California's Foul Strike: A Single Act Punished With Two Strikes

Dawn Philippus

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NOTE

CALIFORNIA'S FOUL STRIKE:
A SINGLE ACT PUNISHED WITH
TWO STRIKES

I. INTRODUCTION

On May 14, 1998, the California Supreme Court decided *People v. Benson*, holding that prior convictions arising from the same transaction may each be counted as "strikes" under the Three Strikes law, even if the defendant did not receive a sentence for one of the convictions. The court stated that its conclusion was consistent with the plain language of the Three Strikes law as well as the history and legislative intent behind the law. As a result of this decision, defendants can now potentially receive three strikes from one incident.

Section II of this Note first provides an overview of the Three Strikes law, and explains how a court determines sentence enhancement under the Three Strikes law. Sections III, IV, and V describe the facts, procedural history, and the California Supreme Court's rationale for upholding the appellate court's decision. Section VI of this Note critiques *People v. Benson*, and the majority's conclusion that the language of the Three Strikes law is sufficiently explicit to allow enhancement of a sentence based on a conviction stayed pursuant to a statu-

1. 954 P.2d 557 (Cal. 1998).
3. See id.
4. See id. at 570.

579
tory prohibition against punishing an act or omission under more than one penal provision. Section VI also compares the Supreme Court’s holding in *People v. Benson* with its holding in *People v. Romero*, and critiques the amount of discretion awarded to the trial court. Finally, Sections VII and VIII conclude that danger lies in relinquishing discretion to the trial court, as it remains unclear whether voters intended that an act that may only be punished once could generate two strikes.

II. OVERVIEW OF CALIFORNIA’S THREE STRIKES LAW

During the last decade, many states enacted multiple offense statutes in response to rising crime rates. These “Three Strikes laws” provide aggravated penalties for recidivist offenders. Both California’s legislature and the electorate enacted versions of a Three Strikes law. California’s Three Strikes law is a two-tiered plan, which focuses on both two and three time convicted felons. Under the law, a defendant’s sentence may be enhanced by prior convictions, otherwise known as “strikes.” Yet the California Supreme Court recently decreased the strength of the Three Strikes law in *People v. Romero*, ruling that a trial court retains discretion to dismiss strikes if the court determines that it is in the furtherance of justice.

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5. 917 P.2d 628 (Cal. 1996).
10. See id.
A. CREATION OF THE THREE STRIKES LAW

Multiple offense statutes imposing heightened sentences for repeat offenders have a long history in the United States. In recent years a demand for such laws has grown in reaction to rising crime rates, violent gang-related crimes, children carrying guns, crimes committed by recidivists, and children being targeted by gun dealers. In response to this public alarm against violent crime, many states enacted multiple offense statutes during the 1990's.

In response to the senseless murder of his eighteen-year-old daughter, Kimber Reynolds, Mike Reynolds proposed California's first version of a multiple offense statute. His version of Three Strikes differed from the other proposals being debated across the country in three respects. First, he proposed that significant sentencing enhancements should be imposed upon conviction for a second felony. Second, Reynolds proposed that a criminal should receive a twenty-five year to life sen-

16. See George Skelton, A Father's Crusade Born from Pain, L.A. TIMES, Dec. 9, 1993, at A3. One evening in 1992, Kimber had just finished having dinner with a friend, and was getting into her car when two men drove up on a stolen motorcycle. One grabbed for her purse, and as she struggled with him, she was fatally shot. The killer was a parolee, and was wanted for a series of robberies and assaults. See id. See Dan Morain, A Father's Bittersweet Crusade, Mike Reynolds Vowed that His Murdered Daughter Would Not Die in Vain; Few Thought He Would Win, But Today He Will See the 'Three Strikes' Bill Signed Into Law, L.A. TIMES, Mar. 7, 1994, at A1.
17. See Zimring, supra note 7, at 245.
18. See id.
tence for his second felony even in the absence of violence.\textsuperscript{19} Finally, Reynolds proposed that the third strike could be generated by any felony conviction under the California Penal Code.\textsuperscript{20}

Initially, Reynolds' Three Strikes package received little support from the general public.\textsuperscript{21} Ultimately, however, the 1993 murder of twelve-year old Polly Klaas ended the public’s apathy and indecisiveness regarding California's multiple offense statute.\textsuperscript{22} Recently paroled from the state prison, a twice-convicted violent offender abducted Polly from her Petaluma home.\textsuperscript{23} Sadly, Polly's murder was the turning point in obtaining the necessary signatures to put Reynolds' Three Strikes bill on the California ballot.\textsuperscript{24} Additional support for the Three Strikes bill arose when President Clinton signed the Violent Crime and Law Enforcement Act of 1994, the federal version of

\begin{itemize}
\item \textsuperscript{19} See id.
\item \textsuperscript{20} See id.
\item \textsuperscript{21} See Michael Krikorian, Striking up a Debate, THE FRESNO BEE, July 27, 1998, at B1. Currently twenty-four states have some form of three strikes legislation in place. California is the only state that does not require the third offense to be a major crime. See id. See George Skelton, A Father's Crusade Born from Pain, L.A. TIMES, Dec. 9, 1993, at A3. Mike Reynolds, Kimber's father, was the driving force behind California's three strikes bill, targeted at career criminals. Reynolds initially had difficulty in obtaining enough signatures to add the bill to the California ballot. See id.
\item \textsuperscript{22} See Tupper Hull, State's Parole System Attacked: Many Wonder Why Davis, With Long Record, Was Free - The Polly Klaas Kidnapping, SAN FRANCISCO EXAMINER, Dec. 5, 1993, at A1. Richard Allen Davis had been in and out of prison since he was 19 years of age. He had six convictions prior to the murder, ranging from burglary to assault with a deadly weapon. See id. See Richard Price, Town Angry at a System that Failed, USA TODAY, Dec. 8, 1993, at 1A. Davis' rap sheet was 11 pages long, including two prior kidnapping convictions. In his most recent stay in prison—a 16-year sentence for kidnapping, assault, and burglary—he had served only half of his sentence before early release for good behavior. Davis would have been in jail on the day Polly Klaas was abducted if he had served his entire sentence. See id.
\item \textsuperscript{23} See Hull, supra note 22, at A1.
\item \textsuperscript{24} See id. See David B. Magleby & Kelly D. Patterson, Consultants and Direct Democracy, POLITICAL SCIENCE & POLITICS, June 1, 1998, Vol. 31, No. 2. Use of the baseball slogan, "Three Strikes and you're out!" also played an important role in increasing the public awareness and support for the three strikes sentencing legislation. The phrase "three strikes, and you're out" has been credited with attracting support to the three strikes movement. See id.
\end{itemize}
the Three Strikes legislation.25 The federal Act imposes life sentences for a third violent felony conviction.26

In March 1994, California Governor Pete Wilson signed Reynolds' Three Strikes program into law.27 California voters approved an identical version of the bill, state Proposition 184, in November 1994.28 The current version of the Three Strikes law specifies punishment for persons who commit any subsequent felony and have one or more prior violent or serious felony convictions.29

B. CALIFORNIA PENAL CODE SECTION 1170.12

The purpose of California's Three Strikes law is to "[e]nsure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."30 The Three Strikes law is designed to provide a "no questions asked" policy in sentencing a


Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to imprisonment if—(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—(i) 2 or more serious violent felonies; or (ii) one or more serious violent felonies and one or more serious drug offenses; and (B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

Id.

26. See id.


28. See id. This proposition is codified in CAL. PENAL CODE § 1170.12.


30. CAL. PENAL CODE § 1170.12 (West Supp. 1999) (as stated in the statement of intent preceding the text of §1170.12 in Prop. 184). The California Penal Code currently contains two similar provisions regulating sentencing impositions for persons convicted of a felony, who have previously committed one or more "violent" or "serious" felonies. CAL. PENAL CODE §§ 667, 1170.12. Because both statutes are nearly identical, for purposes of this Note, all references made hereinafter to California's three strikes legislation are to California Penal Code section 1170.12. Section 1170.12 is the initiative version, which was in effect when the defendant committed the crime in the present case. See id. See People v. Benson, 954 P.2d 557, 558 (1998).
career criminal to life imprisonment for a third felony conviction. The Three Strikes law authorizes lengthy prison sentences for defendants with at least one prior violent or serious felony conviction who are found guilty of any subsequent felony.

The version of the Three Strikes law enacted by the electorate is codified in section 1170.12 of the California Penal Code. Section 1170.12 is a two-tiered plan, which enhances the sentence of criminals convicted of two or three felonies. The sentence enhancement provisions are triggered only when a prior conviction is classified as a strike. Under section 1170.12(b), a strike is a “serious” or “violent” felony identified in the statute. The statute enumerates nineteen violent felonies, which qualify as strikes including: murder, home robbery and rape.

32. See id. § 1170.12. See Steve Lawrence, Lawmakers Refuse to Narrow List of Felonies for '3 Strikes,' Senate: 10 Democrats Join A Vote to Sink the Proposal. A Prison Population Boom is Feared and Disputed, THE ORANGE COUNTY REGISTER, June 5, 1997, at A4. Since its enactment in 1994, the Three Strikes law has been subject to much criticism and debate. One of the largest debates has been over the type of prior conviction that will produce an enhanced sentence under the Three Strikes law. Opponents believe that the law’s punishment often does not fit the crime. These opponents propose that the Three Strikes law should be limited to only violent and serious felonies, arguing that only twenty-five percent of second strikers and fifty percent of third strikers were committed to prison for a serious or violent offense. See id. See Assembly Committee on Public Safety: Hearings on S. 2048 Before the Senate Committees on Judiciary, Criminal Procedure and Budget and Fiscal Review, 1997-1998 Legis., June 30, 1998 (statement of Judith M. Garvey). In response to these arguments, the California Senate proposed a bill that would limit enhanced punishment under the Three Strikes law to persons who are convicted of a violent or serious felony and also have two or more prior violent or serious felony convictions. Supporters of Senate Bill 2048 noted that possession of controlled substances, petty theft with a prior, and second degree burglary are the most common commitment offenses for second strikers; the most common offenses for third strikers are burglary, robbery, and possession of controlled substances. See id.
34. See id.
35. See id.
36. Id. § 1170.12(b)(1)(A-B). Section 1170.12(b) provides that “[n]otwithstanding any other provision of law ... a prior conviction of a felony shall be defined as: (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state.” Id.
37. See CAL. PENAL CODE § 667.5(c) (West Supp. 1999). Section 667.5 lists the following felonies as “violent”: Murder; Voluntary Manslaughter; Mayhem; Rape; Sodomy or Oral copulation by force, or fear; Lewd acts committed on a child under the age of 14; any felony punishable by death or a life sentence; any felony in which the defendant inflicts great bodily injury on a victim; any felony in which the defendant uses a
The statute also identifies thirty-four serious felonies which qualify as strikes, including all violent felonies, attempts to commit violent felonies, residential burglary and some drug sales to minors. Furthermore, section 1170.12(b) mandates that a stay of execution of sentence does not affect the classification of a prior conviction as a "strike." Section 1170.12 requires the prosecuting attorney to plead and prove each prior felony conviction. Moreover, plea-bargaining is not allowed.
on the second or third strike. However, the prosecution has the power to dismiss a strike in the furtherance of justice.

The first level of section 1170.12 affects convicted felons who have one prior serious or violent felony conviction on their record, regardless of the jurisdiction in which the defendant committed the previous felony. For these offenders, a second conviction of any felony results in a sentence double the term provided as punishment for the new offense. The sentence for the second felony and the enhancement run consecutively. If

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41. See id. § 1170.12(e). Section 1170.12 requires that "prior felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7 ...." Id. See also CAL. PENAL CODE § 1192.7 (West Supp. 1999) bars plea bargaining only after the filing of an indictment or information. Thus, there is no restriction on plea bargaining under Penal Code section 1192.7 in the municipal court before the defendant is held to answer. See id.

42. See CAL. PENAL CODE § 1170.12(d)(2) (West Supp. 1999). The Penal Code states that "the prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the interest of justice pursuant to Penal Code section 1385, or if there is insufficient evidence to prove the prior conviction." Id.

43. See id. § 1170.12(b)(2). Section 1170.12 provides that "withstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as ... a conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in state prison ...." Id.

44. See id. § 1170.12(c)(1).

45. See id. § 1170.12(a)(6-8). Section 1170.12(a)(6) states that "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 this section." Id. Thus, when a defendant has at least one strike, and he or she has been convicted of more than one current felony, this section mandates consecutive sentencing on each current felony. Section 1170.12(a)(7) provides:

If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, 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.

Id.

Thus, when at least two of the current felonies are "serious or violent," this section applies. Finally, section 1170.12(a)(8) states that "any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law." Id. This section affects cases where a defendant is already serving a sentence and then is sentenced under the Three Strikes law in a new case. Section 1170.12(a)(8) mandates that the new sentence be served consecutively to the prior one. See id. A second sentence is deemed to be consecutive "when one sentence of confinement is to follow another in point of time." BLACK'S LAW DICTIONARY 304 (8th ed. 1990). Yet a sentence is concurrent when "two or more terms of imprisonment, all or part of each term of which is served simultaneously and the prisoner is entitled to discharge at the expiration of the longest term served." Id. at 291.
the second conviction encompasses more than one crime, consecutive sentences and enhancements are imposed for each conviction.\textsuperscript{46} For example, if an offender has one prior strike on his record for robbery, and commits a new felony of residential burglary, he or she would get sentenced to thirteen years in prison.\textsuperscript{47}

The second level of section 1170.12 applies to felons with two or more serious or violent prior felony convictions who then commit any subsequent felony.\textsuperscript{48} However, this section distinctly differs from the first level in the severity of the sentence imposed.\textsuperscript{49} Unlike the sentence for the second-time felon, the three-time convicted felon's sentence is an indeterminate life sentence.\textsuperscript{50} The minimum term of the indeterminate life sentence is the greater of three possibilities: three times the sentence for the current felony conviction, state imprisonment for twenty-five years, or the sentence as determined by the court for the current conviction plus any applicable enhancements pursuant to section 1170 of the California Penal Code.\textsuperscript{51} Thus, the third time convicted felon can be assured of being sentenced to a term of at least twenty-five years up to life imprisonment.\textsuperscript{52} Because the statute calls for the greater penalty, however, the third time sentence most often results in life imprisonment.\textsuperscript{53} For example, if a defendant had two prior strikes

\textsuperscript{47} See AL MENASTER & ALEX RICCIARDULLI, 3 STRIKES MANUAL 111 (Compendium Press 1996). If the sentencing court chose a mid-term sentence of four years for the new burglary conviction, twice this amount is eight years. Then, with the dual use of the enhancement for the "serious felony" prior of five years, the defendant would ultimately receive a thirteen-year sentence. See id.
\textsuperscript{49} See id. § 1170.12.
\textsuperscript{50} See id. § 1170.12(c)(2)(A).
\textsuperscript{51} See id. § 1170.12(c)(2)(A)(i-iii).
\textsuperscript{52} See id. § 1170.12.
\textsuperscript{53} See Lisa Cowert, Comment, Legislative Prerogative vs. Judicial Discretion: California's Three Strikes Law Takes a Hit, 47 DEPAUL L. REV. 615, 624 (1998) (discussing the policy concerns intertwined with the Three Strikes law and advocating rehabilitation rather than retribution). See Assembly Committee on Public Safety: Hearings on S. 2048 Before the Senate Committees on Judiciary, Criminal Procedure and Budget and Fiscal Review, 1997-1998 Legis., June 30, 1998 (statement of Judith M. Garvey). The Three Strikes law has been subject to a large amount of debate because most offenders with two or more "strikes" receive a sentence of life imprisonment, even if they did not commit a violent or serious crime. See id. See Steven Philippus: Three Strikes Sentencing Law Published by GGU Law Digital Commons, 1999
for robbery and residential burglary, and then committed a third strike, another residential burglary, under the Three Strikes law he or she must spend 25 years in prison before being eligible for parole. 54

Since its enactment, the Three Strikes law has been subject to much judicial review to determine the scope of the law. In one such case, the Three Strikes law has been interpreted as giving trial courts discretion to strike felony convictions of defendants eligible for sentencing under the sentence enhancement scheme. 55
C. People v. Romero: Narrowing of the Three Strikes Law

Until recently, a court's discretion in sentencing a repeat offender was limited. The Three Strikes law specifically empowered the prosecution to move to dismiss a strike or strike a prior felony conviction allegation "in the furtherance of justice." However, the law remained unclear on whether it granted the courts the same power to dismiss.

In People v. Romero, the California Supreme Court examined whether a trial court may, sua sponte, strike prior felony convictions in cases arising under California's Three Strikes laws. The Romero court ruled that a trial court retains discretion to dismiss one or more prior felony convictions, or

56. See Cowert, supra note 53, at 624. Until the Romero decision, the Three Strikes law removed sentencing discretion from the judiciary in sentencing habitual offenders, and instead granted the discretion to the prosecutor, forcing a standoff between the judiciary and the legislature over sentencing discretion. See id.
58. See id.
59. 917 P.2d 628 (Cal. 1996).
60. See Romero, 917 P.2d at 630. Romero was charged with second degree burglary in violation of California Penal Code § 459, attempted burglary of an inhabited dwelling in violation of Penal Code §§ 459, 664, first degree burglary of an inhabited dwelling in violation of Penal Code § 459, and possession of a controlled substance in violation of Health and Safety Code § 11350. Romero's two prior serious felonies of burglary and attempted burglary convictions qualified as "strikes" under the Three Strikes law, making him a third time offender eligible for a life sentence under the second level of the statute. Romero originally plead not guilty. See id. at 632. However, the trial judge offered to dismiss the Romero's prior convictions for three strikes purposes if he changed his plea. The court subsequently struck Romero's prior felony convictions and imposed a six-year sentence as opposed to the sentence of life imprisonment mandated under the Three Strikes law. The district attorney petitioned for a writ of mandamus to vacate the judge's order, arguing that the express language of the Three Strikes law did not grant the judge the power to dismiss prior felony allegations except when requested by the prosecution. The Court of Appeal determined that the trial court could not dismiss prior felony convictions on its own motion. The appellate court ordered the trial court to vacate the sentence and permit the defendant to withdraw his plea. The California Supreme Court granted the defendant's petition for review. Reversing in part, the Supreme Court held that a trial court may dismiss prior felony convictions in furtherance of justice on its own motion in a case brought under the Three Strikes law. See id. at 630. An information is "an accusation exhibited against a person for some criminal offense, without an indictment ... [or] without the intervention of a grand jury." BLACK'S LAW DICTIONARY 779 (6th ed. 1990). A writ of mandamus "[c]ommands[] the performance of a particular act therein specified ... or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived." Id. at 961.
strikes, if the trial court concludes that it is “in furtherance of justice.”

The court focused on Penal Code section 1385(a), which grants the court the general power to strike prior convictions in furtherance of justice. The Supreme Court stated that unless the legislature clearly intended to eliminate the power granted to the courts under Penal Code section 1385(a), California’s Three Strikes statutes should not be read as abolishing a trial court’s power to dismiss strikes in three strikes cases. The court reasoned that the legislature would not have included a provision in the Three Strikes law that allows the prosecuting attorney to strike a prior felony conviction pursuant to 1385 unless it also intended that the court retain its power under section 1385. Thus, the Romero court ruled that trial courts may exercise the power to dismiss strikes at any time, before trial or after trial, but suggested that it might be most appropriate at sentencing.

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62. See *Romero*, 917 P.2d at 632. See CAL. PENAL CODE § 1385 (West Supp. 1999). Section 1385 provides that:
   (a) The judge or magistrate may, either of his or her own motion or upon application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading. (b) This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.

63. See *Romero*, 917 P.2d at 640.
64. See id. at 642.
65. See id. at 648. See People v. Williams, 948 P.2d 429 (Cal. 1998). However, the California Supreme Court has further defined what a trial court should consider in deciding whether to dismiss a strike “in furtherance of justice.” In ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, “in furtherance of justice” pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had presently not committed one or more felonies and/or had not previously been convicted of one or more serious and/or violent felonies. See id.
However, the court also cited several examples of when the court might abuse this discretion. The court warned that a dismissal of a strike must truly be in the furtherance of justice. Specifically, the Romero court held that the trial court may not strike prior convictions solely for judicial convenience, court congestion, a judge's hostility to the Three Strikes law, or because the defendant pleads guilty. The court's decision was fully retroactive.

The Three Strikes law has now taken a new turn in California with the problem of determining whether two strikes can arise from one act, even though one of the convictions was stayed pursuant to the prohibition on multiple punishment. The California Supreme Court's ruling in People v. Benson is the first decision on how the Three Strikes law affects such cases, and its repercussions are sure to affect scores of criminal defendants throughout the state of California.

66. See Romero, 917 P.2d at 648-649.
67. See id.
68. See id.
69. See id. at 648. See Dan Morain, Assembly OK's Bill Limiting Judges' 3-Strikes Leniency Legislature. L.A. TIMES, July 10, 1996, at A1. The California legislature reacted immediately to Romero with the General Assembly's passage of Senate Bill 331, which curtailed judicial discretion by barring the judiciary from dismissing prior felony conviction allegations for violent felonies. See id. See S.B. 331, 1996-1997 Legis. (Cal. 1996). Under Senate Bill 331, the court has the discretion to strike a defendant's prior felony conviction, upon motion of the prosecuting attorney or upon its own motion if three requirements are met. First, none of the defendant's prior convictions could be for a violent felony. Second, the defendant's current conviction could not be for a serious or violent felony. Third, the current offense must have occurred more than five years after the defendant's release from custody for the prior felony conviction. See id. See Dan Morain & Max Vanzi, Senate Panel Blocks Revisions of 3-Strikes Law, L.A. TIMES, July 17, 1996, at A1. However, on July 16, 1996, by a four-to-one vote, the Senate Criminal Procedure Committee voted against sending the bill to the Senate floor, denying any opportunity for a full Senate hearing on the bill. In rejecting the bill the Committee cited confusing language and concern over the fact that eighty percent of felons sentenced under Three Strikes laws are nonviolent as the primary factors. See id.
71. Benson, 954 P.2d at 557.
III. FACTS OF PEOPLE v. BENSON

In 1979, Russell Benson went to a neighbor’s apartment under the guise of borrowing her vacuum cleaner. After he returned the vacuum, he went back to the apartment a second time, claiming he forgot his keys. Once inside her apartment, Benson grabbed the victim from behind, struggled with her and forced her to the floor. Benson then proceeded to stab her approximately twenty times over her entire body with a knife. Miraculously, the victim survived the attack and was able to identify Benson as her attacker. The victim underwent four major surgeries and was severely scarred as a result of the attack. The police discovered a knife and bloody clothing in Benson’s apartment and arrested him for the crimes committed against his neighbor.

Subsequently, a jury convicted Benson of residential burglary and assault with intent to commit murder. Benson was also found to have used a knife during the commission of a felony and inflicted great bodily injury to the victim in commission of the crimes. On October 16, 1980, the trial court sen-
tenced Benson to state prison for ten years for the residential burglary charge. However, Benson's sentence for the assault with intent to commit murder was stayed. After serving five years, Benson was released on parole from state prison on September 12, 1985.

Nine years later on November 30, 1994, while shopping in a discount store, Benson stuffed several packages of cigarettes in his pockets and in the sleeves of his jacket and walked out of the store without paying for them. Having observed Benson's actions, security personnel tried to detain him outside of the store but Benson fled. The security guards caught up with Benson, however, and ultimately arrested him. The total value of the merchandise Benson stole was twenty dollars.

Benson was charged with second degree robbery, second degree burglary, and petty theft with a prior conviction based upon the 1979 incident. A jury found Benson guilty of petty

deadly or dangerous weapon is an element of the offense of which he or she was convicted.

See CAL. PENAL CODE § 12022.7 (West Supp. 1999). This section states:
Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission or attempted commission of a felony shall, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of three years, unless infliction of great bodily injury is an element of the offense of which he or she is convicted.

See supra note 39 for a definition of a stay.
See id.
See Petitioner's Brief on the Merits, People v. Benson, No. S061678 (filed Oct. 29, 1997). See CAL. PENAL CODE § 211 (West 1988), which states "[r]obbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." See supra note 80 for definition of burglary. See CAL. PENAL CODE § 666 (West Supp. 1999). Section 666 states in part:
Every person who, having been convicted of ... burglary ... and having served a term therefor in any penal institution or having been imprisoned therein as
theft with a prior conviction, not guilty of robbery, and was deadlocked on the burglary count. The court counted Benson's 1980 burglary and assault with intent to commit murder convictions as two prior strikes under California's Three Strikes law. During sentencing, the trial court considered Benson's 1994 conviction of petty theft with a prior to be his third strike and sentenced him to state prison for twenty-five years to life. Had his earlier conviction been considered only as one strike, Benson would have faced a maximum six-year sentence.

IV. PROCEDURAL HISTORY

Benson requested that the trial court review his sentence for the 1994 discount store incident and strike the prior conviction allegations, arguing that the court violated the proscription against double punishment contained within Penal Code section 654 by counting each 1980 conviction as a strike. The

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. 90. See Petitioner's Brief on the Merits, People v. Benson, No. S061678 (filed Oct. 29, 1997).

91. See CAL. PENAL CODE § 1170.12 (West Supp. 1999). See CAL. PENAL CODE § 667.5(c)(8), (12) (West Supp. 1999). Assault with intent to commit murder is a violent felony. See id. See CAL. PENAL CODE § 1192.7(c)(8), (9), (18), (23) (West Supp. 1999). Residential burglary is a serious felony, and assault with intent to commit murder is also a serious felony. Each one of these crimes is a qualifying prior felony conviction for the purposes of the Three Strikes law. See id.

92. See Benson, 954 P.2d at 557.


94. See People v. Benson, 954 P.2d 557, 559 (Cal. 1998). Benson claimed that the trial court erred in counting both the burglary and assault with intent to commit murder counts from the 1980 convictions as separate strikes under California's Three Strikes law. See id. See CAL. PENAL CODE § 654 (West Supp. 1999). Section 654 of the Penal Code provides that: "[a]n 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." Id. When a defendant is convicted or pleads guilty to two or more crimes section 654 bars multiple punishment for the same act. See id. See People v. Mendoza, 69 Cal. Rptr. 2d 728, 735 (Cal. Ct. App. 1997). The purpose of section 654 is to prevent multiple punishment for single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, trial courts may impose sentence for only one offense. On the other hand, multiple punishment is proper if the evidence discloses
trial court found no violation of section 654, however, and de­
nied the defendant's motion to strike his prior convictions. The court stated it lacked the authority to strike a prior conviction allegation. The court also refused to reduce the petty theft conviction to a misdemeanor.

The California Court of Appeal affirmed the trial court's judgment. The appellate court determined that Benson's prior burglary conviction could be used counted both as a prior, elevating the petty theft conviction to a felony, and as a strike under California's Three Strikes law. The court also held that Benson's prior offenses that were part of the same incident could be separate strikes under the Three Strikes law. The appellate court then remanded the case to allow the trial court to exercise its discretion to strike one of the prior conviction allegations as permitted in People v. Romero.

that a defendant entertained multiple criminal objectives, which were independent of and not merely incidental to each other. See id. See Neal v. State of California, 357 P.2d 839, 843-844 (Cal. 1960). The California Supreme Court defined a test to determine what is an indivisible course of conduct:

whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.

Id. In Neal, the separate punishment imposed on the defendant for arson could not stand because the objective of the offense was to commit the two attempted murders. Because there were two individual intents separate punishments were proper. See id.

95. See Benson, 954 P.2d at 559.


98. See id. The Court of Appeal first noted that Penal Code section 654 bars multiple punishment for the same act. See id. at 699. The appellate court then recognized the holding in People v. Pearson, which held that when a defendant is convicted or pleads guilty to two or more crimes, and section 654 would bar multiple punishment for the crimes, the crimes may not be used as separate priors in subsequent proceedings. See People v. Pearson, 721 P.2d 595, 600-601 (Cal. 1986). The Pearson court held that this rule applies unless the legislature explicitly states that subsequent action may be based on the stayed convictions. See id. Yet the Benson court rejected the defendant's contention that the Three Strikes law is ambiguous. See Benson, 62 Cal. Rptr. 2d at 699-700. The court stated the language was clear, and they need go no further than the language of the statute. See id.


100. See id. (citing People v. Romero, 917 P.2d 628 (Cal. 1996)). In Romero, the court ruled that a trial court retains discretion to strike one or more prior felony con-
Benson appealed to the California Supreme Court, questioning whether multiple felonies could be punished as separate strikes when they arose from a single criminal act. Benson contended that the trial court erred by treating his 1980 convictions as two strikes, arguing that his burglary and assault with intent to commit murder convictions comprised a single act against a single victim and were contemporaneously committed with a single intent. Because the 1980 convictions were punished as a single crime pursuant to Penal Code section 654, Benson argued that the crimes should not individually be counted as strikes. The California Supreme Court granted review.

V. THE COURT'S ANALYSIS

In Benson, the majority of the California Supreme Court held that prior convictions arising from the same set of facts should each be counted as strikes for purposes of sentencing under the Three Strikes law, even if the sentence on one of the prior convictions was stayed. The dissent vehemently disagreed, contending that the majority overturned decades of case law designed to protect against multiple punishment for a single act. The dissent recognized that the purpose of Penal Code section 654 was to prevent multiple punishment for the same act, and argued that the majority violated this proscription by counting Benson's 1980 burglary and assault with intent to commit murder as two separate strikes.
A. THE MAJORITY OPINION

In Benson, the California Supreme Court determined that Benson's prior felony convictions for residential burglary and assault with intent to commit murder counted as two strikes rather than as one strike. The court first analyzed the plain language of the Three Strikes law, section 1170.12, and determined that a stay of execution of sentence pursuant to Penal Code section 654 did not affect consideration as a prior conviction or a strike. Additionally, the court reviewed the legislative history and purpose of the Three Strikes law and held that the legislature intended to count prior convictions as strikes. Accordingly, the California Supreme Court upheld Benson's conviction of twenty-five years to life.

1. Statutory Interpretation: Determining What is a "Strike"

To determine whether Benson had one or two strikes, the majority first looked to the plain meaning of the sentence enhancement law, Penal Code section 1170.12. The court examined whether the legislature explicitly declared that subsequent penal or administrative action could be based on stayed convictions. Following the appellate court's analysis, the court recognized the well settled rule that "[w]hen statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." The court

108. See id. at 558.
109. See id. The California Supreme Court in Benson decided the case de novo. The court reviewed the trial court's determination that the defendant had two prior qualifying felony convictions that rendered him subject to sentence as a third strike offender. The court analyzed the plain language of the Three Strikes law, and the legislative history and purpose of the law. The court held that the trial court had properly found the defendant as having two prior strikes, and affirmed the judgment of the Court of Appeal which had also found the Benson to be a third strike offender. See id. at 558. When a court is reviewing de novo, it is starting "[a]new; afresh; a second time." BLACK'S LAW DICTIONARY 435 (6th ed. 1990). This means that the court gives no deference to previous courts' position. See id.
110. See Benson, 954 P.2d at 558.
111. See id.
112. See id. at 559.
113. See id. at 560.
114. Id. (quoting People v. Overstreet, 726 P.2d 1288 (Cal. 1986)). The Supreme Court noted that the Court of Appeal agreed with the trial court's conclusion, recognizing the rule that "[w]here the statute is clear, courts will not interpret away clear
noted that section 1170.12(b)(1) expressly provides that a stay of execution of sentence "shall not affect the determination of a prior conviction." 115

The court also considered its own precedent established in People v. Pearson. 116 In Pearson, the court held that when a defendant's guilty plea results in a conviction of two or more crimes, and Penal Code section 654 bars multiple punishment for the crimes because they are based on the same criminal act, the crimes could not be used as separate prior convictions in subsequent proceedings. 117 Subsequent penal action, however, may be based on the stayed convictions if the legislature explicitly declares this intent. 118 In Benson, the court concluded that the statutory language of the Three Strikes law was sufficiently clear to overcome the general rule of Pearson. 119 The legislature had explicitly declared that subsequent penal action

language in favor of an ambiguity that does not exist." Benson, 954 P.2d at 560 (quoting People v. Coronado, 906 P.2d 1232, 1234 (Cal. 1995)). The appellate court stated that it need go no further than the language used in the Three Strikes law, as the language of the statute is clear. See Benson, 954 P.2d at 560.

115. Benson, 954 P.2d at 561. The majority suggested that the dissent's interpretation of section 1170.12(b)(1) would be to replace the phrase "the stay of execution of sentence, except those stays mandated by section 654." Id. The majority then concluded that this proposed construction of the statute does not reflect the meaning that the legislature intended. See id. See supra note 39 for the language of Penal Code section 1170.12(b).


117. See Benson, 954 P.2d at 559. See also Pearson, 721 P.2d 595 (Cal. 1986). In Pearson, the defendant committed acts of sodomy upon two children. See id. at 596. For each of his acts, he was convicted of two offenses, sodomy with a child under 14 years of age, and lewd conduct. The trial court imposed a sentence for the lewd conduct convictions, but stayed the sentence on the sodomy convictions, pursuant to Penal Code section 654, so the defendant would not be punished twice for the same act. See id. In affirming the defendant's conviction, the Supreme Court of California held that the defendant could not be subjected to future enhancements based on all four of his convictions. See id. at 600-601. Instead, the court could only enhance his sentence based on convictions where the defendant received an actual sentence, not when it was stayed. See id. However, the court noted that the Legislature could explicitly declare that subsequent penal or administrative action could be based on stayed convictions. See id. Yet without this declaration, the court was bound by section 654, which prohibits a defendant from being disadvantaged as a result of the stayed convictions. See id. See supra note 94 for explanation of Penal Code section 654.

118. See Benson, 954 P.2d at 559.

119. See id. at 561.
might be based on convictions stayed pursuant to Penal Code section 654.120

The Supreme Court dismissed several arguments that the trial court erred by treating Benson as a third strike offender.121 First, the court addressed the defendant's contention that the Three Strikes law cannot overcome the general rule of Pearson, because the law does not specifically refer to a stay of execution of sentence under section 654.122 The court rejected this argument, noting that the Three Strikes law explicitly states in its introductory clause that a strike for purposes of the statute "shall be defined" as set forth in §1170.12(b) "[n]otwithstanding any other law ...."123

Second, the court dismissed Benson's argument that interpreting the Three Strikes law to include convictions stayed pursuant to section 654 would encourage prosecutors to "overcharge" defendants.124 In response, the majority noted that its holding in Pearson clearly recognized that the Legislature was free to adopt a sentencing scheme that abolished the holdings of the courts regarding the sentencing of repeat offenders.125

Finally, noting that the Three Strikes law did not require the electorate to enumerate each type of stay the electorate intended to override, the majority concluded that the defendant's argument failed to defer to the language of the Three Strikes

120. See id.
121. Id.
122. See Benson, 954 P.2d at 561. Benson argued that in order for a sentence that is stayed under section 654 to count as a strike, the Three Strikes law should be more explicit. See id. Instead the Three Strikes law generally states that the stay of execution of sentence will not affect what is to be considered as a strike. See CAL. PENAL CODE § 1170.12(b)(1) (West Supp. 1999).
123. Benson, 954 P.2d at 561. The court determined that this clause prevented the Three Strikes law from being limited, and could include any type of stay. The majority also noted that the initiative version of the Three Strikes law was enacted after Pearson, concluding that the provision must be interpreted to include convictions stayed pursuant to section 654. See id.
124. Id.
125. See id. at 562. The court determined that in enacting the Three Strikes law, the electorate abolished the holdings of other courts in accordance with the holding in Pearson. See id.
law. The Supreme Court concluded that the Legislature and the electorate expressly stated that each conviction for a serious or violent felony should count as a strike regardless of whether the prior sentence was stayed.

2. Ballot History and Legislative Intent of the Three Strikes Law

The California Supreme Court next reviewed the history of the Three Strikes law and the arguments made in support of the legislation before it was enacted. The court recognized that ballot arguments accompanying an initiative might be considered in determining the electorate’s intent in adopting the measure. The court observed that neither the ballot arguments accompanying the initiative nor the legislative analysis indicated that strikes were limited to convictions that received a sentence. The ballot arguments and legislative analysis also failed to indicate that strikes could not include

126. See id. The defendant argued that a stay can arise in a number of contexts other than stays granted under section 654. For example stays can be mandatory where the term imposed is prohibited by law or exceeds the limitation on the overall aggregate term. See Benson, 954 P.2d at 562 (citing Cal. Rules of Court, rule 447). Also, trial courts allow temporary stays of sentences to permit defendants to get their personal affairs in order. See Benson, 954 P.2d at 562 (citing People v. Karaman, 842 P.2d 100 (Cal. 1992)).

127. See Benson, 954 P.2d at 560. The court determined that indeed stays do arise in contexts other than those granted under section 654, and noted that this fact “emphasizes the great significance that [the court] should accord to the use of broad language by the electorate and the Legislature to exclude all stays of execution of sentence, without qualification or exception.” Id. at 562. The court also recognized that the defendant contended to the rule that “[t]o create an exception [to section 654], the other statute need not refer to section 654 explicitly.” Benson, 954 P.2d at 562 (alteration in original) (quoting People v. Hicks, 863 P.2d 714 (Cal. 1993)). In Hicks, the California Supreme Court examined Penal Code section 667.6(c), to determine if it overrode provisions in Penal Code section 654. See Hicks, 863 P.2d at 719. Section 667.6(c) authorizes consecutive full-term sentences for enumerated sexual offenses “whether or not the crimes were committed during a single transaction.” The Hicks court concluded that the legislature did not have to cite section 654 in section 667.6(c) in order to override section 654. See id.

128. See Benson, 954 P.2d at 562.

129. See id. (citing People v. Romero, 917 P.2d 628 (Cal. 1996)).

130. See id. at 562. Some ballot arguments reviewed by the majority included: “[S]erious or violent [c]onvictions [committed] before 1994 ... are counted as strikes;” “[I]f the person has two or more previous serious or violent felony convictions, the mandatory sentence for any new felony conviction ... is life imprisonment ....” Id.
prior convictions that had been stayed pursuant to section 654. 131

The court also focused on the legislative intent behind the Three Strikes law. 132 The bill did not expressly require that prior convictions be derived from separate criminal acts. 133 The court reasoned that if only certain types of stays were to be included within the meaning of the Three Strikes law, the electorate or the Legislature could have so indicated. 134 The court determined that nothing in the bill suggested that the legislature intended an exception for prior convictions where the sentence was stayed under section 654. 135 Thus, the court concluded that, in light of the electorate and legislative intent, and the purpose and objectives underlying the Three Strikes law, convictions stayed pursuant to section 654 of the Penal Code may count as separate strikes. 136

The Supreme Court explained the purpose for considering a person who committed two crimes against a single victim in a single act and received only one sentence as a second strike offender. 137 The legislature and the electorate sought to ensure that a defendant's prior serious and violent felony convictions would count as strikes, despite whatever leniency a court had

131. See Benson, 954 P.2d at 562.
133. See id. at p. 9. The Bill stated:
This bill does not contain any requirement that the prior offenses be separate. Thus, a single act of robbery of three people in a store could result in a sentence of twenty-five years to life. Likewise, one case with two counts of a serious felony would subject the defendant to a life sentence for any future felony.

Id.
134. See Benson, 954 P.2d at 563.
135. See id. (citing People v. Superior Court (Himmelsbach), 230 Cal. Rptr. 890, 898 n.8 (Cal. Ct. App. 1986)). In Himmelsbach, the people argued that the language of Penal Code section 12311 (which prevented persons who were convicted of certain crimes from receiving probation or a suspended sentence) precluded a stay under section 654. However, the Himmelsbach court rejected this contention, stating the legislature could have included an exception for sentences stayed under 654, but it did not. See Himmelsbach, 230 Cal. Rptr. at 898. Similarly, the Benson court determined that if the Three Strikes law was only meant to include certain types of stays, the electorate and the legislature could have so indicated. See Benson, 954 P.2d at 563.
136. See id.
137. See id.
previously afforded the defendant at sentencing. Thus, regardless of whether the violent felony consisted of a single or several acts, a repeat felon should be treated as a second strike offender.

With legislative goals in mind, the court applied the Three Strikes law to the case at bar. According to the legislature, Benson’s two prior felony convictions yielded two strikes. He received the benefit of section 654 in his earlier proceeding and received a single sentence. Only when Benson reoffended did he face prolonged incarceration. The court reasoned that the Three Strikes law provided Benson with notice that he would be treated as a recidivist if he reoffended, and he chose to ignore that notice. Thus, the California Supreme Court treated Benson as a second strike offender pursuant to the Legislative and electorate intent.

The court rejected Benson’s argument that treating a defendant who committed two crimes against a single victim in a single act and who received one sentence as a second strike offender is contrary to the principles behind the Three Strikes law. The court found that the electorate and Legislature

138. See id. at 564.
139. See id. at 563, (citing People v. Askey, 56 Cal. Rptr. 2d 782 (Cal. Ct. App. 1996)). In Askey, the defendant contended that the Three Strikes law failed to give adequate notice of the specific punishment to be imposed in a third strike case. The defendant argued that the law is unclear on how courts are to determine how many strikes a defendant has. The court held that the defendant’s thirteen prior felony convictions provided adequate notice of the penalty to be imposed. See Askey, 56 Cal. Rptr. 2d at 785.
140. See Benson, 954 P.2d at 563.
141. See id.
142. See id.
143. See id. at 564.
144. See id. The court stated that the Three Strikes law provided Benson with notice that he would be treated as a recidivist if he reoffended. The majority concluded that Benson must bear the consequences of his actions since he chose to ignore that notice and commit another felony. See id.
145. See Benson, 954 P.2d at 564. The court also noted that their analysis does not suggest a repeal of section 654, and the opinion should not affect the application of section 654 in other contexts. See id.
146. See id. See also Petitioner’s Brief on the Merits, People v. Benson, No. S061678 (filed Oct. 29, 1997). Benson argued that the purpose of the recidivist statute is to punish more severely persons who persist in violating the law. Benson contended that if an offender has committed one prior act he or she is eligible for enhanced sen-
could rationally conclude that a person who had committed additional violence during a prior serious felony should be treated more harshly than someone who committed the same initial felony without the violence. According to the court, Benson demonstrated that he posed a more serious threat to public safety because of his needless violence in 1979, and now deserved a harsher sentence.

Finally, the court rejected Benson’s assertion that “dramatic and harsh results” would result if the court interpreted the Three Strikes law as qualifying a prior conviction for a serious or violent felony that had been stayed under section 654 as a separate strike. The court stated it was not at liberty to alter the intended effect of the statute on such grounds. However, the court noted that a trial court retains discretion to strike one or more prior felony convictions in the interest of justice, thereby preventing possible “dramatic and harsh results.”

After examining the language of section 1170.12 and the statute’s legislative intent, the California Supreme Court concluded that Benson had two strikes, not one. The court remanded the case to the trial court for resentencing because the

tencing as a “second striker.” However, that individual has not committed the repeated criminal acts required for the imposition of the harshest sentence provided by the statute. See id.

147. See Benson, 954 P.2d at 564. Examples of criminal acts with additional violence the court cited included shooting or pistol-whipping a victim during a robbery, or assaulting a victim during a burglary. See id.

148. See id. The court stated that the facts of the present case provide a classic illustration of a criminal act with additional violence: “in stabbing his victim approximately 20 times, this defendant 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.” Id.

149. See id.

150. See id. (citing People v. Askey, 56 Cal. Rptr. 2d 782 (Cal. Ct. App. 1996)). The Askey court rejected the defendant’s claim that a sentence of 25 years to life in prison was excessive “because all of his strikes were incurred in a single prior proceeding,” leaving him only one chance before receiving an indeterminate sentence. Askey, 56 Cal. Rptr. 2d at 786.

151. The court noted that in People v. Romero, 917 P.2d 628, 630 (Cal. 1996), the trial court retains its discretion under Penal Code section 1385. Benson, 954 P.2d at 564. See CAL. PENAL CODE § 1385 (West Supp. 1999). Section 1385 states: “[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.” Id.

152. See Benson, 954 P.2d at 565.
trial court mistakenly believed it lacked the authority to strike a prior conviction allegation. However, the trial court has since reaffirmed Benson’s twenty-five year to life sentence, finding that it was not in the interests of justice to strike one of his convictions. Benson is now requesting review by the Court of Appeal of the trial court’s decision.

B. JUSTICE CHIN’S DISSenting OPINION

Although Justice Chin agreed with the majority that the defendant was a recidivist and deserved increased punishment under the Three Strikes law, he disagreed with the majority’s holding. Justice Chin believed that the majority’s conclusion overturned decades of case law designed to protect against multiple punishment for a single criminal act. Justice Chin first examined the history of section 654 and the procedure
courts adopted to implement it.\textsuperscript{158} He then applied that history in his analysis of the relevant portions of the Three Strikes law.\textsuperscript{159} Justice Chin argued that the majority's holding would result in unfavorable consequences, because a defendant could now receive three strikes from one incident.\textsuperscript{160} Justice Chin also argued that interpreting the Three Strikes law as allowing one punishment for one act is consistent with the purpose of the law and section 654.\textsuperscript{161} In conclusion, Justice Chin would have ruled that Benson had only one strike and not two.\textsuperscript{162}

1. Examination of the History of Section 654

In his dissent, Justice Chin noted that the original purpose of Penal Code section 654 was to guarantee that a defendant would not receive multiple punishments for a single act.\textsuperscript{163} The courts were faced with the task of protecting the defendant from multiple punishments without providing the defendant with an undeserved windfall.\textsuperscript{164} Justice Chin also recognized that, although multiple convictions are allowed when a defendant has committed several offenses based on a single act or an indivisible course of conduct, multiple punishments are not.\textsuperscript{165} As a result, he argued, the Three Strikes law should not be

\textsuperscript{158} See id. at 566-568.
\textsuperscript{159} See id. at 568-571.
\textsuperscript{160} See id. at 571.
\textsuperscript{161} See id.
\textsuperscript{162} See Benson, 954 P.2d at 571.
\textsuperscript{163} See id. at 566 (Chin, J., dissenting). See supra note 94 for the text of Penal Code section 654.
\textsuperscript{164} See Benson, 954 P.2d at 566 (Chin, J., dissenting). For example, if a person commits a battery with serious bodily injury and felony assault in a single act, and is convicted of each crime, section 654 would prohibit multiple punishment. The defendant would be sentenced for felony assault, which proscribes the longest punishment. Yet the courts were faced with the dilemma of ensuring that the defendant would not be set free if the felony assault charge was dismissed. See id.
\textsuperscript{165} See id. Justice Chin relied on the Supreme Court's decision in Pearson, 721 P.2d 595 (Cal. 1986), where the court recognized the general rule that "defendants may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct." Benson, 954 P.2d at 566 (quoting Pearson, 721 P.2d at 596) (Chin, J., dissenting). However, Chin noted, the courts had to decide how to treat multiple convictions that could be punished but once. See Benson, 954 P.2d at 566 (Chin, J., dissenting). See supra note 117 for facts and holding of Pearson.
read to increase punishment when multiple convictions resulted from one act.166

Justice Chin noted that early courts were often inconsistent in applying the law.167 Several courts set aside excess convictions in order to avoid double punishment instead of staying the sentence.168 In People v. Niles,169 the court developed the modern procedure of staying the impermissible punishment by staying the sentence on the lesser offense.170 This procedure allowed the court to simultaneously convict the defendant of multiple offense and avoid multiple punishment.171

166. See Benson, 954 P.2d at 566.
167. See id.
168. See id. See People v. McFarland, 376 P.2d 449 (Cal. 1962). In McFarland, after someone detected their stolen vehicle at the defendant's house, the police searched the defendant's residence, and discovered stolen articles from several different burglaries. See id. at 451. Even though he received two convictions from one of the incidents, the Supreme Court found that a sentence could not be imposed for both because of Penal Code section 654's prohibition of punishment for multiple convictions from one transaction. See id. at 455. Thus, the court decided to set aside the excess conviction, finding "[t]he appropriate procedure therefore, is to eliminate the effect of the judgment as to the lesser offense insofar as the penalty alone is concerned." Id. at 457. In Benson, Justice Chin noted this was the procedure until the modern method of staying the impermissible punishment developed. See Benson, 954 P.2d at 566 (Chin, J., dissenting).
169. 39 Cal. Rptr. 11 (Cal. Ct. App. 1964). In Niles, the defendant was convicted of burglary and assault by means of force likely to produce great bodily injury. See id. at 13. The Court of Appeal held that pursuant to Penal Code section 654, the defendant could not be punished for both the burglary and assault, since they arose from the same transaction. In order to avoid double punishment, the court stayed the sentence on the burglary charge. The California Court of Appeal affirmed the stay of execution of sentence, since the defendant's actions constituted an indivisible transaction. See id. at 15.
170. See Benson, 954 P.2d at 566.
171. See id. Justice Chin acknowledged several other cases where the stay procedure had been further developed. See id. In In re Wright, 422 P.2d 998 (Cal. 1967), the defendant was convicted of kidnapping for the purpose of robbery, first degree robbery of the first victim, and first degree robbery on another victim. See Wright, 422 P.2d at 999. The trial court imposed concurrent sentences for the kidnapping and robbery of the first victim, even though section 654 prohibited multiple punishment because the crimes were based on one act. The Supreme Court determined that concurrent sentencing would not satisfy section 654, and cited the then new stay procedure of People v. Niles as a valid method to satisfy section 654. The court then set aside the sentence for the robbery. See Wright, 422 P.2d at 1002. Justice Chin noted the contribution to the modern stay procedure made in Pearson. See Benson, 954 P.2d at 566 (Chin, J., dissenting). In Pearson, the Supreme Court balanced the potential windfall to the defendant in the chance that a conviction might be reversed and the prejudice to him in allowing separate sentences for different convictions from a single incident. The court
Acknowledging that California courts have followed this stay procedure for the last three decades, Justice Chin believed that the procedure satisfied section 654's mandate that the stayed conviction "under no condition, can operate to [defendant's] prejudice." Justice Chin asserted that by allowing a sentence to be enhanced based on a conviction stayed pursuant to section 654, the majority was overturning decades of case law and an established sentencing procedure.

2. The Statutory Language, Legislative History, and Purpose of the Three Strikes Law

In first evaluating the statutory language of section 654, Justice Chin recognized that "[s]ection 654 ... is presumed to govern every case to which it applies by its terms—unless some other statute creates an express exception." Justice Chin asserted the Three Strikes law did not create an express exception that would overrule the proscription of double punishment in section 654. Justice Chin argued that Benson's sentence then determined the procedure of staying the sentence instead of reversing. See Pearson, 721 P.2d at 599 (citing In re Wright, 422 P.2d at 1001-1002). Justice Chin noted that the Pearson court concluded that "[a]ny 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." Justice Chin also noted that the Pearson court specifically stated 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." Benson, 954 P.2d at 567 (quoting Pearson, 721 P.2d at 601) (Chin, J., dissenting).

See supra note 39 for definition of a stayed sentence.


173. See id.

174. Id. (quoting People v. Siko, 755 P.2d 294 (Cal. 1988)). In Siko, the defendant was convicted of three current felonies: rape, sodomy, and lewd conduct with a child, all involving the same child in the same incident. The court sentenced the defendant to consecutive terms for each of the three felonies. The defendant appealed, arguing that he could not be punished separately for all three convictions because he only committed two acts under Penal Code section 654. The prosecution argued that section 654's bar to multiple punishment was eliminated with respect to consecutive sentencing for the three offenses by Penal Code section 667.6(c). The Siko court disagreed, finding that no where in section 667.6 was section 654 expressly mentioned, and reiterated the rule that repeal by implication is disfavored. See Siko, 755 P.2d at 296.

175. See Benson, 954 P.2d at 569 (Chin, J., dissenting). Justice Chin stated "[n]othing in this language explicitly declares that a conviction for which section 654
was stayed only to comply with section 654's mandate that the conviction could not be used for any penal purpose. Accord­ingly, Justice Chin concluded that Benson's assault with intent to commit murder conviction, stayed pursuant to section 654, should not count as a strike.

Justice Chin agreed with the majority that under Pearson a defendant's sentence could not be enhanced based on prior convictions which have been stayed pursuant to section 654 unless the Legislature explicitly declared that subsequent penal or administrative action may be based on the stayed convictions. However, unlike the majority, he argued that nothing in the language of the Three Strikes law explicitly declared that a conviction for which section 654 prohibited punishment could be counted as a separate strike. Justice Chin asserted that "[t]he mere reference to a stay of execution of sentence is not such an explicit declaration. It is not the stay that affects [a] conviction's use as a strike; it is section 654." Therefore, Justice Chin concluded that the language of the Three Strikes law was not sufficiently clear to overcome the requirements of Pearson.

Justice Chin also criticized the majority's determination that language in the Three Strikes law overcame the rule of Pearson. The majority stated that the language of the introductory clause of the Three Strikes law, "[n]otwithstanding any other law ... a prior conviction of a felony shall be defined as ..." made it clear that the Legislature intended that a defen-

prohibits punishment can be a separate strike." Id. at 568 (citing Pearson, 721 P.2d 601).
176. See Benson, 954 P.2d at 568-569 (Chin, J., dissenting). Justice Chin stated that:

It does not violate section 654 to enhance a sentence for a prior conviction because the defendant is being punished for recidivism. But it does violate that section to enhance a sentence twice, once each for two prior convictions, if the convictions arose from the same act within the meaning of the section.

Id. at 568-569 (citing Pearson, 721 P.2d at 602).
177. See Benson, 954 P.2d at 569 (Chin, J., dissenting).
178. See id. at 568. See Pearson, 721 P.2d at 601.
179. See Benson, 954 P.2d at 568 (Chin, J., dissenting).
180. Id. at 569.
181. See id. at 568.
182. See id. at 569.
dant's sentence could be enhanced based on stayed convictions.\textsuperscript{183} Justice Chin disagreed with this interpretation of the statute because the language of the Three Strikes law referred only to the definition of a qualifying conviction.\textsuperscript{184} He maintained that nothing in the Three Strikes law mandated that a person be punished twice for the same act.\textsuperscript{185} Justice Chin concluded that the language of the Three Strikes law could be clearer, despite the majority's conclusion that it could not "imagine language clearer or more unequivocal."\textsuperscript{186}

Justice Chin also criticized the majority's reliance on the intent of the legislature and the electorate.\textsuperscript{187} The majority determined that the legislature and the electorate intended that all serious or violent convictions should count as strikes.\textsuperscript{188} He contended that the legislative analysis of the Assembly Bill did not demonstrate that the legislature and the electorate intended to allow multiple strikes for a single act.\textsuperscript{189} Justice Chin noted that the majority should not have relied on information from the Assembly Bill because it did not apply to Benson's case.\textsuperscript{190} Justice Chin argued that even the example used in the

\begin{quote}
\textbf{183.} Benson, 954 P.2d at 569 (Chin, J., dissenting).
\textbf{184.} See id. See CAL. PENAL CODE § 1170.12(b) (West Supp. 1999). The relevant portions of section 1170.12 provide that:
\begin{itemize}
\item Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as ... (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state ... None of the following disposions shall affect the determination that a prior conviction is a prior felony ... (A) The suspension of imposition of judgment or sentence. (B) The stay of execution of sentence.
\end{itemize}
\textbf{Id.}
\end{quote}

\textbf{185.} See Benson, 954 P.2d at 569 (Chin, J., dissenting). Justice Chin stated that this language "falls far short of an explicit declaration that the Three Strikes law has abrogated the fundamental promise that section 654 has made for over a century that a person will not be punished \textit{twice} for the same act." \textbf{Id.}

\textbf{186.} Benson, 954 P.2d at 560, 569 (Chin, J., dissenting). Justice Chin stated that if the Legislature and the electorate had really intended to allow multiple strikes for a single act, the language could have been more explicit. For example, the Three Strikes law could have stated: "Multiple convictions arising out of the same act or omission shall be multiple strikes." \textbf{Id.} at 569 n.2.

\textbf{187.} See \textit{id.} at 569.

\textbf{188.} See \textit{id.}

\textbf{189.} See \textit{id.} at 569 (Chin, J., dissenting).

\textbf{190.} See \textit{id.} Justice Chin stated that the report was relevant to People v. Fuhrman, 941 P.2d 1189 (Cal. 1997), that was brought and tried separately from Benson. \textbf{See id.} The \textit{Fuhrman} court considered the legislature's intent in determining whether prior
Assembly Bill report, a crime of violence against multiple victims, did not apply to Benson, as section 654 did not prohibit multiple punishment against multiple victims.  

3. **Unfavorable Consequences of the Majority Decision**

Justice Chin predicted that unfavorable consequences would arise from the majority decision. Under *Benson*, Chin argued, a defendant could receive three strikes from a single incident. To illustrate his point, Justice Chin gave an example of a person who stops a pedestrian at knifepoint, and demands a watch. Based on such an act, a person could be convicted of false imprisonment, assault with a deadly weapon, and attempted robbery. Each statutory violation would count as a felony because a deadly weapon is involved. Hypothetically, that person could have three strikes stemming from this one incident, because each felony would qualify as a strike. Justice Chin stated that while trial judges might dismiss the excess convictions in order to avoid multiple strikes, dismissal was not the appropriate solution because the purpose of section 654 was to avoid dismissal. Thus, Justice Chin argued that the stayed convictions should be preserved for the chance that the conviction for which the sentence was actually imposed is later dismissed.

felony convictions must have been brought and tried separately in order to qualify as multiple strikes. See *Fuhrman*, 941 P.2d at 1193.  

191. See *Benson*, 954 P.2d at 563. The majority cited the example that “a single act of robbery of three people in a store could result in a sentence of 25 years to life. Likewise, one case with two counts of a serious felony would subject the defendant to a life sentence for any future felony.” *Id.* (alteration in original). Justice Chin argued that that scenario involves a crime of violence against multiple victims. See *id.* at 569 (Chin, J., dissenting).  

192. See *id.* at 570 (Chin, J., dissenting).  

193. See *id.*  

194. See *id.*  

195. See *id.*  

196. See *Benson*, 954 P.2d at 570 (Chin, J., dissenting).  

197. See *id.*  

198. See *id.* Moreover, Justice Chin stated, the stay procedure has been the practice for 30 years. See *id.*  

199. See *id.*
Justice Chin also attacked the majority’s description of section 654 as providing the defendant with leniency.\textsuperscript{200} He stated that section 654 had served as a basic and necessary provision of California’s criminal justice system for over a century, managing to ensure that no person may be punished more than once for a single act involving a single victim.\textsuperscript{201} He stressed that the court was neither lenient in sentencing Benson in 1980, nor was the court lenient now.\textsuperscript{202} Instead, Justice Chin found Benson’s treatment as a two-strike offender to be excessive.\textsuperscript{203}

4. Interpreting the Three Strikes Law as Allowing One Punishment for One Act is Consistent with the Purpose of the Three Strikes Law and Section 654

Justice Chin further argued that permitting an exception for a stay pursuant to section 654 will not make the Three Strikes law’s reference to “[t]he stay of execution of sentence” meaningless.\textsuperscript{204} He contended that other types of stays could be included within the meaning of the statute.\textsuperscript{205} As examples, Justice Chin referred to a stay granted for probation and also to a stay granted when a defendant’s appeal is pending.\textsuperscript{206} Justice Chin argued that this portion of the Three Strikes law prevented defendants from claiming a conviction was not a strike merely because it was stayed.\textsuperscript{207} Justice Chin asserted that the provision was meant to include other types of stays, and that...

\textsuperscript{200} See id.

\textsuperscript{201} See Benson, 954 P.2d at 570 (Chin, J., dissenting).

\textsuperscript{202} See id.

\textsuperscript{203} See id.

\textsuperscript{204} Id.

\textsuperscript{205} See id.

\textsuperscript{206} See Benson, 954 P.2d at 570 (citing \textit{In re Wright}, 422 P.2d 998, 1002 (Cal. 1967)) (Chin, J., dissenting). The \textit{Wright} court noted these examples in determining whether to follow the then new stay procedure created in \textit{People v. Niles}. See \textit{Wright}, 422 P.2d at 1002. Justice Chin also recognized that a stay is permitted if the term exceeds statutory limits or to allow defendants to put their affairs in order. See Benson, 954 P.2d at 570 (Chin, J., dissenting).

\textsuperscript{207} See Benson, 954 P.2d at 570 (Chin, J., dissenting). As an example, Justice Chin stated that “if a person is convicted of a serious felony and sentenced to state prison, but the court stays the sentence pending appeal, and the person then commits another felony, the earlier conviction could qualify as a strike despite the stay.” Id.
this interpretation was consistent with the purpose of section 654.208

Justice Chin denied the majority's assertion that he was rewriting the Three Strikes law to provide that "the stay of execution of sentence, except those stays mandated by section 654" shall count as strikes.209 However, Justice Chin argued the fundamental principle of section 654 was that a person may be punished only once for the same act; the stay was merely a procedural tool devised to comply with that principle.210 This stay procedure has existed for almost three decades, and the language of the Three Strikes law was not explicit enough to change it.211 Instead, he argued the majority transformed the Three Strikes law to require that regardless of how a conviction was stayed, it would count as a strike.212

5. Benson's Single Intent Should Preclude Multiple Punishment Under the Three Strikes Law

Justice Chin agreed with the majority that a person who committed additional violence in the course of committing a felony deserved harsher treatment than an individual who committed the same felony without the additional violence.213 Yet his opinion diverged from the majority's because Justice Chin focused on crimes committed with different intents.214 He recognized that section 654 does not prohibit multiple punishment for all crimes committed on one occasion.215 Rather, mul-
tiple punishment is prohibited for crimes if the perpetrator has a single intent. Justice Chin claimed Benson committed no "additional" violence during this crime because Benson's intent for both the burglary and the assault constituted one act of violence on his neighbor. Thus, although a defendant who commits "additional" violence with separate intents deserves harsher treatment, Justice Chin believed Benson did not deserve harsher treatment because his act in 1979 against his neighbor involved only one intent.

Finally, Justice Chin agreed with the majority that the Three Strikes law provides a defendant with notice that if he or she reoffends, the defendant will be treated as a recidivist. He agreed that the Three Strikes law provided Benson with such notice. However, Chin concluded, that although Benson should be treated as a recidivist, he should not be punished twice for the same act.

VI. CRITIQUE

The majority erroneously concluded that the language of the Three Strikes law was clear. The contention that a stay of execution of sentence should be more broadly interpreted is supported by clear statutory language, the legislative history of the

See id. (citing People v. Latimer, 858 P.2d 611, 617 (Cal. 1993)). In each of these situations, Justice Chin explained, under Fuhrman, multiple strikes would be allowed. See Benson, 954 P.2d at 571 (Chin, J., dissenting). See Latimer, 858 P.2d at 612. In Latimer, the defendant kidnapped a woman, drove her into the desert, and then raped her and left her behind. The Supreme Court determined that the defendant could not be punished for both the kidnapping and the rape under 654, since the defendant had only a single intent and objective. See id. at 616.

216. See Benson, 954 P.2d at 571 (Chin, J., dissenting).
217. See id.
218. Id.
219. Id.
220. See id.
221. See Benson, 954 P.2d at 571 (Chin, J., dissenting).
222. See id. Chin stated "[t]he issue is not whether defendant is a recidivist but whether he should be punished twice for the same act. Defendant clearly had a strike against him when he stole the cigarettes. The sole question is whether he had two strikes. He did not." Id.
Three Strikes law, and the history of Penal Code section 654.\textsuperscript{223} Furthermore, the majority's reliance on the ballot history of the Three Strikes law and legislative intent is confused and inaccurate. The majority pieced together the language from the ballot history in order to support its conclusion, and cited an inappropriate example of the application of section 654 in its argument.\textsuperscript{224} In addition, the majority's conclusion that Benson deserved a harsher sentence because he committed an additional act of violence is questionable, as Benson only had the intent to commit a single felony. Further, the majority's reliance on dismissal as an alternative to preserving the conviction with a stay may result in unwelcome results in the future. Finally, under the holdings of Benson and Romero, the discretion awarded to trial courts may result in inconsistent judgments.

A. THE LANGUAGE OF THE THREE STRIKES LAW IS NOT EXPLICIT

The majority stated that it could not imagine the language of the Three Strikes law to be clearer.\textsuperscript{225} However, as Justice Chin pointed out, it is quite easy to imagine clearer language.\textsuperscript{226} Instead of merely stating that the "stay of execution of sentence" shall not affect the determination of what is a qualifying strike, the Three Strikes law could provide that "[m]ultiple convictions arising out of the same act or omission shall be multiple strikes."\textsuperscript{227}

When the language of a statute is clear and unambiguous, courts should not look beyond the plain meaning of the words of the statute to interpret it.\textsuperscript{228} In addition, Penal Code section 654 should only yield to the Three Strikes law if the enhancement statute calls for a contrary result in "clear and unambi-

\textsuperscript{223} See People v. Benson, 954 P.2d 557 (Cal. 1998).
\textsuperscript{224} See id.
\textsuperscript{225} See Benson, 954 P.2d at 561. The legislature can overcome the mandate of section 654 that a defendant can only receive one sentence for convictions arising from a single transaction if it explicitly declares that subsequent penal action can be based on the stayed convictions. See Pearson, 721 P.2d 595, 601 (Cal. 1986).
\textsuperscript{226} See Benson, 954 P.2d at 569 (Chin, J., dissenting).
\textsuperscript{227} Id.
\textsuperscript{228} See id. at 560.
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guous terms.229 However, because the language of the Three Strikes law is unclear, the court should have attempted a more indepth interpretation and considered the purpose and history of section 654.230 Section 654 was enacted to provide a guarantee to all defendants that they would not receive multiple punishments for a single criminal act, having one objective and one intent.231 The Supreme Court had previously struck down a similar challenge to section 654's bar to multiple punishment because the legislature did not expressly mention the section, stating that "repeal by implication is disfavored."232 Yet the Benson majority disregarded this rule and defeated section 654's purpose by enhancing Benson's sentence based on a conviction for which he did not receive a sentence.233

229. MENASTER & RICCIARDULLI, supra note 47, at 31. Critics have argued that the Three Strikes law is far from clear and unambiguous that any exception for section 654 was intended: "[Penal Code section] 654 has been around for a long time, and it takes very clear language to override it; this is not the situation here." Id.

230. See Benson, 954 P.2d at 565 (Chin, J., dissenting).

231. See id. at 568. Section 654 mandates that a conviction cannot be used for any penal purpose. That section is violated by enhancing a sentence twice with two prior convictions if the convictions arose from the same action. See id. See also People v. Miller, 558 P.2d 552, 560-561 (Cal. 1977). The Supreme Court has recognized that the purpose of section 654, which prohibits double punishment, is to ensure that a defendant's punishment will be commensurate with his criminal liability. The defendant in Miller was convicted of robbery in the first degree, burglary in the first degree, and assault with a deadly weapon after robbing a jewelry store and shooting the store security guard, and received a sentence for each conviction. See id. at 555. The Supreme Court reversed, finding that section 654 precluded the imposition of sentence for the assault conviction. The court held that the assault was committed during the same course of conduct and against the same victim as in the case of the aggravated burglary conviction and the defendant could not be punished for both of those convictions. See id. at 561.

232. People v. Siko, 755 P.2d 294, 296 (Cal. 1988). In Siko, the prosecution argued that section 654's bar to multiple punishment was eliminated with respect to consecutive sentencing for the three offenses by Penal Code section 667.6(c). The Supreme Court disagreed, stating that "[a]s a general rule of statutory construction, of course, repeal by implication is disfavored. Such repeal is particularly disfavored when, as here, the statute allegedly repealed expresses a legal principle that has been a part of our penal jurisprudence for over a century." Id. See supra note 174 for further discussion of Siko. Courts of Appeal have also held that in other situations the Three Strikes law did not override section 654. See People v. Martin, 38 Cal. Rptr. 2d 776 (Cal. Ct. App. 1995), holding that section 654 will sometimes bar consecutive sentences on multiple current convictions. See id. at 779. See also People v. McKee, 42 Cal. Rptr. 2d 707, 710 (Cal. Ct. App. 1995).

233. See Benson, 954 P.2d at 565. Benson did not receive a sentence for the assault with intent to commit murder conviction, as it was stayed pursuant to section 654. However, he did receive a ten-year sentence for the residential burglary charge. See
The majority also asserted that the language of the Three Strikes law is explicit enough to overcome the rule of *Pearson*, and that subsequent penal or administrative action could be based on stayed convictions. To overcome the rule from *Pearson*, the Three Strikes law would have to explicitly state that sentences stayed under the mandate of section 654 count as strikes. However, the language of the Three Strikes law is not clear and the Legislature did not clearly indicate whether sentences could be enhanced based on sentences stayed pursuant to section 654. Thus, the language of the Three Strikes law is not clear enough to overcome the rule of *Pearson*, and under the current configuration sentences should not be enhanced based on convictions that were stayed pursuant to section 654.

Because the Three Strikes law does not explicitly state whether convictions that have been stayed under the mandate of section 654 should count as strikes, the use of the term “stay” in the statute is ambiguous. Because the Supreme Court has held that an ambiguous statute must be construed in favor of the defendant, Benson’s assault with intent to commit murder conviction should not have counted as a strike.


234. *See Benson*, 954 P.2d at 559. As the court stated in *Pearson*, “[w]ithout [an explicit] declaration [that subsequent penal action may be based on a conviction stayed under section 654], it is clear that section 654 prohibits defendant from being disadvantaged in any way as a result of the stayed convictions.” *Id.* *See Pearson*, 721 P.2d 595 (Cal. 1986).


236. *See Benson*, 954 P.2d at 567 (Chin, J., dissenting). The majority’s interpretation of the Three Strikes law disadvantages Benson, and other similarly situated defendants who have committed a single criminal act and received multiple convictions. *See id.*

237. *See id.*

238. *Id.*

239. *See People v. Overstreet*, 726 P.2d 1288, 1290 (Cal. 1986). In *Overstreet*, the word “trial” as used in a sentence enhancement provision for felonies committed while released pending trial was ambiguous as to whether it included proceedings following determination of guilt prior to sentencing. The Supreme Court found that the ambiguity in the statute had to be construed in favor of the defendant. The court stated that:

When language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably
B. THE MAJORITY'S RELIANCE ON THE BALLOT HISTORY AND LEGISLATIVE INTENT IS CONFUSED AND INACCURATE

The majority's conclusion that the ballot history and legislative intent supported the use of any stayed conviction for purposes of a strike is misguided. The majority cited language from various congressional hearings and ballot pamphlets in support of its finding that the Three Strikes law over­rides section 654 in specific circumstances. However, it seems that the majority pieced the language together to fit its conclusion. In addition, the language cited by the majority does not clearly indicate that the Legislature or the electorate intended to include convictions stayed pursuant to section 654 within the scope of the Three Strikes law. Yet the majority permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute. Strict construction of penal statutes protects the individual against arbitrary discretion by officials and judges and guards against judicial usurpation of the legislative function which would result from enforcement of penalties when the legislative branch did not clearly prescribe them.

Id. See Petitioner's Brief on the Merits, People v. Benson, No. S061678 (filed Oct. 29, 1997). Similarly, since the Three Strikes law was ambiguous as to the fact if a conviction that is stayed pursuant to section 654 can count as a strike, Benson was entitled to the benefit of the doubt of the legislature's and electorate's true intent. See id.

240. See Benson, 954 P.2d at 562-563.
241. See id. See Michael Vitiello & Andrew J. Glendon, Article III Judges and the Initiative Process: Are Article III Judges Hopelessly Elitist?, 31 LOY. L.A. L. REV. 1275, 1284 (1998). The ballot pamphlets themselves have been criticized as having misled the public into voting for the electorate version of the Three Strikes law. The literature has been attacked because of its reliance on a flawed study prepared by the office of California Governor Pete Wilson. The study projected that "three strikes" would save billions of dollars. Even more misleading were claims that the law targeted rapists, child molesters, and murderers. Yet the study failed to reveal the fact that the Three Strikes law would lead to long prison sentences for aging felons convicted of non-violent third strike felonies. The public simply did not receive any contrary evidence. See id.

242. See Benson, 954 P.2d at 562 (quoting Ballot Pamp., argument in favor of Prop. 184, as presented to the voters, Gen. Elec. (Nov. 8, 1994) p.36). The majority quotes language from the Ballot Pamphlet for Proposition 184 that "[s]erious or violent convictions committed before 1994 are counted as strikes." Id. Yet this language came later in the argument in favor of Proposition 184. Directly before this statement was the story of Kimber Reynolds, the daughter of Mike Reynolds that was viciously murdered by a "career criminal." The argument went on to state that "3 Strikes keeps career criminals, who rape women, molest innocent children and commit murder, behind bars where they belong." Id. Yet the argument failed to state that persons who receive several convictions from one incident, some of which are stayed to avoid multiple punishment, will count as strikes. Voters were simply not given the information or the opportunity to make this decision, and instead were given examples of extreme criminal behavior. See id.
presumed that although the intent was not specified, all previous serious or violent felony convictions count as strikes even when the convictions were stayed pursuant to section 654.244

Justice Chin correctly recognized the inaccuracy of the example cited by the majority in support of its argument that the legislature and the electorate intended to include convictions stayed pursuant to section 654 as strikes.245 The majority's example was that a “single act of robbery of three people in a store would subject the defendant to a life sentence for any future felony.”246 However, this example involves a crime of violence against multiple victims, not convictions stayed pursuant to section 654.247 Section 654 does not prohibit multiple punishment for multiple victim crimes, and it does not apply to the court's example.248

C. BENSON DID NOT COMMIT AN ADDITIONAL ACT OF VIOLENCE

In Benson, the majority stated that Benson deserved to be “treated more harshly” because he committed an additional act of violence during the 1979 incident with his neighbor.249 However, Justice Chin correctly noted that Benson did not commit 243. See Benson, 954 P.2d at 562-563 (quoting Analysis by the Legis. Analyst, p. 33). The majority also quoted analysis by the Legislative Analyst, which also accompanied Proposition 184 that “[i]f the person has two or more previous serious or violent felony convictions, the mandatory sentence for any new felony conviction is life imprisonment.” Id. Yet nothing in this language addresses convictions stayed pursuant to section 654.

244. See Benson, 954 P.2d at 562-563.

245. See id. at 569.


247. See Benson, 954 P.2d at 569 (Chin, J., dissenting). If a defendant commits a crime of violence against different individual victims, he or she can be sentenced for each act on each person. See id. See People v. Latimer, 858 P.2d 611, 617 (Cal. 1993). Section 654 only applies when the defendant's crimes constituted one act. See supra note 215 for facts and holding of Latimer.

248. See Benson, 954 P.2d at 569 (Chin, J., dissenting).

249. Benson, 954 P.2d at 564. The majority stated that “the electorate and the Legislature rationally could—and did—conclude that a person who committed additional violence in the course of a prior serious felony ... should be treated more harshly than an individual who committed the same initial felony, but whose criminal conduct did not include such additional violence.” Id.
an additional act of violence. Instead, Benson’s acts against his neighbor constituted one act of violence. The burglary was for the purpose of committing an assault, not for a different purpose, such as theft. Under 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.

Applying this doctrine to Benson, the elements of the burglary were the same as those of the assault. The felony intent that was used to prove the burglary conviction was the intent to commit the assault on the victim, leaving Benson only with the intent to commit a single felony. Benson’s entry into his neighbor’s apartment would have been non-felonious but for the intent to commit the murder. Therefore, Benson had no criminal intent separate from the assault itself, and committed only one act of violence.

D. DISMISSAL IS NOT THE APPROPRIATE SOLUTION WHEN THE DEFENDANT COMMITTED TWO OFFENSES IN A SINGLE ACT

In rejecting the argument that dramatic and harsh results will ensue from interpreting the Three Strikes law as qualify-
ing convictions stayed pursuant to section 654 as strikes, the majoritoy mentioned in a footnote that a trial court is free to dismiss a prior conviction under Penal Code section 1385.258 Thus, the court implied that it might be an abuse of discretion for a judge not to dismiss a conviction stayed under section 654 when multiple convictions arise from a single act.259 However, as Justice Chin argued, dismissal is not the appropriate solution.260 Stayed convictions should be preserved in the event that the conviction for which the punishment was imposed is set aside for any reason.261 Otherwise, the defendant may receive a windfall and withstand no punishment at all.262 As suggested by Justice Chin, if the result of Benson’s holding is that courts entirely dismiss convictions governed by section 654, the prosecution may come to regret its victory.263 The result of a Penal Code section 1385 dismissal of a conviction is that “[t]he defendant stands as if he had never been prosecuted for the charged offense.”264 Dismissal will thus defeat the purpose of the sentence enhancement statute.

E. UNDER THE HOLDINGS OF BENSON AND ROMERO, THE DISCRETION AWARDED TO TRIAL COURTS MAY RESULT IN INCONSISTENT JUDGMENTS

Two years before Benson, in People v. Romero,265 the same court held that a trial court may, on its own motion, strike prior felony conviction allegations in the “interest of justice.”266

258. See Benson, 954 P.2d at 564.
259. See id. See Alex Ricciardulli, Three Strikes and Form Motion Update, CALIFORNIA SUPREME COURT CASES SINCE LAST PDQ, 1 (1998). Although Benson has allowed convictions stayed under Penal Code section 654 to count as strikes, all hope is not lost. A court can still dismiss a conviction under Penal Code section 1385. A court may even abuse its discretion if it does not dismiss the prior conviction. Furthermore, there are constitutional due process concerns underlying Penal Code section 654, which the Three Strikes law cannot override that may prevent multiple strikes. See id.
260. See Benson, 954 P.2d at 570 (Chin, J., dissenting).
261. See id.
262. See id.
263. See id.
264. Ricciardulli, supra note 259, at 2 (quoting People v. Alvarez, 56 Cal. Rptr. 2d 814, 820 (Cal. Ct. App. 1996), rev’d in part 928 P.2d 1171 (Cal. 1997). The court held that the result of a 1385 dismissal is that “[t]he defendant stands as if he had never been prosecuted for the charged offense.” Id.
265. 917 P.2d 628 (Cal. 1996).
266. Romero, 917 P.2d at 630.
The Benson and Romero holdings change the whole landscape of the Three Strikes law because the trial court has discretion as to whether they should follow the sentencing guidelines adopted by the Legislature and the electorate.267 On one hand, Romero makes it easier for recidivists to avoid an indeterminate life sentence prescribed by the Three Strikes law by granting the trial court judge discretion to dismiss a qualifying strike.268 Yet, on the other hand, Benson grants a trial court discretion to count a sentence stayed under Penal Code section 654 as a strike, making it harder on recidivists.269 Thus, the range of penalties may increase dramatically.270

This situation is problematic because the Legislature and the electorate may not have intended the court to have discretion to dismiss priors, or may not have intended that a stayed conviction under section 654 should count as a strike.271 Even more uncertain is whether the Legislature and the electorate intended for trial courts to have this much latitude in sentencing.272

Due to a trial court’s discretion, sentences may become inconsistent among the California courts, thereby frustrating uniform determinate sentencing goals.273 Because the Romero

267. See Interview with Mort Cohen, Professor of Law at Golden Gate University School of Law, in San Francisco, CA. (Aug. 17, 1998). See Cal. Ct. Rule 428(a) (West Supp. 1999). The California court rule setting forth the criteria for a judge to determine whether or not to impose enhancement states: “If the judge has statutory discretion to strike the additional term for an enhancement, the court may consider and apply any of the circumstances in mitigation enumerated in these rules or, pursuant to rule 408, any other reasonable circumstances in mitigation that are present.” Id.

268. See Romero, 917 P.2d 628.

269. See Benson, 954 P.2d 557.

270. See Daniel P. Kessler & Anne Morrison Piehl, The Role of Discretion in the Criminal Justice System, 14 J.L. ECON. & ORG. 256, 257 (1998) (recognizing that discretion can enable participants in the criminal justice system to nullify legitimately adopted sentencing laws and to impose inequitable sentences based on irrelevant characteristics of defendants and crimes).


272. See id.

273. See Kessler & Morrison Piehl, supra note 270, at 257. See Assembly Committee on Public Safety: Hearings on S. 2048 Before the Senate Committees on Judiciary, Criminal Procedure and Budget and Fiscal Review, 199-1998 Legis., June 30, 1998 (statement of Judith M. Garvey). The legislature has also been concerned with the amount of discretion given to the trial court. As argued in a California Assembly
decision did not define what reasons justify dismissing strikes, and Benson did not set guidelines on why a trial court should count a stayed conviction under section 654 as a strike, the severity of sentences could greatly differ among defendants. In light of this unwieldy discretion, different defendants under similar circumstances could potentially receive two completely different sentences.

For example, a defendant with two strikes based on prior convictions for robbery and residential burglary, who commits another residential burglary must spend twenty-five years in prison before being eligible for parole. Another defendant in the same circumstances may have the first residential burglary dismissed because the trial judge deemed it to be in the interest of justice. The second defendant would only have two strikes under the Three Strikes law and could be sentenced to thirteen years in prison. Accordingly, under the court’s interpretation of the Three Strikes law and the discretion given to the trial court, two defendants in the same circumstances who committed the same crimes could have sentences differing by twelve years.

Committee on Public Safety in determining whether to limit what can count as a strike to strictly felonies that are considered serious or violent:
Selective enforcement of the law is an ever-present risk, and the risks become more significant when a life sentence can result from a non-violent offense. Recent studies by the Judicial Council point out how proceedings sometimes reflect the biases and prejudices of the larger society. Although prosecutors have formed internal review procedures to reduce the chances that the law is applied selectively, some panels conducting these reviews have little or no representation.

Id.

274. See Interview with Mort Cohen, Professor of Law at Golden Gate University School of Law, in San Francisco, CA. (Aug. 17, 1998).
275. See Pressman & Kase, supra note 53, at 37.
276. See MENASTER & RICCIARDULLI, supra note 47, at 114. See supra note 47 for explanation of the calculated sentence.
277. See Pressman & Kase, supra note 53, at 33.
278. See MENASTER & RICCIARDULLI, supra note 47, at 111.
279. See id. at 114.
VII. RAMIFICATIONS OF BENSON

Since its enactment in 1994, the Three Strikes Law has been subject to much criticism and debate. Many critics claim that the law is ineffective in deterring violent crime and clogs the court system. The opposition to Three Strikes laws illustrates the dangers of relinquishing judicial discretion. However, there are those who believe that this is exactly how justice ought to be carried out. Many Three Strikes supporters are average Americans who are troubled by the prospect of criminals returning to the streets after serving light sentences. They view judicial discretion in sentencing as something that is "just not working." Others simply believe that individual judges are cursed with many of the same biases and prejudices as others in society. In their view, removing the power to sentence from the hands of one judge and placing it in the hands of the legislature creates a more balanced approach to punishment. Despite this apparent judicial hand-tying, the power to dismiss a prior strike offense remains a "discretionary weapon in the trial judge's arsenal."

Justice Chin suggests that the majority's decision will result in unfavorable consequences. Although the exact consequences are not known yet, the Benson holding is sure to affect

280. See supra note 32 for discussion on recent movements to change the Three Strikes law to only enhance sentences based on violent or serious felonies, rather than other subsequent felonies. See also supra note 53 for discussion on the claims made by critics that many offenders are receiving irrationally long sentences, even though they did not commit violent or serious offenses.

281. See supra note 54 for discussion on how the Three Strikes law clogs both the prisons and the court systems.


283. See McClain, supra note 282, at 120 n.12.

284. See Daponde, supra note 53, at 556 (determining that Chapter 160, which makes a strike for a parolee equivalent to that of a felon on probation, hinders judicial discretion).

285. Id.

286. See McClain, supra note 282, at 120 n.12.

287. See id.


289. See Benson, 954 P.2d at 570 (Chin, J., dissenting).
scores of recidivist criminals throughout California. The majority in Benson concluded that, in light of the declaration in the Three Strikes law, a stay of execution of sentence would not affect the determination of what constitutes a strike. Therefore, Benson's two prior felony convictions from the 1979 incident qualified as strikes. The majority found this conclusion to be consistent with the voters' expressed intent. The California Supreme Court then affirmed the judgment of the Court of Appeal, but remanded the case to the trial court for resentencing, because the trial court had discretion in striking a prior conviction allegation. The court stated that it expressed no opinion as to how a trial court should exercise that discretion.

VIII. CONCLUSION

One can only ask is this what the voters really intended?

291. See Benson, 954 P.2d at 570 (Chin, J., dissenting).
293. See Romero, 917 P.2d 628.
294. See supra note 133 for an example of an act that may result in three strikes.
296. See id.
297. See id. As the California Supreme Court held in Romero, the trial court has the discretion to strike a prior conviction allegation in the "interest of justice" pursuant to Penal Code section 1385. Id.
298. See id.
Yet it remains questionable whether the legislature and voters really intended for a single act that may only be punished once may generate two strikes.299 Allowing a single criminal act with one intent to result in two strikes defeats both the history and purpose of section 654.300 After the Supreme Court decisions in Benson and Romero trial courts are encouraged to dismiss prior conviction allegations in order to avoid multiple punishment for a single act.301 The discretion granted to trial courts by these two cases opens the door for unfair sentences that will clog both the prisons and the appellate courts.302 Only time will tell if California courts and its citizens will ultimately suffer from the reasoning of the Benson decision.

Dawn Philippus*

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300. See supra notes 225-239 for critique of how the Benson court's interpretation of the Three Strikes law defeats the history and purpose of Penal Code section 654.
301. See supra note 151 and the accompanying text for the court's analysis of how a strike should be dismissed if it is in the interests of justice.
302. See id.

* Golden Gate University School of Law, Class of 2000. Special thanks to my editor Bergen Herd, my faculty advisor Professor Mort Cohen, and defense attorney in People v. Benson, Russell Babcock. I would also like to thank my friends and family who have supported me throughout this process. Lastly, I would like to thank Kurt Winkel for his endless support and encouragement.