

# BCS

# FORUM

The BCS FORUM series publicizes the findings of projects sponsored by the Attorney General's Criminal Justice Targeted Research Program. Through this fellowship program, the Department of Justice funds private academicians to undertake research on policy issues of current interest.

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In an effort to increase the comprehensiveness and quality of criminal justice research in California, the Attorney General developed the Criminal Justice Targeted Research Program within the Bureau of Criminal Statistics (BCS).

The key goals of this effort are to:

- Make better use of the criminal justice data collected and maintained by BCS;
- Forge stronger ties between state government and the research community; and
- Contribute to sound policy development in the field of criminal justice.

The Criminal Justice Targeted Research Program is a unique effort to achieve these goals. Each year, the Attorney General selects two to three doctoral candidates and post-doctoral or senior fellows to undertake a research project of their design. The fellows work closely with BCS staff, effectively blending their special expertise in research design and methodology with the technical expertise found in BCS.

Dr. Robert Tillman received his Ph.D. in sociology from the University of California at Davis and was later a National Institute of Mental Health Postdoctoral Fellow at the University of Southern California. His previous research includes a study of California's "Victims' Bill of Rights," done jointly with Candace McCoy and recently published as a Bureau of Criminal Statistics monograph (Controlling Felony Plea Bargaining in California, 1986). Currently, Dr. Tillman is an Assistant Professor of Sociology at Wheaton College in Norton, Massachusetts.

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# THE IMPACT OF CALIFORNIA'S "PRIOR FELONY CONVICTION" LAW

In 1982, California voters approved Proposition 8, the "Victims' Bill of Rights." Many policy-makers opposed this omnibus package of criminal justice system reforms, claiming that its provisions were so vague or contradictory that they could not be implemented.<sup>1</sup> One of the provisions which did seem fairly straightforward added Section 667(a) to the state Penal Code. It reads:

...any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

While existing statutes provided longer sentences for repeat offenders, this new law represented an important departure from previous practice by changing determinate sentencing practices in three ways:

- The statute required the court to impose an additional prison term, or "sentencing enhancement," to any serious felony offender previously convicted of a serious felony.<sup>2</sup> Prior law had generally limited this sentencing enhancement to offenders who had been convicted and also served prison terms.

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## CALIFORNIA'S SENTENCING LAWS

Determinate Sentencing Law --  
*Passed in 1977, this is the comprehensive sentencing structure for punishing all convicted felons. The law is designed to impose a presumptive "base" term for each conviction, adjustable downward or upward depending on mitigating or aggravating factors. The state prison term is even more severe if the defendant is convicted of multiple charges and receives prison terms on each, to be served consecutively. Of course, the sentence will be less severe if the judge decides not to impose a prison sentence at all, instead sentencing the offender to county jail and/or probation. See Penal Code Section 1170 and related provisions.*

Sentencing Enhancements -- *Some factors relating to the crime or the criminal are considered so serious that additional prison terms are added to the prison sentence imposed under the Determinate Sentencing Law, e.g., felon carries or uses a gun while committing the crime, crime victim suffers great bodily injury. See Penal Code Section 12022 and its related provisions.*

*The sentencing enhancement considered in this FORUM is the requirement that an additional five years in state prison be imposed on an offender who previously has been convicted of a serious felony. For each prior felony conviction charged and proven, another five years in state prison may be added to the prison sentence. See Penal Code Section 667 and its subsections.*

- Unlike existing prior offense enhancements which could be applied only to prior convictions and prison terms less than five years old (ten years for certain offenses), the new enhancement could be triggered by a previous conviction regardless of when it occurred.
- The new law increased the maximum sentence enhancement for a prior prison term for most "violent felonies," subsumed under the "serious felony" category, from three to five years.<sup>3</sup>

All of these changes were designed to expand the scope of previous laws aimed at repeat offenders by applying the new law to a larger population of offenders and by lengthening the prison terms of those offenders against whom it could be imposed. While these changes may seem straightforward, their practical application can be quite intricate.

Opponents argued that the "serious felonies" to which the law applied were not sufficiently defined, although Proposition 8's drafters clearly intended to include at least the eight "violent felonies" defined by existing law (PC 667.5).

More importantly, under the new law prosecutors and judges retained considerable discretion in applying the "prior felony" enhancement. The law did not specify when or if the prosecutor should charge the enhancement. The prosecutor could choose not to charge the enhancement at all, or could add or drop it much later than the original charges. Moreover, PC 667(a) did not address the judge's power to suspend or "stay" the enhancement charges even if they were proven.<sup>4</sup>

This built-in discretion created the possibility that PC 667(a) enhancements would become the objects of plea bargaining. Rather than strictly applying the new enhancement to every case eligible, prosecutors could use it to obtain guilty pleas from defendants who might otherwise demand trials. This practice could result in sentence disparities among defendants and across counties where the new enhancement would be applied unevenly.

The new "prior felony conviction" enhancement thus exemplified a traditional tension within criminal law between legislative intent (in this case, the intent of the voters) and the realities of the implementation process. Clearly, the law was intended to send serious, repeat felony offenders to prison for longer periods of time.<sup>5</sup> Yet, the discretion retained by judges and prosecutors created the possibility that the new law would be used to enhance the efficiency of the criminal justice system by avoiding time-consuming trials.

This *FORUM* describes the results of an evaluation of the impact of PC 667(a).<sup>6</sup> That evaluation employed both quantitative and qualitative data to address three questions: (1) How often are the new prior felony conviction enhancements imposed, (2) How does the new law affect the sentences of serious felony offenders, and (3) How does PC 667(a) affect plea bargaining practices? The results of that study and the implications of the findings for criminal justice policy are briefly discussed in this *FORUM*.

How often was the new law imposed?

The question of how often the new law was imposed should be stated more precisely as: "In how many cases where the defendant was eligible to be sentenced under the new law was the enhancement actually imposed?" Answering this question is not a

simple task because of the difficulty in determining the number of defendants eligible to be charged with PC 667(a). The best available indicators of these numbers are provided by California Board of Prison Terms data on persons entering state prisons.

**TABLE 1**  
**SENTENCE ENHANCEMENTS FOR PERSONS RECEIVED IN PRISON**  
**Penal Code Section 667(a)**  
**Statewide, July 1982-August 1984**

	Prisoners			
	Eligible	Charged	Proven	Imposed
<b>Number</b> .....	5,016	1,427	770	598
Percent of those eligible.....	100	28	15	12
Percent of those charged.....	—	100	54	42
Percent of those proven.....	—	—	100	78

Source: California Board of Prison Terms.

Table 1 shows the rate of charging and the attrition of prior felony conviction enhancements for persons received in prison in the first two years after the passage of Proposition 8. These data reveal that relatively few (28 percent) of those persons eligible were charged under the "prior felony conviction" statute. In some of these cases defendants' records may have been unavailable or inaccurate, thereby preventing prosecutors from charging those defendants technically eligible for the enhancement. However, it may be that, in many of these cases, prosecutors did not charge the PC 667(a) enhancements in exchange for guilty pleas.

Sentence enhancements such as PC 667(a) are most often charged in an information filed in Superior Court, rather than in the complaint filed earlier in Municipal Court. It is at the stage after the complaint has been filed but before the case has proceeded to Superior Court that plea negotiations involving the decision to charge the enhancement frequently take place. Since the passage of Proposition 8 in 1982, plea negotiations at the pre-information stage have become increasingly important.<sup>7</sup>

The use of the enhancement for plea bargaining purposes at the Superior Court level is indicated by the fact that only 54 percent of those persons who were initially charged with PC 667(a) had the charge proven, and even fewer (42 percent) had the additional five years imposed at sentencing. The bulk of those enhancements that dropped out did so before being proven in court, suggesting that many were dropped by prosecutors in the course of plea negotiations. Once the charges are proven in court, however, judges appear to have been reluctant to dismiss, strike, or stay them, since 78 percent of those enhancements that were proven were actually imposed. Furthermore, it may be that in many of those 172 cases where the enhancements were proven but not imposed, the charges were dropped on the motion of the prosecutor.

In summary, relatively few (12 percent) serious felony offenders with prior convictions for serious felonies received enhancements to their sentences under PC 667(a). Our conclusion is that the best explanation for this fact is that the enhancements are being used as "chits" in the plea bargaining process, where they are used to obtain guilty pleas.

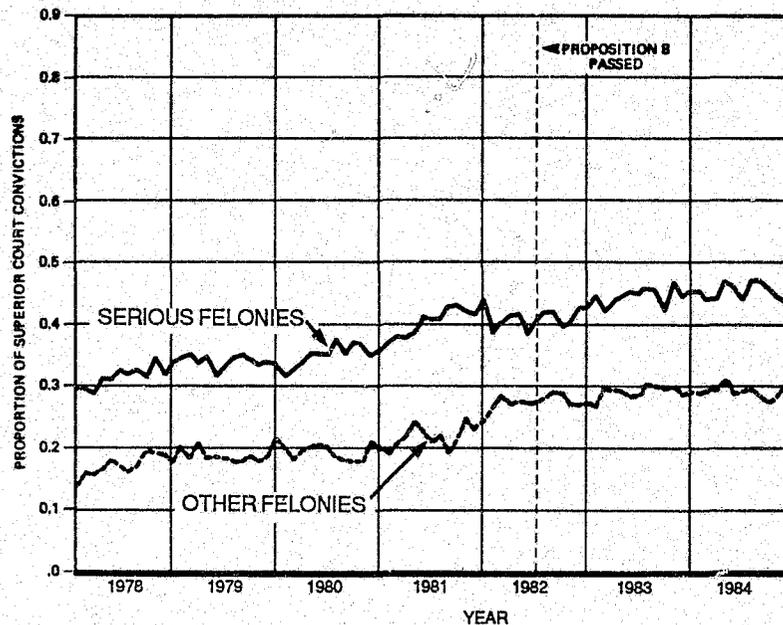
## What Were the Effects on Sentencing?

Even though the five-year prior felony conviction enhancement was infrequently charged and even less frequently imposed, it might still result in more severe sentences for serious offenders. Prosecutors could use the enhancement as a threat in order to obtain pleas to relatively tough sentences. Defense attorneys in Alameda, Los Angeles, and San Diego counties claimed in interviews that in these situations their clients often "get scared" and agree to lengthy sentences, even when case weaknesses might well result in convictions on lesser charges and lighter sentences.

Thus, Proposition 8's "prior felony conviction" provision might have produced longer sentences in cases where the enhancement was threatened but not charged. As a result, sentence severity for all serious felony offenders may have increased after the passage of the new law. In this section we examine trends in two measures of sentence severity: imposition of prison sentences and length of prison sentences.

Data on the imposition of prison sentences before and after Proposition 8 were obtained from the Offender-Based Transaction Statistics (OBTS) system maintained by the California Bureau of Criminal Statistics.<sup>8</sup>

**FIGURE 1**  
PRISON SENTENCES AS A PROPORTION OF  
TOTAL SUPERIOR COURT SENTENCES, 1978-1984  
Serious Felonies versus Other Felonies  
Statewide



The data displayed in Figure 1 represent the number of defendants sentenced to prison as a proportion of all defendants sentenced in superior court, by month of final disposition from January 1, 1978 through December 31, 1984. The data are further broken down according to whether the defendant's most-serious charge at arrest was a Proposition 8 "serious felony" or an "other felony." These data, then, represent the proportion of persons potentially eligible to be sentenced to prison who actually received a prison sentence.

Looking only at the post-Proposition 8 side of the trend line for "serious felonies," one sees that the proportion of eligible persons sentenced to prison did increase: from 40.6 percent in June 1982 to 47.4 percent in December 1984. However, several other prominent features of the data immediately raise the question of how much Proposition 8 had to do with this increase. First, the trend line was already moving up prior to June 1982 and the post-Proposition 8 appears to be a continuation of this trend. This suggests that whatever caused or allowed judges to more frequently impose prison sentences in the pre-Proposition 8 period also caused them to do so in the post-Proposition 8 period. Secondly, not only did those convicted defendants originally charged with "serious felonies" show an increased likelihood of being sentenced to prison, but so did those charged with "other felonies." This again indicates that something other than Proposition 8 was driving the rate upwards.

To more precisely determine the effects of Proposition 8 on sentencing, interrupted time-series statistical techniques were applied to the data. These techniques allow one to determine if the rate of change after the occurrence of an event at some point in the series was greater than what would have been expected had the pre-event rate of change continued. In this analysis, the specific empirical question was: did the increase in the use of prison sentences after Proposition 8 represent a statistically significant change beyond what would have been expected had the pre-Proposition 8 trends continued? The analysis showed that there was no statistically significant change.<sup>9</sup> Thus, the post-Proposition 8 trends were a continuation of earlier trends towards more punitive sentencing.<sup>10</sup>

Rates of imprisonment may not be the best indicators of an increase in sentencing severity. It may be that most of those offenders affected by the prior felony conviction enhancement would have received prison sentences had the law not been in effect simply because judges and prosecutors are less likely to be lenient with repeat offenders. For this reason, a better indicator might be the length of the term received by those offenders sentenced to prison.

**TABLE 2**  
**MEDIAN PRISON SENTENCE LENGTH (IN YEARS) FOR**  
**ROBBERY AND RAPE COMPLAINTS, 1980-1984**  
**Alameda County, San Diego County, and Compton District of Los Angeles County**

	Total		Alameda County		San Diego County		Compton	
	Number	Years	Number	Years	Number	Years	Number	Years
<b>Robbery</b>								
1980.....	565	4.0	283	3.0	173	5.0	109	4.0
1981.....	646	4.0	266	3.0	266	5.0	114	4.0
1982.....	602	3.7	272	3.0	243	5.0	87	3.0
1983.....	624	3.0	249	3.0	257	4.0	118	3.0
1984.....	561	3.0	169	3.0	261	3.0	131	3.0
<b>Rape</b>								
1980.....	74	6.8	38	6.0	22	7.0	14	7.5
1981.....	124	7.0	58	4.5	26	7.6	40	9.0
1982.....	93	6.0	46	6.0	26	7.0	21	6.0
1983.....	79	7.0	31	6.0	36	8.0	12	5.0
1984.....	112	6.0	38	6.0	51	7.0	23	6.0

Sources: CORPUS (Alameda); JURIS (San Diego); PROMIS (Compton).

To assess the impact Proposition 8 had on sentence lengths, data on sentences were examined from three jurisdictions: Alameda County, San Diego County, and the Compton district of Los Angeles County. The lengths of sentences were compared for two serious felonies — robbery and rape — before and after the law was passed. Table 2 shows the median sentence lengths for persons initially charged (in the complaint) with robbery or rape and convicted in one of the three jurisdictions between 1980 and 1984.

The data show considerable variation in sentence lengths over the years and across jurisdictions. However, the data are more significant for what they do not show. Despite the availability of the tough new sentence enhancement, no systematic increase in sentence lengths after 1982 is evident. The sentence lengths for both robbery and rape cases either stayed relatively stable or, for robbery cases in San Diego County and Compton, actually declined during the period. Thus, the new prior felony conviction enhancement did not push average sentence lengths upward.

### What was the Impact on Plea Bargaining?

The data on the attrition of 667(a) enhancements, presented earlier, suggested that these charges were used in the plea bargaining process rather than for sentencing purposes. This interpretation was supported in interviews with prosecutors, one of whom observed that the new law hung like "Damocles' sword" over the heads of defendants.

**TABLE 3**  
**CONVICTIONS ON RAPE AND ROBBERY COMPLAINTS<sup>a</sup>**  
**RESULTING FROM TRIALS AND GUILTY PLEAS, 1980-1984**  
**Alameda County, San Diego County, and Compton District of Los Angeles County**

	1980		1981		1982		1983		1984	
	Number	Percent								
<b>Rape</b>										
Total										
Trials	34	20.9	47	21.4	26	13.8	21	10.7	26	13.7
Pleas	129	79.1	173	78.6	162	86.2	175	89.3	164	86.3
Alameda										
Trials	15	17.9	14	13.9	8	8.2	6	5.9	12	13.3
Pleas	69	82.1	87	86.1	89	91.8	95	94.1	78	86.7
San Diego										
Trials	8	17.4	6	12.2	9	19.6	11	19.6	8	13.1
Pleas	38	82.6	43	87.8	37	80.4	45	80.4	53	86.9
Compton										
Trials	11	33.3	27	38.6	9	20.0	4	10.3	6	15.4
Pleas	22	66.7	43	61.4	36	80.0	35	89.7	33	84.6
<b>Robbery</b>										
Total										
Trials	97	8.5	93	8.3	104	9.0	80	7.1	57	6.2
Pleas	1,040	91.5	1,022	91.7	1,051	91.0	1,050	92.9	863	93.8
Alameda										
Trials	33	8.4	24	4.9	30	5.9	17	3.7	14	4.8
Pleas	486	93.6	470	95.1	477	94.1	442	96.3	279	95.2
San Diego										
Trials	26	6.2	26	6.3	39	9.4	18	4.7	11	3.0
Pleas	396	93.8	384	93.7	378	90.6	366	95.3	357	97.0
Compton										
Trials	38	19.4	43	20.4	35	15.2	45	15.7	32	12.4
Pleas	158	80.6	168	79.6	196	84.8	242	84.3	227	87.6

<sup>a</sup> Cases where the most serious charge in the complaint was rape or robbery and which resulted in a conviction on any charge.  
 Sources: CORPUS (Alameda); JURIS (San Diego); PROMIS (Compton).

To determine if the new prior felony conviction enhancements were being used to secure guilty pleas, the "trial rates" for rape and robbery cases in Alameda County, San Diego County, and Compton were examined. These rates were based on the proportion of robbery and rape complaints resulting in convictions following a trial (either a jury or a court trial). Data on trial and guilty plea rates for the two offenses are displayed in Table 3.

While the data are not conclusive — information on more offenses over longer periods of time would provide more complete answers — the general trends seem clear; after 1982 the proportion of robbery and rape case convictions resulting from trials declined, and, therefore, the proportion of guilty pleas increased at corresponding rates. In all three jurisdictions combined, the proportion of robbery convictions obtained through trials was relatively small in all five years, but declined from 8.5 percent in 1980 to 6.2 percent in 1984. Trials in rape cases were much more common and showed a more significant decrease, from 20.9% in 1980 to 13.7 percent in 1984. In San Diego County, the proportion of rape convictions that resulted from trials declined from 17.4 percent in 1980 to 13.1 percent in 1984. In Compton, those proportions dropped from 33.3 percent to 15.4 percent.

How much of this decline in trials can be attributed to PC 667(a) is difficult to say given the limitations of the data. To reach a more precise estimate would require data that compared cases in which defendants had suffered prior serious felony convictions to cases involving no prior convictions on serious felony charges. Nonetheless, these quantitative data combined with information obtained in interviews and observations lead to the conclusion that PC 667(a) may have been in part responsible for the decline in trials.

## Conclusions

California's new prior felony conviction law was intended to send serious, repeat offenders to prison for longer periods of time. These findings indicate that this has not happened. In general, Proposition 8 did not increase the likelihood that serious felons would be sentenced to prison, nor did it increase the sentence lengths for those who were imprisoned. However, it is likely that for the small group of defendants against whom the new law was actually imposed, sentence severity may have increased significantly. The law has, apparently, affected plea bargaining practices, allowing prosecutors to more often secure guilty pleas in cases involving serious felonies.

Was the new law, then, a failure? Perhaps not. Prosecutors may not charge the enhancement as often as possible, because they feel that the sentences many offenders receive are harsh enough without the enhancement. Secondly, the use of the habitual offender charge as a mechanism for securing guilty pleas may ensure that serious offenders are sentenced to prison, whereas a jury trial might result in a dismissal or an acquittal on technical grounds. Prosecutors might further argue that obtaining guilty pleas in these cases frees them to devote their resources to other cases involving serious crimes, where lengthy, time-consuming trials are unavoidable.

Yet, the use of the prior felony conviction enhancements in the plea bargaining process does point up the difference between the ideals of legal reform and the realities of the criminal justice process. A separate section of Proposition 8 enacted PC 1192.7, which specifically prohibits plea bargaining in serious felony cases — the same cases covered by the prior felony conviction statute. In an earlier publication, the authors reported that this law has in some jurisdictions shifted plea bargaining from superior to lower court but has not diminished the frequency with which serious felony cases are disposed after plea negotiations. Thus, Proposition 8 created a contradictory situation. While in one of its provisions it prohibited plea bargaining in serious felony cases, in another provision it supplied prosecutors with a new tool for negotiating guilty pleas in exactly those cases.

In assessing success or failure of the new law, then, the issue becomes whether prosecutors and other members of the criminal justice system should, at times, be allowed to circumvent the restrictions of the law in order to ensure that substantive justice is achieved. In any case, the public should be aware that laws, once enacted, are not mechanically applied but rather are interpreted and selectively implemented by members of the criminal justice system who must keep that system operating on a daily basis.

## NOTES

1 California Assembly Committee on Criminal Justice, *Analysis of Proposition 8* (Sacramento: Assembly Office of Publication, 1982).

2 These "serious felonies" are defined by Penal Code Section 1192.7(c) states:

As used in this section "serious felony" means any of the following: (1) murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury...; (5) oral copulation by force, violence, duress, menace, threat of great bodily injury...; (6) lewd or lascivious acts on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any other felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with the intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) burglary of an inhabited dwelling house...; (19) robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give heroin, cocaine, or phencyclidine (PCP) to a minor; (25) any attempt to commit a crime listed in this subdivision other than an assault.

3 Penal Code Section 667.5 provided enhancements of three years for each prior prison term for most "violent felonies". These violent felonies are: murder or voluntary manslaughter; mayhem; rape as defined in subdivision (2) of Section 261; sodomy or oral copulation by force, violence, duress, menace or fear of immediate and unlawful bodily injury; lewd acts on a child under 14 as defined in Section 288; any felony punishable by death or life imprisonment; certain other felonies in which the defendant inflicts great bodily injury or uses a firearm. Existing law (PC 667.51 and PC 667.6) allowed sentences for certain sex offenses to be enhanced with additional prison terms of five years on the basis of prior convictions without a prison term.

4 Section 667(a) of the Penal Code states that serious offenders with prior serious felony convictions "... shall receive... a five-year enhancement." (emphasis added) The use of the word "shall" in this context was interpreted by many as indicating that the sentence enhancement was mandatory and that judicial authority to strike or dismiss the enhancement was overridden. In October of 1985, in *People v. Fritz* (40 Cal. 3d 227, 1985), the California Supreme Court ruled that trial courts retained the power to strike the enhancement. More recently, the legislature enacted AB 2049 (effective 5/6/86) which abrogated *People v. Fritz* by deleting court discretion to strike a prior serious felony conviction.

5 This purpose was clearly enunciated by then Attorney General George Deukmejian who was quoted as saying: "There is absolutely no question that this proposition will result in more criminal convictions, more criminals being sentenced to prison, and more protection for the law-abiding citizenry." *California Ballot Pamphlet* (Sacramento: Secretary of State, 1982).

6 See Candace McCoy and Robert Tillman, *Controlling Felony Plea Bargaining in California: The Impact of the "Victims' Bill of Rights."* (Sacramento, Department of Justice, 1986).

7 See McCoy and Tillman, *Controlling Felony Plea Bargaining in California*.

8 Unfortunately, those data cannot distinguish defendants with prior serious felony convictions. The data do, however, allow one to focus on those defendants charged with serious felonies who were convicted in Superior Court, some of whom were potentially eligible for the PC 667(a) enhancement by virtue of a prior serious felony conviction in their record. Using data from BCS's Adult Criminal Justice Statistical System, we established that approximately 31 percent of 1984 Superior Court convictees, initially charged with serious felonies, had a prior serious felony conviction. This is a conservative estimate. The data used to make that estimate tend to undercount older defendants who have a higher probability of having sustained a previous serious felony conviction simply because they have had more time to do so.

9 One might argue that a significant change in sentencing among the convictees eligible for the PC 677(a) enhancement might be masked within the larger group of persons who did not have a prior serious felony conviction. However, the proportion of the total group who were eligible for the enhancement was large enough (31 percent) that such change would have been discernible (by the time series analysis) as a statistically significant change in the total group.

10 For a fuller description see McCoy and Tillman, *Controlling Felony Plea Bargaining in California*, Chapter 5.

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