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## FISCAL IMPACT REPORT

SPONSOR Gentry ORIGINAL DATE 1/25/2018  
LAST UPDATED \_\_\_\_\_ HB 18  
SHORT TITLE Three Strikes Enhancement SB \_\_\_\_\_  
ANALYST Edwards

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	\$0.0	\$1,567.2	\$3,134.5	\$4,701.7	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
Attorney General's Office (NMAG)  
New Mexico Sentencing Commission (NMSC)  
Law Office of the Public Defender (LOPD)  
New Mexico Corrections Department (NMCD)

#### Responses Not Received From

Administrative Office of the District Attorneys (AODA)

### SUMMARY

#### Synopsis of Bill

HB 18 proposes to amend Section 31-18-23 NMSA 1978 regarding life imprisonment for three violent felony convictions.

<u>Currently Included</u>	<u>Additional Crimes</u>	<u>Expanded Scope</u>
First and second degree murder	Voluntary manslaughter	Kidnapping resulting in great bodily harm
Second degree shooting at or from a motor vehicle	Third degree aggravated battery inflicting great bodily harm	Criminal sexual penetration and aggravated criminal sexual penetration
Kidnapping resulting in great bodily harm by captor	Second degree shooting at a dwelling or occupied building inflicting great bodily harm	Robbery while armed with a deadly weapon
Aggravated, first degree criminal sexual penetration	Third degree aggravated battery against a household member	
Armed robbery resulting in great bodily harm	First degree abuse of a child	
	Aggravated arson	
	Aggravated assault upon a peace officer	
	Assault with intent to commit a violent felony upon a peace officer	
	Third degree aggravated battery upon a peace officer inflicting great bodily harm	

The provisions of this act apply to persons who have been convicted on, before or after the effective date of this act of one of the violent felonies described in Section 1 of this act for the purpose of determining sentencing enhancements pursuant to that section for subsequent violent felony convictions on or after the effective date of this act. This stipulation could create a wave of new individuals sentenced to prison without possibility of parole.

House Bill 18 does not amend Section 31-21-10 NMSA 1978, which provides for parole for persons sentenced to life imprisonment and for persons sentenced for most first, second, third or fourth degree felonies.

**FISCAL IMPLICATIONS**

The fiscal impact of this bill will be large. The LFC and NMSC project (see attachment 1) incarceration costs alone over the next 15 years could cause a general fund impact of \$23.5 million. The courts state there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, and appeals from convictions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

See attachment 1.

## SIGNIFICANT ISSUES

The NMAG suggests the bill provides “additional grounds for prosecutors to seek sentence enhancements for violent offenders.” The NMAG suggests other offenses that may fairly be considered “violent” which the drafters may want to consider adding to the definition of violent felony are (1) third degree robbery, § 30-16-2, (2) criminal sexual contact, § 30-9-12(A), and criminal sexual contact of a minor, § 30-9-13.

New Mexico’s three strikes law (Sections 31-18-23 and 31-18-24 NMSA 1978) was enacted in 1994. Section 31-18-24 NMSA 1978 (not included in HB 18) sets forth sentencing procedures if a three strikes sentencing enhancement is pursued:

“31-18-24. Violent felony sentencing procedure.

- A. The court shall conduct a separate sentencing proceeding to determine any controverted question of fact regarding whether the defendant has been convicted of three violent felonies. Either party to the action may demand a jury trial.
- B. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. In a nonjury trial, the sentencing shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by a jury upon demand of the defendant.
- C. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow arguments. The jury shall retire to determine the verdict. In a nonjury sentencing proceeding, or upon a plea of guilty where no jury has been demanded, the judge shall allow argument and determine the verdict.”

New Mexico Sentencing Commission staff reviewed available New Mexico criminal justice data and were unable to find an instance when an offender received a three strikes sentencing enhancement.

According to NMSC, roughly half of the states have enacted some form of three strikes statutes, with most enacting theirs around the time New Mexico did in 1994. The most recent was Massachusetts in 2012. Notably, that same year California voters passed Proposition 36, which provides that a three strikes life sentence can only be imposed if the third felony is serious or violent; this was significant as the California three strikes law was in many ways the model for the national discourse on these laws. Most states have modified, sometimes extensively, their three strikes laws since they were initially adopted (see attachments).

LOPD submitted the following analysis to HB 18:

Since a mandatory life sentence is at issue, a person charged with a third felony would be much more likely to demand a full trial in the hopes of either acquittal or at least conviction of a lesser included offense that would not trigger a life sentence. This bill would significantly increase the number of such trials.

Such an increase in cases going to trial – for cases that, due to their seriousness, often involve more complex trials than others – would certainly impact resources of the Law Office of the Public Defender [hereinafter LOPD], and those of the courts and DAs, as

well. However, it is impossible to predict the number of such eligible charges or to quantify the number of these additional felonies would constitute third offenses for LOPD clients.

Under the present statutory scheme, LOPD workload is so heavy in some offices that lawyers have been required to move to withdraw from new cases in order to provide effective assistance of counsel to their existing clients. The Legislature and LFC are well aware of the myriad constitutional concerns implicated in forcing indigent criminal defendants to proceed without effective assistance of counsel.

Barring some other way to reduce indigent defense workload, any increase in the number of felony prosecutions would bring a concomitant need for an increase in indigent defense funding in order to keep this problem from spreading. Of course accurate prediction of the fiscal impact would be impossible to speculate; assessment of the required resources would be necessary after the implementation of the proposed statutory scheme.

LOPD, in response to previous three strikes bills, stated that the purpose of the three strikes law as it currently exists is to identify recidivist criminals who show a “violent nature,” or “proclivity for violence,” and impose a life sentence for the safety of the public. LOPD expressed concern that “New Mexico has many felonies that are broadly worded enough to include both violent and non-violent conduct; the bill does not make the distinction to target only people who commit crimes in a violent way, and thus evidence a recidivist tendency justifying life in prison in order to protect the community.” LOPD stated that the lack of definition may sentence criminals who are not violent and may not warrant a life sentence.

LOPD previously provided examples of the broad nature of the bill, including the following: “kidnapping can include holding someone by the arm to make them take money out of an ATM. The bill does not limit itself to first degree kidnapping, and second degree kidnapping is defined as simply restraint with a particular intent; no actual harm need be suffered. Furthermore, even first degree kidnapping involves only ‘injury,’ and not great bodily harm, so that a scratch or bruise would suffice to be considered ‘violent’ under this bill.” The LOPD is concerned that accruing offenses eligible under the broad categories of the bill could quickly and unnecessarily sentence someone to life in prison.

LOPD previously stated that “maintaining the great bodily harm requirement for all offenses that do not inherently require it is the best way to focus on individuals who repeatedly behave in a violent manner, and not just individuals who recidivate criminally. Section 31-18-17 NMSA 1978 already provides for significant sentencing enhancements for repeat felons, without imposing a life sentence. The life sentence provision should be targeting people whose level of violence justifies an extreme sentence for the safety of the community, recognizing that it is significantly greater than the penalty for any of the individual crimes, particularly where Section 31-18-23 NMSA 1978 does not allow any judicial discretion to find that a particular defendant is not in fact violent or a danger to the community.”

Finally, LOPD previously asserted that “the proposed additional felonies, as a third felony offense, would still be subject to a four-year mandatory sentencing enhancement under Section 31-18-17, the habitual offender enhancement statute applicable to all non-capital felonies (a

fourth or subsequent felony offense incurs a mandatory eight year enhancement). Because that enhancement term applies to each felony in a new proceeding, it is a practical reality that habitual offender enhancements in a single case often total 12 or 16 years.”

Societal benefits, particularly to potential victims, would also accrue through enhanced sentences if they reduce or delay re-offenses. LFC cost-benefit analysis of criminal justice interventions shows that avoiding victimization results in tangible benefits over a lifetime for all types of crime and higher amounts for serious violent offenses. These include tangible victim costs, such as health care expenses, property damage, losses in future earnings, and intangible victim costs such as jury awards for pain, suffering, and lost quality of life.

## **PERFORMANCE IMPLICATIONS**

The AOC is participating in performance-based budgeting. The bill may have an impact on the measures of cases disposed of as a percent of cases filed and percent change in case filings by case type.

## **ADMINISTRATIVE IMPLICATIONS**

LOPD noted that the proposed legislation would “certainly affect LOPD attorneys’ representation in cases where a potential third violent felony is charged, increasing the number of these cases that go to trial.”

## **ALTERNATIVES**

LOPD previously stated “maintaining the great bodily harm requirement for all offenses that do not inherently require it is the best way to focus on individuals who repeatedly behave in a violent manner, and not just individuals who recidivate criminally.” LOPD also stated that Section 31-18-17 NMSA 1978 provides for sentencing enhancements for repeat felons, without imposing a life sentence. The LOPD believes that a life sentence should be retained only for those individuals whose actions truly warrant the sentence. As an alternative, the Legislature could revisit the basic habitual offender statute.

## **OTHER SUBSTANTIVE ISSUES**

NMSC cautions care should be taken to ensure that the applicability section set forth in HB 18 does not violate the provisions of Article II, Section 19 of the New Mexico Constitution preventing retroactive laws, bills of attainder, and impairment of contracts: “no ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature.”

NMSC explained that many states, including New Mexico, have adopted “truth in sentencing” laws. Such laws typically require “serious violent offenders” to serve not less than 85 percent of their sentence. The attached New Mexico Sentencing Commission reports include information on time served by serious violent offenders (males and females) in New Mexico.

TRE/sb

NMSC provided an extensive cost simulation, provided below:

### Simulation of Number of Offenders 2000 -2014

To determine the impact of expanding the list of qualifying offenses subject to mandatory life imprisonment for three violent felony convictions, the New Mexico Sentencing Commission (NMSC) used data provided by the courts to run a simulation. Table 1 contains the list of charges that were used in the analysis.

Table 1. Charges

First Degree Murder
Second Degree Murder
Voluntary Manslaughter
3rd Degree Aggravated Battery GBH
2nd Degree Shooting at a Dwelling of Occupied Building
2nd Degree Shooting at or from a Motor Vehicle
3rd Degree Aggravated Battery HHM
Kidnapping
1st Degree Child Abuse
1st Degree CSP
1st or 2nd Robbery
Aggravated Arson
Aggravated Assault Upon a Peace Officer
Assault with Intent to Commit a Violent Felony Upon a Peace Officer
Aggravated Battery Upon a Peace Officer GBH

NMSC has data on court cases disposed from 2000 – 2014. For the simulation, NMSC tried to determine the effect if the law had been changed in 2000 to include the charges in Table 1. NMSC selected all cases that had a conviction on any of the above charges from 2000 – 2014. NMSC then counted the number of convictions by offender. Over the 15-year period, 8,355 individuals were convicted for one of the charges at least once. Table 2 contains the number of individuals that were convicted once, twice or three times or more over the 15-year time period. The percentage of offenders who had three or more convictions was 0.4%. This would yield an estimated additional 35 offenders in the New Mexico Corrections Department serving life sentences over the first 15 years of the statute implementation. There were 379 offenders who had two convictions during the time period on these charges (4.5%).

Table 2. Number of Offenders by Number of Convictions

Once	7,941	95.0%
Twice	379	4.5%
3 times or more	35	0.4%
Total	8,355	100%

### **Estimating Differences in Sentence Lengths**

To estimate the difference in sentence lengths, NMSC used NMCD release data. NMSC looked at the average time from sentence date to release date for each of the charges. NMSC found the averages varied widely by charge, ranging from 2 to 21.5 years. It is important to note that this average does not include any pre-sentence confinement credit, so the actual amount of time served is probably higher.

NMSC then calculated the weighted average, which takes into account the number of offenders who served time for each charge relative to the total number. For example, first degree murder has the longest average. However, there are fewer offenders who serve time on that charge compared to a charge like third degree aggravated battery, which has a large number of offenders and a significantly shorter average sentence to release length. The weighted average from sentence date to release date across all these crimes was 4.8 years. If upon the third conviction for one of these crimes, the offender was subject to a 30-year sentence, NMSC estimates that the average time from sentence to release would be 25.5 years, if an offender earned all available meritorious deduction. This would be an increase in sentence of 20.7 years.

### **Estimate Cost of Increased Sentence Length**

Using the department's FY15 average cost to incarcerate a male inmate of \$44,778 per year in a state-owned prison, LFC estimates project the individual impact per inmate per year would be \$1.3 million across a 30-year prison sentence. The cost would be up to \$23.5 million if all 35 offenders who had three or more convictions on these charges received a 30-year sentence. In addition, trial costs could be as much as \$480 thousand.

2014

# Three Strikes Legislation

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## Three Strikes Legislation

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Three Strikes and You're Out ("Three Strikes") laws mandate long sentences for certain habitual offenders, usually 25 years to life in prison for third-time violent offenders. Since 1993, Three Strikes has been implemented for federal offenses and in at least 25 states.<sup>1</sup>

Although they share a common name, Three Strikes laws are quite diverse. The number of offenses that trigger the Three Strikes mechanism, the types of crimes counted as strikes, and the sentences mandated upon conviction vary widely. Most states have relatively narrow laws and have not sentenced many prisoners under Three Strikes. The laws of most states limit strikes-eligible offenses to a small number of violent felonies, and require three violations to trigger a mandatory sentence such as life without parole, or 25 years to life. In some states, the law can be triggered by more or fewer than three strikes (Clark et al., 1997).

The broadest and most widely used Three Strikes law was implemented in California in 1994 and not modified until 2013. Offenses eligible to count as strikes in California include 21 "violent" felonies and 25 "serious" felonies, with some overlap between the two categories. If an offender already has one strike and then commits *any* of the state's approximately 500 felonies, the sentence is automatically doubled. With two strikes, any additional felony conviction sends the offender to prison for 25 years to life. The law requires a state prison sentence in all Three Strikes cases, restricts "good time" credits to 20 percent, and prohibits plea bargaining. As of October 2005, over 87,500 individuals had been sentenced under the second- and third-strike provisions of California's Three Strikes law, including over 7,500 offenders who received a sentence of 25 years to life in prison for a third strike (Legislative Analyst's Office, 2005). In comparison, no other state has sentenced more than 400 offenders under a Three Strikes law (Chen, 2008a). However, in order to reform the harsh nature of the Three Strikes legislation, California

## **Despite Racial Disparities and Excessive Punishments, U.S. Supreme Court Supports Three Strikes**

### ***Lockyear v. Andrade*, 538 U.S. 63 (2003)**

For stealing about \$150 worth of videotapes, Leandro Andrade was found guilty of two felony counts of petty theft. With previous felony convictions on his record, he was sentenced to two consecutive terms of 25 years to life under California's Three Strikes law. Andrade appealed his case all the way to the U.S. Supreme Court, based on an argument that the sentence was in violation of the Constitution's protection against cruel and unusual punishment under the Eighth Amendment. In a 5 to 4 decision decided on March 5, 2003, the court upheld his sentence, stating that the previously imposed sentence was not grossly disproportionate to the offenses he committed.

### ***Ewing v. California*, 538 U.S. 11 (2003)**

On March 5, 2003, the Supreme Court also upheld the 25-years-to-life sentence of Gary Ewing, who while on parole stole three golf clubs valued at \$399 each. Ewing had been given the harsh sentence for the relatively minor crime due to the fact that he had previously been convicted of four felonies. In another 5 to 4 decision, the Court decided that Ewing's claim that his sentence was highly disproportionate to the offense with which he was charged was unfounded. His sentence was affirmed.

In both the *Lockyear* and *Ewing* cases, under California law, the thefts could have been treated as misdemeanors, which would have allowed Andrade and Ewing to avoid Three Strikes sentencing. Legal scholars have questioned whether the prosecutorial and judicial discretion exercised in these cases may have been influenced by the race and class status of the defendants. Andrade was an admitted heroin addict since 1977. Ewing was a long-time drug addict who was dying of AIDS at the time of his sentencing.

According to a report by the Policy Institute in Washington, D.C., during the first three years after the law took effect, African Americans were imprisoned under California's Three Strikes law at a rate 13 times that of Whites.

voters passed Proposition 36 in November 2012 (effective in 2013). According to this law, with two strikes, an offender would be sentenced to 25 years to life if and only if the offender commits an additional felony of a serious or violent nature (previously, the law had stated that any felony would induce a long-term sentence). With this reformatory law, the state of California is estimated to save up to \$90 million a year, and approximately 3,000 inmates serving life sentences would be eligible to petition for a reduced sentence (Sankin, 2012).

African American men, who constitute only about 3 percent of California's population, represent approximately 44 percent of third-strikers among California prison inmates (U.S. Census Bureau, 2006; California Department of Corrections and Rehabilitation, 2008). Some of the racial disparities in Three Strikes sentencing are explained by differences between Blacks and Whites in factors such as offenses committed, prior record, and parole status; however, after these "legally relevant" factors are taken into account, Blacks remain significantly more likely than Whites to receive third-strike sentences (Chen, 2008b).

Uneven application of prosecutorial or judicial discretion may be responsible for some of the Black/White disparity in Three Strikes sentences. A prosecuting attorney may file a motion to dismiss one or more prior convictions that would otherwise count as strikes, thus sparing a defendant the mandatory third-strike sentence of 25 years to life in prison if convicted (Legislative Analyst's Office, 2005). Discretion may also be exercised by prosecutors or judges to charge multiple counts, including strikes, from a single incident, or to charge certain offenses known as "wobblers" as either felonies (which trigger Three Strikes) or misdemeanors (which carry a maximum sentence of one year in jail) (Legislative Analyst's Office, 2005; Ricciardulli, 2002). The gap between Blacks and Whites in Third Strikes sentences is greater for "wobblers" than for offenses that are unequivocally charged as felonies, suggesting that discretion in "wobbler" charging may be exercised to the detriment of African American defendants (Chen, 2008b).

Studies of the crime-reduction effects of Three Strikes laws have produced mixed results. Ramirez and Crano (2003) detect few immediate impacts of Three Strikes on crime in California, some deterrence and incapacitation effects over time for violent and premeditated offenses and for "minor" crimes not targeted by Three Strikes, and no impacts on drug offenses. Worrall (2004) finds "virtually no deterrent or incapacitative effects on serious crime." Kovandzic, Sloan, and Vieratis (2002; 2004) find significant declines in crime trends for some offenses in some states in the aftermath of Three Strikes' adoption, but they also find significant increases in roughly the same number of states, suggesting either that the findings were either random statistical artifacts or that the law has both positive and negative impacts that cancel each other out on the whole. The only exception to this finding is for rates of homicide, for which more significant *increases* than declines are found (Kovandzic et al., 2004). The finding supports the hypothesis that criminals who face a Three Strikes sentence may have an increased incentive to kill potential witnesses.

The law's limited proven crime-reduction effects combined with high costs led some critics to call for reform of the law. In 2005, California's Three Strikes policy cost approximately \$500 million per year to implement, with expenses expected to

### Three Strikes Laws in Other Places

In 1994, the state of Georgia enacted a tough “two strikes” law that imposed a life sentence for a second drug offense. By 1995, the state had invoked the law against only 1 percent of White defendants facing a second drug conviction, but against more than 16 percent of eligible Black defendants. The result: by 2000, 98.4 percent of those serving life sentences in Georgia under its two strikes provision were Black.

escalate dramatically in the long run (Legislative Analyst’s Office, 2005). The increased rate of incarceration associated with the law also imposed human and social costs for sentenced individuals, their families, and their communities (for discussion see, e.g., Mauer and Chesney-Lind, 2002; Travis, 2002; Travis and Waul, 2003). Those social costs were borne disproportionately by African American men. The full impact of the Proposition 36 changes remain to be seen but, another cost of Three Strikes laws may be that they seriously damage the perception of fairness and legitimacy in the criminal sentencing process, particularly among African Americans.

*Elsa Chen*

### Note

1. States with Three Strikes laws are Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Louisiana, Maryland, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin. Source for all states except Alaska: National Conference of State Legislatures, “Three Strikes” Legislation Update, December 1997. Alaska law information obtained via personal communication with Ms. Teri Carnes, Senior Staff Associate, Alaska Judicial Council, September 22, 2006.

### References

- California Department of Corrections and Rehabilitation. Second and Third Striker Felons in the Adult Institution Population, December 31, 2007. Sacramento, CA: California Department of Corrections and Rehabilitation, Offender Information Services Branch, Estimates and Statistical Analysis Section, Data Analysis Unit, 2008.
- Chen, E. Y. 2008a. “Impacts of ‘Three Strikes and You’re Out’ on Crime Trends in California and throughout the United States.” *Journal of Contemporary Criminal Justice* 24, no. 4 (2008): 345–70.
- Chen, E. Y. 2008b. “The Liberation Hypothesis and Racial and Ethnic Disparities in the Application of California’s Three Strikes Law.” *Journal of Ethnicity in Criminal Justice* 6, no. 2 (2008): 83–102.

- Clark, J., J. Austin, et al. “‘Three Strikes and You’re Out’: A Review of State Legislation.” Washington, DC: National Institute of Justice, 1997.
- Kovandzic, T. V., J. J. Sloan, and L. M. Vieratis. “‘Striking Out’ as Crime Reduction Policy: The Impact of ‘Three Strikes’ Laws on Crime Rates in U.S. Cities.” *Justice Quarterly* 21, no. 2 (2004): 207–39.
- Kovandzic, T. V., J. J. Sloan, and L. M. Vieratis. “Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of ‘Three Strikes’ in U.S. Cities (1980–1999).” *Criminology and Public Policy* 1, no. 3 (2002): 399–424.
- Legislative Analyst’s Office. “A Primer: Three Strikes: The Impact after More Than a Decade.” Sacramento, CA: Legislative Analyst’s Office, 2005.
- Mauer, M., and M. Chesney-Lind, eds. *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*. New York: The New Press, 2002.
- Ramirez, J. R., and W. D. Crano. “Deterrence and Incapacitation: An Interrupted Time-Series Analysis of California’s Three-Strikes Law.” *Journal of Applied Social Psychology* 33, no. 1 (2003): 110–45.
- Ricciarduli, A. “The Broken Safety Valve: Judicial Discretion’s Failure to Ameliorate Punishment under California’s Three Strikes Law.” *Duquesne Law Review* 41, no. 1 (Fall 2002): 36.
- Sankin, A. “California Prop 36, Measure Reforming State’s Three Strikes Law, Approved by Wide Majority of Voters.” *Huffington Post*, November 12, 2012. [http://www.huffingtonpost.com/2012/11/07/california-prop-36\\_n\\_2089179.html](http://www.huffingtonpost.com/2012/11/07/california-prop-36_n_2089179.html).
- Travis, J. “Invisible Punishment: An Instrument of Social Exclusion.” In *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, edited by M. Mauer and M. Chesney-Lind, 15–36. New York: The New Press, 2002.
- Travis, J., and M. Waul, eds. *Prisoners Once Removed*. Washington, DC: Urban Institute Press, 2003.
- U.S. Census Bureau. “Table 3: Annual Estimates of the Population by Sex, Race, and Hispanic or Latino Origin for California: April 1, 2000 to July 1, 2006 (SC-EST2006-03-06).”
- Worrall, J. L. “The Effect of Three-Strikes Legislation on Serious Crime in California.” *Journal of Criminal Justice* 32, no. 4 (2004): 283–96.



# E-Bulletin

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## *Sentencing and Corrections Policy Updates*



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## Front Page

### 2010 Midyear Legislative Summary

*Lawmakers continue to enact policies aimed at reducing recidivism, prison populations and costs.*

As economic pressures continue to mount for the third consecutive fiscal year, states are looking for changes outside prison walls to meet reduced operating budgets for corrections departments. Through June 30, 2010, state legislatures have passed laws that restructure drug offenses and drug courts, expand community corrections, and create more rehabilitative and reentry services for inmates.

South Carolina passed the Omnibus Crime Reduction and Sentencing Reform Act of 2010. This came after more than a year of work by a bipartisan study committee that recommended comprehensive changes to the state's criminal code. Some changes include adding to the "violent crime" list; restructuring certain property, drug and violent offenses; requiring a period of post-prison "reentry" supervision for certain offenders; requiring use of risk and needs assessments for parole release decisions and to determine the type of supervision and services needed for parolees and probationers; and creating an oversight committee to monitor

implementation of the act and make recommendations to the legislature on reallocation of any cost savings that result from these changes. The Public Safety Performance Project of the Pew Center on the States provided technical assistance to the study and published a [brief](#) outlining the changes.

At least 15 states addressed drug laws. Alabama authorized [drug courts](#) to be used with sentencing and supervision options that include pretrial release, pretrial diversion, probation, jail, prison, parole, community corrections or other release from a correctional facility. Indiana, Pennsylvania, and Virginia also authorized creation of drug courts, while Minnesota, Oklahoma and Utah expanded theirs. Colorado restructured penalties for certain [drug offenses](#) and removed certain mandatory prison terms, ultimately permitting more judicial discretion in sentencing drug offenders. Kentucky, New Hampshire, Louisiana and New Mexico commissioned studies to evaluate existing drug laws.

At least eight states addressed community corrections. Alabama, Arizona, Colorado, Florida, Indiana and Nebraska did so by increasing funding, enhancing coordination among services, creating bed space, and evaluating the effectiveness of existing programs. Mississippi created the [Circuit Court Community Corrections Act of 2010](#) with an oversight commission, charged with piloting community corrections programs in specified counties. Pilot programs include nonresidential community service, educational and vocational training, post-adjudication rehabilitation, work release, diversion programs, and juvenile and adult drug courts. Vermont created the Community Safety and Corrections Task Force to determine best practices in correctional supervision, such as reducing the need for bed space through alternative sentencing.

Inmate labor programs were addressed by at least nine states and Puerto Rico. Florida, Iowa, Kansas, Mississippi, Oklahoma, Puerto Rico and Virginia now permit use of inmate labor for public or private projects.

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Work release programs are on the rise as well. Some, like Nebraska's and Virginia's, require inmates to deposit a portion of earned wages in a fund to support the program. Alabama and Kansas authorized new work release programs, while Louisiana commissioned an evaluation of current programs. Kentucky, Minnesota and Utah now require jail inmates to reimburse correctional facilities for some costs associated with their incarceration.

Legislation related to rehabilitation, reentry and transitional services for inmates were enacted in at least 17 states, Puerto Rico and Washington, D.C. Florida encouraged local public safety coordinating councils to develop comprehensive reentry plans and required that rehabilitative community reentry programs be funded through community corrections. Reentry programs include housing assistance, health care, education, substance abuse treatment and employment. Hawaii now requires soon-to-be-released inmates who are parents to participate in programming related to family and parenting issues. Iowa appropriated funds to its Department of Workforce Development for an offender reentry program that will provide employment skills training.

NCSL's [Sentencing and Corrections Enactment Database](#) contains detailed summaries of legislation enacted between Jan. 1 and June 30, 2010.

## On The Fiscal Front

### The Economy and Crime

*A criminology professor's take on how the current economic recession affects crime rates.*

On July 26, at the 2010 NCSL Legislative Summit, the NCSL Law and Criminal Justice Committee hosted a presentation on [crime and the economy](#) by [Richard Rosenfeld](#), curator's professor in the Department of Criminology at the University of Missouri–St. Louis.

Rosenfeld said the current economic recession is a break from the past in that crime rates generally do not increase across the board, and that information related to drug markets suggests drug activity has not increased during this recession. While it is unknown how police force reductions have affected crime rates, it is likely that now-diminishing justice program stimulus funds have helped state and local jurisdictions maintain operations.

Rosenfeld explained how research explores the relationship between the economy and crime, noting that, while perception of a poor economy is seen to correlate with robbery rates, those rates change irrespective

to the economy and consumer pessimism. He said the historic crime drops in the 1990s can be attributed mainly to demographics – baby boomers have aged – are aging out of crime-prone years. Rapidly increasing incapacitation rates also likely contributed in the short-run to crime drops, but with other longer-term consequences, he said.

He described mechanisms that link property crimes to economic conditions, including such things as unemployed people being at home, thus creating fewer opportunities for daytime home burglaries. On the other hand, a down economy usually improves markets for illegal goods, perhaps provoking crimes in areas outside of low-income neighborhoods where they normally thrive.

Rosenfeld recommended to lawmakers that they use crime data in policy development, but cautioned against data that are untimely and inadequate in providing for comparative assessments. State-level crime statistical units are the best source for timely information on a state's crime rates, according to Rosenfeld, while the state-to-state

comparative data provided by the FBI's Uniform Crime Reports are valuable but not timely enough. He also cautioned that, as states develop and debate policy, gaps in information often are filled by criminal justice interest groups.

More information about the [Law and Criminal Justice Committee's Legislative Summit sessions](#), as well as [Richard Rosenfeld's power point](#), are available on the NCSL website.

### How Criminology Can Save States from Bankruptcy

*Identifying the "power few" in the criminal population and pushing the right criminological buttons might keep states out of the red.*

The National Institute of Justice interviewed Lawrence Sherman, PhD, about the relationship between the economy and crime. The [video and a transcript of the interview](#), divided into five sections, are available on the NIJ's website and summarized on the next page.

### ***Segment 1: The “Power Few” and “Push-Button” Criminology***

Dr. Sherman suggests that applying popular economic theory to criminology might be a key to helping states balance their criminal justice budgets. Push-button criminology requires identifying the “power few”—the small handful of criminals who commit the majority of offenses—and adjusting sentencing policies to target this group. Ultimately, Dr. Sherman says, we must incapacitate certain offenders and reallocate criminal justice funds to better support crime prevention through increased police presence.

### ***Segment 2: The Crime Harm Index***

The right question to ask regarding crime rates, Dr. Sherman says, is not whether it is going up or down, but how the crime adds up—what is the overall harm to society? He compares this “crime harm index” to the gross domestic product and challenges the Bureau of Justice Statistics to implement such an index to accurately inform the nation on U.S. crime rates.

### ***Segment 3: Crime and Justice Research Needs to Evaluate Cost-Effectiveness***

Dr. Sherman recommends that researchers include cost data in studies and research grants that systematically review the criminal justice system so that governments can better determine what crime prevention efforts they can afford and how much they want to spend. Reiterating that only a handful of offenders are committing a large number of crimes, he again suggested that one more cost-effective strategy would be to “reconfigure [the criminal justice] portfolio” by reducing prison spending, increasing investments in policing, and managing those investments “more aggressively in the direction of the strategies that are effective.”

### ***Segment 4: The Role of the Federal Government in Solving Crime and Justice Problems***

Because of its large-scale economy, Dr. Sherman argues that the federal government should play a much larger role in research and development of strategies to transform criminal justice operations at all levels. He recommends considering criminal justice as an integrated multi-governmental effort.

### ***Segment 5: Criminological Forecasting***

Dr. Sherman suggests using criminological forecasting, coupled with more selective incarceration, to better maintain crime rates. He argues it may be more accurate to forecast crime rates than to allow judges and

prosecutors to determine incarceration based on a rap sheet that may accurately reflect the likelihood that an offender will return to a life of crime.

NCSL gratefully acknowledges the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, for allowing us to reproduce, in part or in whole, the video, [“Interview with Lawrence Sherman, Ph.D. – Less Prison, More Police, Less Crime: How Criminology Can Save the States from Bankruptcy.”](#)

The opinions, findings, and conclusions or recommendations expressed in this video are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice or NCSL.

## **Issue in Focus**

### **Three-Strikes Laws: Past and Present**

*In the mid-1990s, “three strikes and you’re out” were buzzwords in sentencing reform. Fifteen years later, states continue to enact and amend three-strikes laws, reexamining penalties that are best suited to crack down on habitual offenders.*

*Early Three-Strikes Laws: 1993 – 1995*

[“Three strikes and you’re out” for habitual offenders](#) was coined and successfully carried out in the 1993 fall elections in Washington, where voters approved the Persistent Felony Offender Act. It required life without the possibility of parole for third-time serious felony offenders.

Three-strikes laws generally require a prison term for habitual or persistent offenders. However, the number and types of crimes that trigger a three-strikes sentence, as well as the length of the prison term, differ from state to state.

Nearly all states have some type of sentence enhancement that applies to habitual offenders, and many states have mandatory minimum provisions that apply to repeat offenders of violent crimes. The three-time loser notion caught on in the early 1990s; 24 states passed laws between 1993 and 1995.

In 1994, California, Colorado, Connecticut, Georgia, Indiana, Kansas, Louisiana, Maryland, New Mexico, North Carolina, Tennessee, Virginia and Wisconsin enacted “three-strikes”-type laws. An additional 10 states—Arkansas, Florida, Montana, North Dakota, New Jersey, Nevada, Pennsylvania, South Carolina, Utah and Vermont—passed laws in 1995.

#### *Current Three-Strikes Laws*

Of the 24 states that enacted three-strikes laws during the early 1990s, at least 16 have since made notable changes. In particular, states eliminated life without parole penalties and replaced mandatory sentences with sentencing ranges. However, three-strikes laws in at least eight states—Arkansas, Georgia, New Mexico, North Dakota, Tennessee, Utah, Vermont and Virginia—remain as first enacted.

Gaining notoriety on several criminal justice issues, [South Carolina’s 2010 Omnibus Crime Reduction and Sentence Reform Act](#) modified the state’s three-strikes law. The new law eliminated the requirement that three-strikes penalties are mandatory. Under the state’s three-strikes laws, punishment for two- and three-strikes convictions can be terms up to life without parole. The act also adds certain crimes—such as attempted murder, first degree assault and battery by a mob, second degree assault and battery by a mob, and assault and battery of a high and aggravated nature—to the list of “most serious offenses” that are punishable under the three-strikes statute. Certain offenders that are within three years of release now are eligible for parole or work release. Like South Carolina, at least 10 other

states—Colorado, Connecticut, Florida, Kansas, Louisiana, Maryland, Montana, Nevada, New Jersey, and Wisconsin—have increased judicial discretion in three-strikes sentencing. In Florida, for example, judges are not required to apply penalties to two-strikes offenders; rather, they may penalize an offender up to a certain maximum, depending on the underlying offense.

At least seven states—Indiana, Louisiana, Montana, Nevada, New Jersey, North Carolina, and Wisconsin—have eliminated the possibility of life without parole or narrowed the circumstances under which the court can impose a life without parole sentence for three-strikes offenses. Montana eliminated life without parole, replacing it with sentencing ranges and also allowing the judge to impose fines. Under Nevada’s updated three-strikes law, an offender can be eligible for parole after a minimum prison term is served. North Carolina’s life without parole sentence and review for parole eligibility after 25 years served provisions were eliminated. Instead, the law requires that the sentence for habitual offender status run consecutively with the sentence for the underlying felony conviction.

At least eight states have created sentencing ranges under their three-strikes laws. Connecticut changed its three-strikes sentencing from mandatory maximum prison terms to minimum and maximum ranges, depending on the offense. Nevada added several sentencing ranges to those available for third-strike offenders in addition to the life sentence requirements in the original law. Louisiana requires a determinate sentence, but provides ranges within which the sentence

must fall, depending on whether it is a second or third conviction and on the applicable sentence for the underlying offense. Pennsylvania maintained its mandatory minimum sentences, but added mandatory maximum sentences for two- and three-strikes provisions to carry a minimum prison term that is double the length of the mandatory minimum.

Since California’s three-strikes law passed in 1994, the Legislature has removed the mandatory life sentence penalty (that required at least 25 years be served) for third-strike offenders. The law now requires offenders to serve a prison term three times that for the underlying offense, 25 years, or the term for the underlying offense plus any sentence enhancements, whichever is the greatest of the three. More than 15 years after initial popularity, states such as California continue to review and refine their three-strikes laws.

## On A Related Note

### On the Hill

#### ***National Criminal Justice Commission Act***

On July 27, 2010, the U.S. House of Representatives passed the [National Criminal Justice Commission Act of 2010](#) (HR 5143), which would establish a national, bipartisan commission to conduct a comprehensive evaluation of the nation’s criminal justice system and offer recommendations for reform in areas including sentencing policy, incarceration rates, law enforcement, crime prevention, substance abuse, corrections and reentry. A [Senate version](#), S. 714, currently is pending. The NCSL Law and Criminal Justice

Committee [action policy](#) on this bill is available on the NCSL website.

### ***The Second Chance Act***

In 2008, Congress passed the [Second Chance Act](#), which provides grants to states, local governments and nonprofit groups for innovative reentry relate programs aimed at reducing recidivism. On July 21, 2010, the U.S. Senate Judiciary Committee held a [hearing](#) on the Second Chance Act to consider budget appropriations for FY 2011.

### ***Collateral Consequences of Criminal Convictions***

The House Judiciary subcommittee on Crime, Terrorism, and Homeland Security held a [hearing on June 9, 2010](#), to discuss the collateral consequences of criminal convictions, which include reentry barriers to employment, education and housing. The hearing addressed ways to reduce collateral consequences of convictions in order to reduce recidivism. Two pieces of federal legislation have been recently introduced to address some of the issues raised at this hearing – [H.R. 5300](#), the “Fairness and Accuracy in Employment Background Checks Act of 2010” and [H.R. 5492](#), the “Fresh Start Act of 2010.” H.R. 5300 requires the FBI to make changes to improve the accuracy of federal criminal background checks and other information. H.R. 5492 amends the federal criminal code to allow an individual convicted of a nonviolent criminal offense to file a petition for expungement of the record of such conviction under certain circumstances.

## **Recent Reports**

### ***Innovations in Community Corrections***

NCSL’s recent report, [Innovations in Community Corrections](#) explores how states are implementing community-based policies and programs that can safely reduce prison populations and costs, including creating incentive funding streams, investing in evidence-based practices, addressing offender needs, and obtaining assistance from federal agencies and other organizations.

### ***National Research of Public Attitudes on Crime and Punishment***

As part of its work in the states to protect public safety and control corrections costs, the [Public Safety Performance Project](#) (PSPP) partnered with two of the nation’s leading polling firms—[Public Opinion Strategies](#) and the [Benenson Strategy Group](#)—to explore public attitudes toward crime and punishment. The firms

conducted focus groups and a national survey of voters to measure support for policy change and to enhance how citizens communicate about these complicated issues. The project recently released a [summary of the findings](#).

### ***Washington State Institute for Public Policy’s Benefit-Cost Tool for States***

In 2010, the [John D. and Catherine T. MacArthur Foundation](#), [The Pew Charitable Trusts](#) and the [Washington State Institute for Public Policy](#) (WSIPP) entered into a partnership to develop a cost-benefit tool to help states make policy decisions. A [recently released report](#) by WSIPP describes the progress made on a portion of this project. It focuses on evidence-based sentencing and corrections policy options to reduce crime and lower corrections costs.

**NOTE:** Links to external websites and reports are for information purposes only and do not indicate NCSL’s endorsement of the content on those sites.

This newsletter is prepared under a partnership project of NCSL’s Criminal Justice Program in Denver, Colorado and the Public Safety Performance Project of the Pew Center on the States, based in Washington, D.C. The NCSL project is designed to help states tap the best research and information available to put a fiscal lens to sentencing and corrections policy options and reforms.

## **Mark Your Calendars**



NCSL Fall Forum  
December 8–10, 2010  
Phoenix, Arizona