) the term determined by the court pursuant to section 1170 for the underlying conviction

CAL. PENAL CODE § 1170.12 (c)(2)(A). The terms are virtually identical to the legislature's version of the statute. See CAL. PENAL CODE § 667(e)(2)(i)-(iii) (West 1999).

pliedly rejected the application of the *Edwards* rule to Three Strikes.¹⁸³ Although, the court has not specifically decided *Edwards*' application, when the issue does arise the court should follow *Tillman*'s cue and find that *Edwards* applies to Three Strikes.

Under *Edwards*, a prior felony conviction cannot be used to both increase a sentence and prove an element of the charged offense.¹⁸⁴ The *Tillman* court was correct in its determination that the past trend of pigeonholing Three Strikes into an enhancement or an alternate sentencing scheme box misses the point of *Edwards*—"a single fact may not be used both as an element of the current offense and as the basis for imposition of more severe punishment than would otherwise be prescribed for that offense."¹⁸⁵

In *Tillman*, the court recognized that the *Edwards* rule could potentially limit the prior convictions used to trigger Three Strikes.¹⁸⁶ Nevertheless, the *Tillman* court declined to extend the *Edwards* prohibition against dual use to Three Strikes because "it must be remembered that the rule in *Edwards* is one intended to effectuate legislative intent."¹⁸⁷ The plain language of the Three Strikes statute,¹⁸⁸ the *Tillman* court reasoned, indicated that the legislature intended harsher punishment for *all* recidivist felons, "regardless of whether a prior conviction is a *component* of their current felony."¹⁸⁹

183. Notably, if Three Strikes was found to be an enhancement by the California Supreme Court, then the defendant's sentence in *Benson* would potentially violate the rule set forth in *People v. Jones*, 857 P.2d 1163 (Cal. 1993). In *Jones*, the California Supreme Court held that the same prior conviction could not be used to enhance a sentence under California Penal Code section 667.5 (a) and Penal Code section 667 (b). See *Jones*, 857 P.2d at 1169. Under *Jones*, "when multiple statutory enhancement provisions are available for the same prior offense, . . . [only] the greatest enhancement . . . will apply." *Id.* at 1166-67. In *Benson*, one enhancement occurred when his petty theft was elevated from a misdemeanor to a felony based on his prior felony conviction. See *People v. Benson*, 62 Cal. Rptr. 690, 692 (Ct. App. 1997), *superseded by* *People v. Benson*, 954 P.2d 557 (Cal. 1998). If sentencing under Three Strikes equals an enhancement, then his sentencing violates the *Jones* rule. Since the court cannot use both enhancements under *Jones*, the additional punishment under Three Strikes could have been stricken or stayed to comply with the rule.

184. See *People v. Edwards*, 557 P.2d 995, 999 (Cal. 1976).

185. *People v. Tillman*, 83 Cal. Rptr. 2d 56, 68 (Ct. App. 1999).

186. See *id.* at 69 (stating "despite our disagreement with caselaw finding *Edwards* either no longer viable or inapplicable to the Three Strikes situation . . .").

187. *Id.*

188. See CAL. PENAL CODE § 667(f)(1) (West 1999) ("[Three Strikes] shall be applied in every case in which a defendant has a prior [serious or violent] felony conviction . . .") (emphasis added); see also CAL. PENAL CODE § 667(e) (West 1999) (calculating sentences under Three Strikes shall apply "in addition to any other enhancement or punishment provisions which may apply . . .") (emphasis added).

189. *Tillman*, 83 Cal. Rptr. 2d at 69 (quoting *People v. Sipe*, 42 Cal. Rptr. 2d 266, 278 (Ct. App. 1995) (emphasis added)).

The *Tillman* court concluded the *Edwards* rule frustrates the legislative intent behind Three Strikes.¹⁹⁰ The rule's operative effect would disallow the dual use of a prior felony conviction, thus decreasing the number of strikes that could flow from one prior felony conviction.¹⁹¹

The *Tillman* court started its analysis in the right direction by finding that the *Edwards* rule applied to Three Strikes. Unfortunately, the court lost focus and ultimately found *Edwards* inapplicable in the Three Strikes context. Applying *Edwards* does not frustrate the desire of the legislature and electorate to punish recidivists. First, in the case of *Benson*, an application of the *Edwards* rule still allows for the defendant to be punished for his recidivism by charging him with a felony instead of a misdemeanor for his petty theft. Second, the plain language of Three Strikes indicates that the intent behind the legislation was to "ensure longer prison sentences and greater punishment for those who *commit a felony*"¹⁹² The phrase "commit a felony" can reasonably be interpreted to mean the legislature and electorate did not intend to punish persons who commit *misdemeanors*. A "felony" is defined as a "crime of a graver or more serious nature than those designated misdemeanors."¹⁹³ In *Benson*, the defendant *committed* a misdemeanor crime (petty theft),¹⁹⁴ which technically became a felony when the court charged him with the crime of petty theft with a prior.¹⁹⁵ By charging and convicting *Benson* of a felony instead of a

190. See *id.* In *Tillman*, the defendant's prior rape conviction was used as an element of his current offense for failure to register as a sex offender. In addition, his prior rape conviction was used to enhance his sentencing because it constituted a "strike" under Three Strikes. See *id.* at 58. If the trial court had applied the *Edwards* rule to the facts in *Tillman*, then the defendant would not have been sentenced as a second strike offender (i.e. one for the prior rape conviction and one for the current felony).

191. See *id.* at 69.

192. CAL. PENAL CODE § 667(b) (West 1999) (emphasis added).

193. BLACK'S LAW DICTIONARY 617 (6th ed. 1990).

194. See *People v. Benson*, 62 Cal. Rptr. 2d 690, 692 (Ct. App. 1997) *superseded by* *People v. Benson*, 954 P.2d 557 (Cal. 1998); see also *Ex parte Boatwright*, 15 P.2d 755, 757 (Cal. 1932). The California Supreme Court stated:

Petit larceny, or petit theft, is not of itself a felony, and becomes such only when it is superadded to some other offense of which the party charged has suffered conviction, and this is done, not to enlarge the scope of the crime, but to add to the punishment of the person who commits it, for his many prior violations of the law.

Id. at 757.

195. See *Benson*, 954 P.2d at 558. "A defendant who has been convicted of and imprisoned for enumerated theft-related crimes and who is subsequently convicted of petty theft 'is punishable by imprisonment in the county jail . . . not exceeding one year, or in the state prison.'" *People v. Bouzas*, 807 P.2d 1076, 1078 (Cal. 1991) (quoting CAL. PENAL CODE § 666). The court has the discretion to treat the offense as either a misdemeanor or a felony. See *id.*

misdemeanor, the court already punished Benson for his recidivism once, in satisfaction of the legislature's intent to have recidivists receive increased punishment based on their repeated offenses against society. Thus, Benson's same prior felony conviction should not be used again to punish him for his recidivism under Three Strikes because it violates the *Edwards* rule.

Benson did not raise the *Edwards* issue on appeal. Had he done so, the California Supreme Court would have been forced to decide whether *Edwards* limits Three Strikes. The rule, if applied in Benson's case, would have allowed for a dramatically different result in his sentencing.¹⁹⁶ The application of *Edwards* would have compelled the court to disallow the dual use of Benson's prior felony convictions—elevating his current offense (petty theft) from a misdemeanor to a felony (petty theft with a prior), and using the priors again to increase his sentence under Three Strikes. Such a decision would have meant the difference between Benson spending the rest of his life in prison or receiving a maximum sentence of six years.¹⁹⁷

IV. Analysis

A. The Purpose of Recidivist Sentencing Laws and the Need for a "Brought and Tried Separately" Requirement

The incredibly harsh sentencing under Three Strikes came about because of public frustration over recidivism.¹⁹⁸ Recidivists are persons who continue to commit criminal, antisocial behavior after incarceration for an earlier offense.¹⁹⁹ Recidivist statutes aim at punishing those who have shown they are incorrigible offenders.²⁰⁰

196. *But see Bouzas*, 807 P.2d at 1076. In *Bouzas*, the California Supreme Court determined that in the context of a section 666 petty theft with a prior charge, the prior "is a sentencing factor for the trial court and not an 'element' of the section 666 'offense' that must be determined by a jury." *Id.* at 1085. Based on this language, the California Supreme Court may preclude the *Edwards* rule from applying to a factual situation like the one in *Benson*.

197. See CAL. PENAL CODE § 666 (West 1999); see also CAL. PENAL CODE § 667(e)(1) (West 1999).

198. After news of Polly Klaas' murder was reported in December 1993, the growing public sentiment against repeat offenders such as Richard Allen Davis led to an unprecedented collection of over 800,000 signatures for Proposition 184. See Luna, *supra* note 1, at 5; see also Victor Sze, *A Tale of Three Strikes: Slogan Triumphs Over Substance as Our Bumper-Sticker Mentality Comes Home to Roost*, 28 LOY. L.A. L. REV. 1047, 1057 (1995).

199. See MENASTER & RICCIARDULLI, *supra* note 9, at 36.

200. See Rogers, *supra* note 137, at 153; see also CAL. PENAL CODE § 667(b) (West 1999) (stating "It is the intent of the Legislature . . . 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.").

Consistent with the purpose of recidivist statutes, the California Court of Appeals in *People v. Diaz*²⁰¹ concluded that:

'[I]t has been held in the great majority of cases *that two or more convictions on the same day, or on different counts under the same indictment, or convictions at the same term of court cannot be cumulated so as to count as two or more previous convictions within the meaning of [recidivist] statutes*, although, as specifically held in some cases, *one of such convictions may be counted as a prior conviction within the meaning of the statute.*'²⁰²

A reading of the Three Strikes law indicates that as a recidivist's criminal record becomes progressively more extensive, his sentence should increase accordingly. For instance, if the offender commits a violent offense, he is prosecuted and punished, incurs "one strike" and has an opportunity to change his criminal ways.²⁰³ If he fails to take advantage of this opportunity and commits another serious or violent felony, his sentence will be doubled,²⁰⁴ providing him with one last opportunity to reform his behavior. However, if the offender does not reform from the second punishment, and commits another serious or violent felony, he will be sentenced to life in prison.²⁰⁵

The intent behind recidivist statutes such as Three Strikes will best be served if the defendant is sentenced to life in prison only after he has been "twice convicted of a [serious or violent felony], . . . twice punished for the offenses, and twice fails to reform . . ." ²⁰⁶ If multiple convictions from a prior criminal proceeding become strikes, "the term Three Strikes becomes disingenuous and misleading," thereby "allowing multiple convictions resulting from a single criminal episode to substitute for a true history of repeated criminal conduct."²⁰⁷ The best way to further the intent of Three Strikes and of recidivist statutes generally is to do what the *Fuhrman* court failed to do—incorporate the section 667(a) requirement that prior convictions be brought and tried separately into the Three Strikes law.²⁰⁸

201. 53 Cal. Rptr. 666 (Ct. App. 1966).

202. *Id.* at 668 n.1 (Ct. App. 1966) (emphasis added) (quoting Annotation, *Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes*, 24 A.L.R. 2d 1247, 1249 (1952)).

203. See MENASTER & RICCIARDULLI, *supra* note 9, at 37.

204. See Cal. Penal Code § 667(e)(1) (West 1999).

205. See CAL. PENAL CODE § 667(e)(2) (West 1999).

206. MENASTER & RICCIARDULLI, *supra* note 9, at 38.

207. See Rogers, *supra* note 137 at 153.

208. See MENASTER & RICCIARDULLI, *supra* note 9, at 36.

B. Double-Counting and Dual Use of a Prior Felony Conviction Frustrates the Purpose of a Recidivist Statute

As *Fuhrman* and *Benson* illustrate, when California courts double count a bad act and dually use prior felony convictions, the application of Three Strikes will not necessarily correspond to the defendant's misconduct. Benson received a life sentence for stealing a carton of cigarettes fifteen years after committing his previous offense. He should have been treated as a two-strike offender, not a three-strike offender.

Double-counting allows the number of prior felony convictions, even if from a single prior proceeding, to determine the sentencing—not the number of bad acts. If each prior felony conviction is counted, rather than each criminal act, a defendant's punishment under Three Strikes will turn on arbitrary factors such as the prior prosecutor's choice of charges, the terms of the plea bargain, whether a prosecutor elects to plead offenses committed at different times in separate informations, or whether the defendant is successful in moving for joinder of offenses at trial.²⁰⁹ All of these arbitrary factors cause defendants with the same or similar criminal histories to be treated differently.²¹⁰ For instance, had *Fuhrman* pled guilty to only one count instead of two, he fortuitously would not have faced his third strike. Such arbitrary factors defeat the purpose of Three Strikes.²¹¹

Without a "brought and tried separately" requirement, Three Strikes allows for two sets of defendants to be treated differently on the basis of the timing of their prior felonies.²¹² For example, if one defendant sustains two "serious felonies" in a single prior case, a new "serious felony" conviction will support an automatic twenty-five years to life prison sentence under Three Strikes, plus *one* five year enhancement under California Penal Code section 667(a).²¹³ If another defendant sustains two "serious felonies" in two different cases, and commits a new "serious felony," his sentence would be twenty-five years to life in prison plus *two* five year enhancements under California Penal Code section 667 (a).²¹⁴

Similarly, in the context of dual use, Benson's prior burglary charge was used twice against him (once to ratchet the petty theft mis-

209. *See id.*

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.*

214. *See id.*

demeanor to a felony, and twice to count as a strike). Benson's punishment for his third felony conviction was worse than if his prior felonies had been two murders. For instance, the felony "petty theft with a prior" hinges on whether the defendant committed a prior theft-related offense.²¹⁵ If Benson had committed two prior murders, his third offense, petty theft, *would not be* ratcheted to a felony because a murder was not theft-related. In other words, the trial court would never have sentenced Benson under Three Strikes for the petty theft offense had his two prior felony convictions been murders. Thus, the discrepancy in sentencing between a petty thief with two prior, separate murders on his record and a petty thief, like Benson, with a prior theft-related felony conviction on his record, illustrates the distorted effect caused by dual use and double-counting. Under this hypothetical, Benson's second bad act against society, although comparable in seriousness of offense to the murderer's third bad act, results in Benson receiving a much harsher sentence, even though he was not a three-time offender or a murderer. If a two-time offender can be sentenced as a three-strike offender under a law whose popular slogan was "Three Strikes and You're Out," then double-counting defeats the overall message of the Three Strikes law. Similarly, under dual use the same holds true when a trial court manufactures two strikes from one prior felony conviction. Such an artificial creation of strikes by the trial court miscalibrates a defendant's true history of recidivism, turning Three Strikes into a farcical, overtly harsh measure, reserved not just for those who truly are the "worst of the worst" offenders, but also for those less deserving of a life sentence.

Conclusion

Double-counting a bad act and dual use of a prior felony conviction pose serious real-life consequences for criminal defendants who may be facing a third strike/life sentence when, in reality, they should only be facing a two strike/double sentence if the acts or strikes been counted or used correctly. Thus, the purpose of recidivist laws like

215. See CAL. PENAL CODE §666 (West 1999). It provides:

Every person who, having been convicted of petit theft, grand theft, auto theft under section 10851 of the Vehicle Code, *burglary*, carjacking, robbery, or a felony violation of section 496 and having served a term therefore in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petit theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

CAL. PENAL CODE § 666.

Three Strikes are ill-served when dual use and double-counting occurs. The California Supreme Court should prohibit double-counting by disallowing a single act or indivisible course of conduct from counting as more than one strike. The court should also forbid the dual use of a prior felony conviction as a means to increase a misdemeanor to a felony and to count as a strike. By imposing a brought and tried separately requirement and applying the *Edwards* rule, only then can the public policy purpose behind Three Strikes of increasing penalties for separate, bad acts be accomplished. This author urges the California Supreme Court to uphold the *Edwards* decision, apply it to Three Strikes cases, and prohibit dual use of prior felony convictions.