

"Three Strikes"

An important purpose of the Anti-Violent Crime Initiative is to work with our state and local counterparts to take violent criminals off the streets. When a firearm is involved, we have long used the Armed Career Criminal Act, 18 U.S.C. § 924(e), to achieve the prolonged incarceration of armed, violent offenders. Under the Violent Crime Control and Law Enforcement Act of 1994, we have a powerful new federal tool, the so-called "Three Strikes, You're Out" provision, to help us deal with violent repeat offenders.

This provision should play a key role in every district's anti-violent crime strategy. To help us make the most effective use possible of this potential tool, please ensure that state and local prosecutors are aware of the federal "Three Strikes" provision and your willingness to coordinate prosecutive decisions in cases that are "Three Strikes"-eligible. You should have in place a referral mechanism, perhaps through your violent crime working group, to ensure that appropriate "Three Strikes" cases are presented to you for potential prosecution.

In determining whether to bring prosecutions under this statute, you should be guided by the *Principles of Federal Prosecution*. Trial of an eligible defendant under "Three Strikes" will often provide a more effective punishment than a prosecution under other federal statutes. For the state prosecutor, "Three Strikes" provides a vehicle to take the most dangerous offenders out of the community and keep them out. This is particularly important in states where prison overcrowding results in early release even for violent criminals.

The "Three Strikes" statute is sufficiently important to our violence enforcement efforts that I want to underscore its key provisions. Under the federal "Three Strikes" provision, which is now codified at 18 U.S.C. § 3559(c), the defendant receives mandatory life imprisonment if he or she:

- is convicted in federal court of a "serious violent felony" and
- has two or more prior convictions in federal or state courts, at least one of which is a "serious violent felony." The other prior offense may be a "serious drug offense."

Under the statute, a "serious violent felony" includes murder, manslaughter, sex offenses, kidnapping, robbery, and any offense punishable by 10 years or more which includes as an element the use of force or that, by its nature, involves a significant risk of force. The statute also enumerates certain nonqualifying felonies, including unarmed robbery offenses and arsons that posed no threat to human life.

1. An unarmed robbery offense may serve as a basis for "Three Strikes" sentencing if the offense involved the threat of use of a firearm or other dangerous weapon -or the offense resulted in death or serious bodily injury to any person. If the government files in such a case, the defendant must establish by clear and convincing evidence that neither of those factors existed.
2. An arson will not serve as the basis for "Three Strikes" sentencing if the defendant establishes by clear and convincing evidence that the offense posed no threat to human life and the defendant reasonably believed that it posed no threat to human life.

A "serious drug offense" includes continuing criminal enterprise, violations of Title 21 involving distribution, manufacture, or possession with intent to distribute significant quantities of controlled substances, or equivalent state offenses.

There is a sequencing requirement in the statute: each offense relied upon, except the first, must have been committed after the conviction of the preceding serious violent felony or serious drug offense. The predicate convictions must be final. Sentencing under the statute is triggered by notice filed by the prosecutor with the court prior to trial or plea of guilty in accord with the

procedures contained in 21 U.S.C. § 851(a). We suggest that you file notice only after receiving certified copies of the prior convictions or otherwise verifying the validity of the convictions on which you intend to rely.

3. Section 851(a) of Title 21 requires the filing of an information with the court prior to trial or prior to the entry of a plea of guilty, stating in writing the convictions to be relied upon for sentencing. A copy must be served on the defendant or counsel for the defendant.

The statute does not apply to persons subject to the criminal jurisdiction of an Indian tribal government for offenses committed in Indian country where federal jurisdiction is predicated solely on Indian country, unless the governing body of the tribe has elected that the provision have effect over land and persons subject to the criminal jurisdiction of the tribe.

Furthermore, you should aggressively use all available federal violent felony provisions, including the Hobbs Act, to achieve prolonged incarceration for "Three Strikes"-eligible defendants. Under 18 U.S.C. § 1951, the Hobbs Act covers a robbery that in any way affects interstate commerce, including the robbery of a convenience store or other commercial establishment. While the Department has promoted use of the Hobbs Act robbery provision primarily in cases involving criminal organizations or gangs, you also should consider using it where a defendant's criminal history would support a life sentence under "Three Strikes." These decisions, of course, should be carefully coordinated with state and local prosecutors, taking into account the availability in each case of a state statute that will result in prolonged incarceration of the defendant.

4. The Hobbs Act also prohibits an attempt or conspiracy to commit such a robbery.

To assist us in evaluating how the "Three Strikes" provision is being used, please continue to notify Tom Roberts, in the Terrorism and Violent Crime Section, at (202) 514-0849, concerning potential "Three Strikes" cases. When you file a "Three Strikes" case, please send an urgent report to the attention of the Director of the Executive Office for United States Attorneys.

We also anticipate that there may be issues arising under the "Three Strikes" provision that will be litigated in district courts and U.S. courts of appeals. The Criminal Division is available to assist you in handling these matters. In any event, please coordinate your positions on issues that are less than clear-cut with the Terrorism and Violent Crime Section to ensure consistency and enable us to develop policy positions as needed.

5. The Eastern District of Virginia has developed an outline to assist in determining when a particular case is "Three Strikes"-eligible. A copy of that outline is attached for your convenience.

[cited in [JM 9-60.020](#)]