

RESOLUTION 11-07-2002

DIGEST

Sentencing: Requiring Third Strike to Be a Serious or Violent Felony

Amends Penal Code section 667 to require that a current “third strike” felony be a serious or violent felony.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to Resolutions 1-5-96, 1-7-96, 1-6-97, 5-15-97 and 7-6-99, all of which were approved. Similar to A.B. 1790, currently pending before the State Assembly, and to S.B. 1517 currently pending before the State Senate. The U.S. Supreme Court has granted writ of certiorari decided to hear two cases on this issue: *Lockyer v. Andrade* (No. 01-1127), and *Ewing v. California* (No. 01-6978).

Reasons:

This resolution amends Penal Code section 667 to require that a current “third strike” be a serious or violent felony. This resolution should be disapproved because it does not amend the companion sentencing statute, Penal Code section 1170.12, thus causing a conflict in law.

A defendant with two or more prior felony convictions or “strikes” who is convicted of a third felony must be sentenced to 25 years to life. (Pen. Code, § 667.) A defendant cannot receive "good time credits" to reduce his sentence below the mandatory minimum term of 25 years. (*In re Cervera* (2001) 24 Cal. 4th 1073.) Only a "serious" or “violent” felony can count as the first or second strike. (Pen. Code, §§ 667.5, subd. (c), & 667, subd. (d)(1).) However, the “third strike” offense may be any felony under California law. (*Id.*, § 667, subd. (e)(2)(A).) This includes a wobbler offense when charged and sentenced as a felony (*People v. Terry* (1996) 47 Cal.App.4th 329, 332) and petty theft with a prior. It is this aspect of Three Strikes law that results in sentences for minor thefts and offenses.

This resolution amends the definition of a third strike to address these concerns, but neglects to amend the companion sentencing statute for third strikes, causing a conflict in the law.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates recommends that legislation be sponsored to amend Penal Code section 667 as follows:

- 1 § 667
- 2 (a) (1) In compliance with subdivision (d) of Section 1385, any person convicted of a
- 3 serious felony who previously has been convicted of a serious felony in this state or of any offense
- 4 committed in another jurisdiction which includes all of the elements of any serious felony, shall
- 5 receive, in addition to the sentence imposed by the court for the present offense, a five-year

6 enhancement for each such prior conviction on charges brought and tried separately. The terms of
7 the present offense and each enhancement shall run consecutively.

8 (2) This subdivision shall not be applied when the punishment imposed under other
9 provisions of law would result in a longer term of imprisonment. There is no requirement of prior
10 incarceration or commitment for this subdivision to apply.

11 (3) The Legislature may increase the length of the enhancement of sentence provided in this
12 subdivision by a statute passed by majority vote of each house thereof.

13 (4) As used in this subdivision, "serious felony" means a serious felony listed in subdivision
14 (c) of Section 1192.7.

15 (5) This subdivision shall not apply to a person convicted of selling, furnishing,
16 administering, or giving, or offering to sell, furnish, administer, or give to a minor any
17 methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction
18 was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

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

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

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

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

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

31 (4) There shall not be a commitment to any other facility other than the state prison.
32 Diversion shall not be granted nor shall the defendant be eligible for commitment to the California
33 Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of
34 Division 3 of the Welfare and Institutions Code.

35 (5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section
36 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment
37 imposed and shall not accrue until the defendant is physically placed in the state prison.

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

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

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

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

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

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

57 (B) The stay of execution of sentence.

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

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

62 (2) A conviction in another jurisdiction for an offense that, if committed in California, is
63 punishable by imprisonment in the state prison. A prior conviction of a particular felony shall
64 include a conviction in another jurisdiction for an offense that includes all of the elements of the
65 particular felony as defined in subdivision (c) or Section 667.5 or subdivision (c) of Section
66 1192.7.

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

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

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

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

75 (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section
76 602 of the Welfare and Institutions Code because the person committed an offense listed in
77 subdivision (b) of Section 707 of the Welfare and Institutions Code.

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

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

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

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

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

91 (iii) The term determined by the court pursuant to Section 1170 for the underlying

92 conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section
93 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

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

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

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

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

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

113 (i) If any provision of subdivisions (b) to (h), inclusive, or the application thereof to any
114 person or circumstance is held invalid, that invalidity shall not affect other provisions or applications
115 of those subdivisions which can be given effect without the invalid provision or application, and to
116 this end the provisions of those subdivisions are severable.

117 (j) The provisions of this section shall not be amended by the Legislature except by statute
118 passed by each house by roll call vote entered in the journal, two-thirds of the membership
119 concurring, or by statute that becomes effective only when approved by the electors.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Louis Katz, Charles Sevilla, John Cleary, Peter Hughes, Alex Landon, Jan Stiglitz, Justin Brooks, Gerald Blank, William Fletcher, Laura Berend, Charles Bird, Jan Mulligan, Gina Dronet

STATEMENT OF REASONS

Existing Law: Any felony, regardless of whether it is a serious or violent felony, constitutes the "third strike" for purposes of imposing a mandatory indeterminate life sentence. The first two strikes, however, must be violent or serious felonies. "Violent" or "serious" felonies, as defined in Penal Code Sections 667.5(c) and 1192.7(c), include murder, voluntary manslaughter, attempted murder, mayhem, rape, robbery, grand theft involving a firearm, assault with intent to commit rape or robbery, assault with a deadly weapon or instrument on a peace officer, arson, kidnapping, carjacking, burglary, sodomy by force or violence, oral copulation by force or violence, lewd acts on a child under 14 years of age, continuous sexual abuse of a

child, exploding a destructive device with intent to murder or injure or causing great bodily injury or mayhem, and selling heroin, cocaine, PCP, or any methamphetamine-related drug to a minor.

This Resolution: Would require that the third strike, like the first and the second, be a serious or violent felony to remedy the problems described in the foregoing section. This resolution would not change the definitions of serious felony or violent felony.

The Problem: The purpose of the "three strikes" law is to target recidivists by requiring that they serve lengthier prison sentences. Since the purpose is to punish recidivism, the statute should punish increasingly serious criminal behavior with increasingly harsh sentences. In its current form, however, the statute punishes both increasingly and decreasingly serious criminal behavior with a harsher sentence. Under Section 667(e), a defendant with two prior serious or violent felonies whose third felony is neither violent nor serious, may receive the same harsh penalty as the defendant whose third felony is violent or serious.

As a result, many defendants charged with non-serious, non-violent felonies refuse to enter guilty pleas and proceed to trial, thereby increasing the congestion in the court system and in the jails. If convicted, these defendants will receive a long prison sentence, thereby increasing the costs to a prison system that must care for an aging inmate population. Moreover, the current across-the-board approach provides a potential perverse incentive to prosecutors in third strike cases not to charge (or to charge as misdemeanors) even relatively serious crimes, such as domestic violence. Similarly, because any felony, regardless of whether it is serious or violent, can qualify as the "third strike," it is inordinately difficult to persuade the legislature to make and keep those relatively serious crimes felonies.

The harsh punishment required by Section 667(e) -- and the resulting costs to the legal system -- should be reserved for those who have proven themselves most dangerous to the community -- those who have committed three serious or violent felonies.

In addition, the 9th Circuit has held that imposition of life without parole for a third strike petty crime violates the Eighth Amendment.

IMPACT STATEMENT: This proposed resolution does not affect any other law, statute, or rule.

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