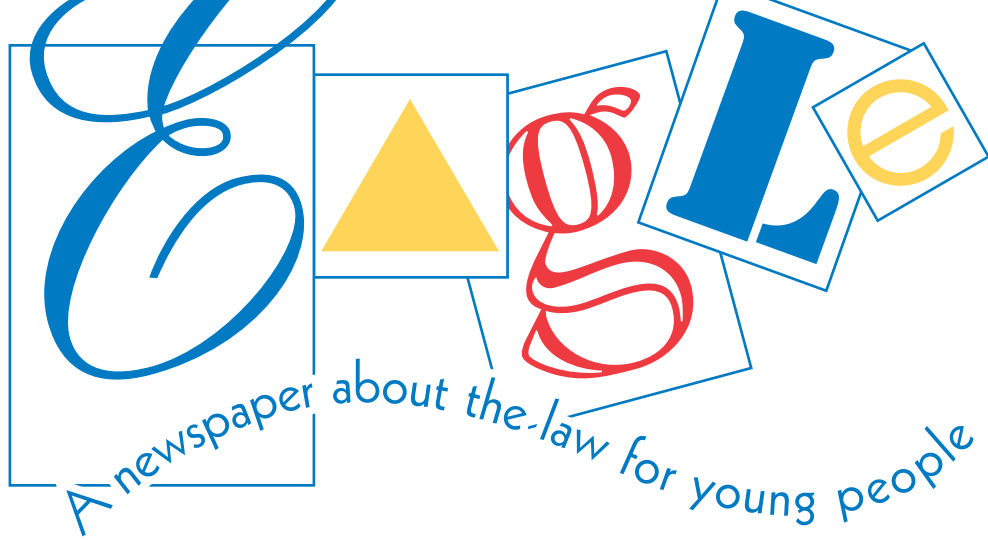


THE LEGAL



SPRING 2003

Cops and Robbers Isn't Just a Game Anymore

by Cheryl Baisden

You might think playing cops and robbers is just a kids' game, but if you point your finger at a classmate and yell "bang" at school, you could be suspended, or even expelled. Four New Jersey kindergarteners found that out the hard way, when they were suspended for three days for pretending their fingers were guns and running around the playground shooting each other.



The children were suspended under the school's zero tolerance policy, which required that students whose actions could be considered violent or potentially violent be immediately suspended or expelled. Most schools in New Jersey have some kind of zero tolerance policy, according to attorney David Rubin, who works as a lawyer for school districts.

Zero tolerance policies are designed to protect students from violence, weapons and drugs by defining the consequences of behaving in certain ways at school. The policies are intended to prevent students from doing things that could be dangerous to other students or teachers, but sometimes the policies, or the people who enforce them, go too far, said Rubin. The problem is that many school policies do not contain written definitions of what is meant by violent behavior, weapons or even drugs, he explained, so they can hurt rather than help students by punishing them for harmless acts.

"Because a lot of schools don't define what they mean in their policies, kids end up being kicked out of school because their mother wasn't thinking and put a small knife in with their lunch so they could carve an apple, or because they forgot they had a pen knife packed in with a school carving project," Rubin said. "That's not the same thing as intentionally bringing a gun to school, but with a zero tolerance policy it is often treated the same way."

New Jersey adopts plan

The state of New Jersey adopted its zero tolerance law in 1995, as part of a national effort to protect students from violence or the threat of violence. Under the law, school districts had to adopt and enforce their own zero tolerance policies. Many school districts, according to Rubin, just adopted the state's standard

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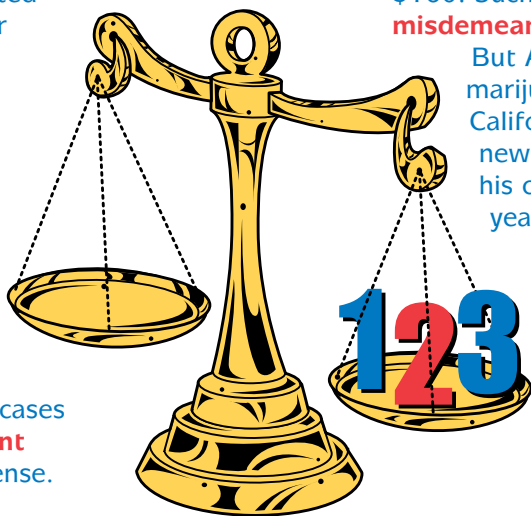
Three Strikes and You're Out!

by Phyllis Raybin Emert

The rule of three strikes and you're out not only applies in baseball; it also refers to tough laws that target **repeat offenders**. But do three-strikes laws promote well-deserved prison sentences or cruel and unusual punishment?

Three-strikes laws have been adopted in some form or another by dozens of states, including New Jersey. The requirements for three-strikes laws vary in different states, but essentially the law requires that after a person is convicted of a crime three times, he or she receives a **mandatory** life sentence.

California has the most controversial three-strikes law because it can lead to a life sentence for non-violent offenses. More than 7,000 people have been sent to California's prisons with life sentences under the state's three-strikes law. In 350 of those cases the third crime the **defendant** committed was a minor offense.



Two California cases with those circumstances recently came before the U.S. Supreme Court as a challenge to the three-strikes law.

Petty theft leads to life in prison

In November 1995, Leandro Andrade was caught shoplifting twice within two weeks at K-Mart stores in Southern California. In both instances Andrade stuffed children's videotapes inside his pants, and both times he was arrested within minutes of leaving the store.

The tapes Andrade stole were worth approximately \$160. Such petty thefts (under \$400) are ordinarily **misdemeanors** punishable by up to six months in jail.

But Andrade had a record of burglaries and marijuana possession from years before. Using California's tough three-strikes law, Andrade's new petty thefts were treated as **felonies**. Upon his conviction, the judge sentenced him to 50 years to life in prison.

Gary Ewing was at a California golf course pro shop in March 2000 when he slipped three expensive golf clubs down his pant leg and left the store. As Ewing limped toward his car in the parking lot, he was arrested for grand theft. The golf clubs he

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Pending Law Limits Youth Access to Violent Video Games

By Barbara Sheehan

Gaining access to mature- and adult-rated video games could become tougher for New Jersey youths if proposed **legislation** is signed into law.

Legislation is pending in New Jersey that would prohibit retailers from selling or renting to a person under 17 any video game rated for mature audiences. Video games rated for "adults only" would be restricted to those 18 and older.

As part of the legislation, stores would also be prohibited from renting or selling videos that do not clearly display the games' official rating by the Entertainment Software Rating Board (ESRB). Ratings range from "Early Childhood" to "Adults Only" (see sidebar). Violators of the law

would be subject to a penalty of \$50 for the first offense, and up to \$250 for subsequent offenses.

What sparked the legislation?

Assemblyman Sean T. Kean, primary sponsor of an Assembly version of this video game bill, says he proposed this legislation after constituents approached him in his hometown of Wall Township with concern about the violent and sexual content of video games.

Kean says he believes a "**desensitizing**" process may occur when minors, particularly young children, are exposed to violence and other adult content



on video games; and he suggested this might contribute to a "deterioration of moral values" in our society.

Kean acknowledged that some people have raised questions about the constitutionality of his proposed legislation, claiming the pending bill restricts free speech

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Take Me Out to the Ball Game — But Don't Steal the Ball

by **Roberta K. Glassner, Esq.**

Imagine catching a record-breaking homerun baseball. For a baseball fan, it's a dream come true. Then imagine your dream turned into a nightmare when the fans next to you pounce on you, kick you and knock the ball out of your glove, giving someone else the opportunity to grab the loose ball.

For San Francisco Giants fan, Alex Popov, the dream came true. Unfortunately, so did the nightmare. On October 7, 2001, the last day of the baseball season, Barry Bonds, star of the San Francisco Giants, hit his record-breaking 73rd homerun into the right-field bleachers of Pacific Bell Park. Alex Popov, already on his feet, raised his arm and caught the ball in his mitt.

According to television footage, during the next six-tenths of a second, Popov started to bring his arm down to clutch the ball to his chest. But, before he could lock it in, he was surrounded, knocked to the ground, grabbed, punched and kicked by the nearby crowd in the bleachers, and the ball was forced out of his glove. Another fan, Patrick Hayashi, emerged from the pile-up with the ball in his hand.

Popov expected Hayashi to return the ball to him, convinced the ball was rightfully his because he was the one who caught it. Hayashi had no such intention, and was similarly convinced that the ball was rightfully his because Popov dropped it. Hayashi pocketed the ball and went home a happy man. Popov fumed.

It's just a baseball. Isn't it?

This baseball the two men were claiming is not just your everyday \$10 baseball. It isn't even just another homerun ball. This is a record setter for the most homeruns hit in a single season. Baseball collectors pay a considerable amount of money for that kind of memorabilia. To give some perspective on the case, the baseball that St. Louis Cardinals first baseman, Mark McGuire, hit for his record-breaking 70th homerun in 1998, sold at auction for \$3 million.

Now that you know what is at stake, let's get back to the case. Popov filed a lawsuit against Hayashi — the first lawsuit ever brought over the ownership of a baseball. Legal terminology flew through the air like base hits. The lawyers pitched words like **possession** and fielded terms like the common law of baseball, rightful ownership and property law. While the judge in the case acted as umpire, the baseball

rested in legal limbo in a safe deposit box, as the judge had ordered.

Popov steps up to the plate

Fourteen months after Barry Bonds hit the ball into the record books, a two-week trial made headlines on a daily basis. Seventeen eyewitnesses testified, along with four law professors, a retired major league umpire and, of course, Popov and Hayashi. The case was tried before San Francisco Superior Court Judge Kevin McCarthy, who would make the decision. There was no jury.

Popov's lawyer, Martin Triano, argued that the ball belonged to Popov, based on the legal definition of possession, which states, "a person who has direct physical control over a thing at a given time is in actual possession of that thing."

One of Popov's expert witnesses, Paul Finkelman, a professor at the Tulsa College of Law and author of *Baseball and the Rule of Law*, said in his statement that the time-honored common law of baseball is "whoever catches a ball that leaves the field of play, owns that ball."

In his statement, Professor Finkelman described a ball hit out of the park as "a wild, unclaimed creature... being hunted, not by people with guns or harpoons, but by fans with gloves." Going back to an 1872 case on whaling law, based on property law, the professor said, "the first to harpoon the whale has possession of it." The professor clearly believed Popov had harpooned the whale when he caught the ball.

Hayashi at bat

Now it was Hayashi's turn. Testifying on Hayashi's behalf, Brian Gray, a professor at Hasting College of the Law in San Francisco, disagreed with Professor Finkelman and chose foxes over whales to make his point. Referring to an 1805 case in which two hunters claimed the same fox, he testified, "it is not enough to pursue the fox or shoot a bullet through its ear. The bullet has to kill the fox." In contrast to Popov's professor, Hayashi's professor clearly believed that because Popov never had the ball fully under his control, he therefore, never had possession of it under the law.

Hayashi's attorney, Michael Lee, argued, "It's not a catch if you drop the ball. When Hayashi reached out and grasped the loose

ball, it was entirely fair game. Scrambling over homerun balls is just part of baseball," Lee said.

The judge's call

For Alex Popov and Patrick Hayashi, it was now the bottom of the ninth inning and all that was left was for Judge McCarthy to make his final call. Would the judge find that Popov harpooned the whale or simply shot the ear of the fox?

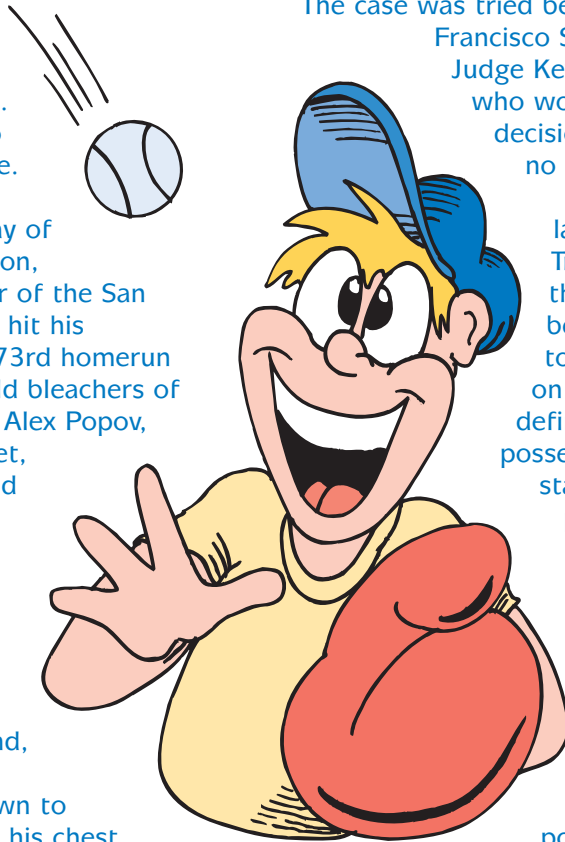
The legal issue the judge had to resolve was which fan had the more legitimate claim to ownership of the baseball, based on the law of possession. Which act best established that possession — Popov's split second catch or Hayashi's final grab?

On December 18, 2002, Judge McCarthy gave his ruling in the case. The judge agreed that Popov had been "set upon by a gang of bandits who dislodged the ball." He also agreed that Hayashi had gotten the ball as a result of being in the middle of "an out-of-control mob engaged in violent, illegal behavior."

But, Judge McCarthy decided, because Popov had not satisfied the requirement of full control, he had not demonstrated possession under the law. On the other hand, Hayashi had gained control through the violence of the mob, and "we are a nation governed by law, not brute force," the judge said.

In the end, Judge McCarthy found that both parties had equal legal claim to the baseball and ordered that it be sold at auction and the profits divided equally between Popov and Hayashi. Earlier this year, the two former adversaries announced that they would use the same sports marketer that garnered the high price for the sellers of McGuire's baseball. Conservative estimates put the value of the controversial baseball at between one and two million dollars.

Roberta K. Glassner is an attorney in New Jersey.



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Cops and Robbers

CONTINUED FROM PAGE 1

sample policy, and never discussed how it would be enforced or how certain terms would be defined.

"When a school district doesn't really tailor its zero tolerance policy to its students and its needs, it ends up running into trouble," said Rubin. "Every situation is different, and you have to work that into your policy so that you look at what really happened and decide what the punishment should be for that incident. If you don't, and you automatically give the same punishment for an innocent comment that you give for seriously threatening



Violent Video Games CONTINUED FROM PAGE 1

and violates the First Amendment of the U.S. Constitution. Kean stands behind his bill, and his constituents.

“At one time, obscenity was protected, too,” said Kean. “But guess what? It’s not now. I believe the [video game] problem needs to be addressed,” he added.

Digital Software Association counters

Squarely opposed to Kean’s legislation and other efforts like it is the Interactive Digital Software Association (IDSA), a trade association representing U.S. computer and video game publishers. The IDSA has argued in court that if movies and plays are entitled to First Amendment protection, then video games should be as well.

In a report titled “Video Games and Youth Violence: Examining the Facts,” the IDSA further asserts that “youth violence has dramatically declined in the U.S. during the past decade, precisely the period in which video game use — among adults and children — has skyrocketed.”

The IDSA also points out in its report:

- The average American video game player is 28 years old.
- American gamers who are under the age of 18 report that they get their parent’s permission 86 percent of the time before purchasing a computer or video game, and industry research in the U.S. shows that 90 percent of games are purchased by adults over 18.
- Many of the games with violent content sold in the United States — and some with far more violence — are sold in foreign markets as well. The incidence of violent crime in these foreign markets is considerably lower than in the U.S., suggesting that the cause of violent crime must lie elsewhere.
- According to the ESRB, 63 percent of games are rated “E” for everyone.

Do violent games make violent kids?

New Jersey entertainment lawyer Ronald Bienstock expresses concern as a parent about the effect of violent video games on children, but he points out that it is virtually impossible in a court of law to blame a specific media source, like a video game, for a violent or tragic consequence when there are so many other possible contributing factors. Bienstock notes that his firm has been involved in such cases, for example, where a teenager committed suicide and his parents blamed it on the lyrics of a song. While compensation, such as a financial settlement, can sometimes be achieved, Bienstock says there’s no legal

standing to claim that others will be harmed in the same way.

Still, on a broader level, some research shows that violent video games can lead to violent behavior. The results of two studies that appeared in the April 2000 issue of the *Journal of Personality and Social Psychology* found a link between violent video games and aggression in college students.

The first study found that “real-life violent video game play was positively related to aggressive behavior and delinquency. The relation was stronger for men and for individuals who are characteristically aggressive.

In the second study, researchers found that “laboratory exposure to a graphically violent video game increased aggressive thoughts and behavior. In both studies, men had a more hostile view of the world than did women.”

Bad for some, not for all?

New Jersey psychologist Dr. Eliot Garson contends that whether violent video games pose a problem depends largely on who’s using them. While acknowledging that he would not want his children using such games because of his own personal values, he said that these games are more problematic for certain kinds of kids — for example those who already have a problem with aggression.

“It’s like a rehearsal,” Dr. Garson said. “It’s a chance to keep practicing what they’re already



having trouble with, which is being out of control.”

Dr. Garson also cautioned against the use of violent games by children under age 11 or 12, who may not yet have as sound an ability to make moral choices. He emphasized that ultimately parents should have a lot of contact with their kids to keep things in check.

Many await outcome

New Jersey Assemblyman Kean is definitely taking his legislation seriously and plans to focus more on it when legislators reconvene in May. Another group watching this and other similar national legislation is the National Association of Recording Merchandisers (NARM), a not-for-profit trade organization with a tie to video industry interests. NARM is also reportedly monitoring bills in Michigan, New York, Oregon and Washington. According to the NARM Web site, those bills either deal with censoring retailers by imposing different taxes for selling violent video games or restrict minors’ access to violent video games, like the New Jersey bill.

Of his proposed legislation, Kean said he received a couple of letters from high school students suggesting that his proposed penalty — \$50 for the first offense and up to \$250 for subsequent offenses — was too low. To that, Kean answered that he does not want to put video stores out of business.

“I’m just trying to change the way industry and video store owners are thinking about it,” Kean said. 🗡️

How are video games rated?

Under New Jersey’s pending legislation, video games sold or rented in New Jersey would be required to display an official rating by the Entertainment Software Rating Board (ESRB), a self-regulating board established in 1994 by the Interactive Digital Software Association (IDSA) to apply and enforce industry ratings.

ESRB ratings, which are also denoted on video game boxes by symbols, are as follows:

EARLY CHILDHOOD — Content may be suitable for ages three and older. Contains no material that parents would find inappropriate.

EVERYONE — Content may be suitable for persons age six and older. May contain minimal violence and some comic mischief or crude language.

TEEN — Content may be suitable for persons age 13 and older. May contain violent content, mild or strong language, and/or suggestive themes.

MATURE — Content may be suitable for persons age 17 and older. May contain mature sexual themes or more intense violence or language.

ADULTS ONLY — Content suitable only for adults. May include graphic depictions of sex and/or violence. Not intended for persons under the age of 18.

RATING PENDING — Product has been submitted to the ESRB and is awaiting a final rating.

someone, you don’t end up protecting kids, you end up hurting and confusing them.”

Viola S. Lordi, a Woodbridge attorney who represents many school boards, agrees that incidents should be examined on a case-by-case basis, because “education is not a cookie-cutter process,” she said. Lordi points out that schools have a more difficult job today and cautions against tossing zero tolerance policies aside.

“I think that as a society we have to say that there is some conduct that will not be tolerated in schools,” Lordi said.

“Suspension can be an effective tool, but you need to do more than just suspend, you

need to educate as well,” she said.

Rubin said that students should have the right to express themselves with their friends without being afraid that they will be punished unjustly. Different rules should apply in different situations. For example, a second grade student may not know that joking with a friend about shooting someone might be misunderstood, but a high school student should know that such a comment could sound threatening.

“You can’t have the same rules apply to both kids, it just doesn’t make sense,” Rubin said. “And in a standard zero tolerance policy where nothing is clearly defined, kids can’t even explain themselves. They lose the right of being considered innocent until proven guilty.

Zero tolerance sometimes makes zero sense

Under the most rigid zero tolerance policies, if a student does something that could possibly be looked at as violent, or promoting violence, he is automatically suspended or expelled, without being given an opportunity to defend himself. Rubin recommends that school districts take incidents on a case-by-case basis, and look at the facts instead of automatically kicking students out of school under strict policies.

The case of the cops and robbers suspension is just one example of a zero tolerance policy without clearly defined terms. Other New Jersey cases have included:

- A second-grader who was expelled for drawing a picture of a gun.

- A fourth-grader who was questioned by police, suspended and sent for a psychological test because he was overheard saying he was going to “shoot” a girl in his class with a paper wad in a rubber band.
- A 15-year-old boy who was expelled because he changed his computer screen saver in the school library to say “Turn me off and I will blow up.”

“Hopefully, more schools will start looking at their zero tolerance policies and rewrite them so they clearly define what is a violation and what isn’t,” Rubin said. “A good zero tolerance policy is one that helps students avoid discipline because the rules are clearly defined and everyone knows what they are. Then kids aren’t being kicked out of school for just being kids.” 🗡️



Three Strikes CONTINUED FROM PAGE 1

stole were valued at approximately \$1,200.

Ewing had a record of nine previous convictions. He might have received up to a year in county jail for stealing the golf clubs, but the theft was treated as a felony under California's three-strikes law. Upon his conviction for this offense, Ewing was sentenced to 25 years to life in prison.

Both men claimed that the punishment they received was too harsh to fit their crimes, and violated the cruel and unusual punishment clause of the U.S. Constitution's Eighth Amendment, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Andrade and Ewing **appealed** to the U.S. Supreme Court, who heard their cases in November 2002.

Origins of California's three-strikes law

In 1993, a 12-year-old girl named Polly Klaas was kidnapped from her home in Petaluma, California and murdered by a convicted child molester. The man, Richard Allen Davis, had been convicted twice for kidnapping and was out on parole after serving eight years of a 16-year prison sentence. Davis was convicted of the murder of Polly Klaas and sentenced to death. Californians were outraged by this terrible crime and demanded action to keep repeat offenders in prison and off the streets. The following year, the three-strikes law was passed by the California state legislature and then approved by California voters as Proposition 184.

California three-strikes law comes under fire

The controversy for the U.S. Supreme Court centers on whether the third-strike conviction for a minor offense should lead to life imprisonment for repeat offenders. The issue is whether the punishment fits the crime, or in legal terms whether the long sentences are "grossly

disproportionate" to the crimes committed.

"Nothing in the Constitution requires society to wait for another person to be victimized by another serious or violent crime before isolating (a repeat criminal) for a substantial period of time," wrote California Attorney General Bill Lockyer in his brief to the U.S. Supreme Court.

Erwin Chemerinsky, Andrade's defense attorney, noted in his brief that in California sexual assault is punishable by up to eight years in prison and manslaughter by up to 11 years, yet his client received 50 years for a nonviolent crime.

"I think it is outrageous that someone could be sentenced to 50 years in prison for shoplifting \$150 worth of videotapes," Chemerinsky said.

New Jersey defense attorney H. Robert Boney Jr. agrees that three-strikes laws are cruel and unusual punishment, and he is concerned that legislators and voters are not really "seeing the human impact these tough laws have on families." The three-strikes law "doesn't take a close look at the individual

and completely rules out rehabilitation," Boney declared.

Numerous state officials point to the three-strikes law as being responsible for a dramatic decline in crime rates in California since 1994. Yet the state

with the sharpest decline in crime during this same period was New York, which did not adopt a three-strikes law. Others say that crime rates were already declining even before California passed the three-strikes law.

A study by a group called Campaign for an Effective Crime Policy found that there has been no reduction in crime under the three-strikes law in California. Instead, the law has cost California taxpayers nearly \$5 billion in new prison construction to handle the large numbers of prisoners.

Some experts say the law isn't necessary because repeat-offender laws already on the

Three Strikes in New Jersey

The state of New Jersey enacted a three-strikes law in June 1995, which was officially called the Persistent Offenders Accountability Act. This law was written to apply only to violent criminals and provided that anyone convicted of a third violent crime must be imprisoned for life. Inmates can be released if they are over 70-years-old and have served 35 years of their sentence.

The three-strikes law in New Jersey lists six types of third-strike felonies, including murder, aggravated manslaughter, certain aggravated sexual assaults, armed robbery, carjacking and certain kidnappings. Unlike California, a non-violent offense cannot be used as a third strike.

The first person sentenced under New Jersey's three-strikes law was Gregory Oliver of Paterson, who was convicted of robbery and assault in 1996. Oliver had several previous convictions, including robbery and assault in 1979, and multiple robbery convictions in 1986. His arrest record dated back to 1966 when, as a teenager, he was charged with stealing money from parking meters.

Oliver appealed to the New Jersey State Supreme Court claiming that the three-strikes law was cruel and unusual punishment and, therefore, unconstitutional. In February 2000, the state's highest court dismissed Oliver's appeal, declaring that the law is constitutional.

At the time the Court said, "The state has the right to extend the sentence of someone who repeatedly preys on society."

— Phyllis Raybin Emert


books provide long prison terms for career criminals. Dan Macallair, of the Center for Juvenile and Criminal Justice, a non-profit research organization, studied the California three-strikes law. According to his study, Macallair told *The Star-Ledger* in 1999, instead of going down "crime has gone up in the California counties where prosecutors use the law the most. Courts are backlogged because more defendants are demanding trials and the state has taken money from higher education to build more prisons," Macallair said.

U.S. Supreme Court decides

On March 5, 2003, the U.S. Supreme Court **upheld** California's three-strikes law in a 5-4 vote. The Court decided that neither Andrade's nor Ewing's sentence was "so grossly disproportionate as to violate the Eighth Amendment's prohibition against cruel and unusual punishment." In her written opinion, U.S. Supreme Court Justice Sandra Day O'Connor stated that any criticism of California's three-strikes law should be directed at its legislature.

"Though three-strikes laws may be relatively new, our tradition of deferring to state legislatures in making and

implementing such important policy decisions is longstanding," Justice O'Connor wrote.

U.S. Supreme Court Justice Stephen G. Breyer included an appendix in his **dissenting opinion** that analyzed how other state laws would have treated Ewing, who received 25 years to life under California law. In 33 states, Justice Breyer noted, Ewing would have received no longer than a 10-year sentence. 



appeal — legal proceeding where a case is brought from a lower court to a higher court to be re-heard.

defendant — in a trial, the person who is accused of a crime.

desensitizing — making someone less sensitive to others.

disproportionate — out of proportion, in this case, with the severity of a crime.

dissenting opinion — a statement written by a judge that disagrees with the opinion reached by the majority of his or her colleagues.

felony — a serious criminal offense usually punished by imprisonment of more than one year.

legislation — a proposed law.

mandatory — required.

misdemeanor — a lesser crime, usually punishable by a fine or short jail term.

possession — having control over a thing.

repeat offenders — someone who commits a crime and serves jail time for that crime and then commits another crime when released from jail.

upheld — supported; kept the same.

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