

## CHAPTER 11: ORANGE COUNTY

In Orange County, District Attorney Tony Rackauckas lifted former District Attorney Mike Capizzi's ban on plea bargains and has been less eager to prosecute nonviolent felonies as third strikes. We would still like to see the law changed. Sensible prosecutorial discretion has softened some of the law's objectionable features, but that could change. The position of district attorney is ineluctably political, and it is better if they don't have the capability, if circumstances change, to perpetrate injustice for political gain.

--*Orange County Register* "Editorial: Three-Strikes Sense," May 30th 2003.

### Orange County

Orange County was created in 1889 from land that was in Los Angeles County, and acquired its name because of the extensive orange groves within the area.<sup>1</sup> Orange County is located south of Los Angeles County and north of San Diego County and has 42 miles of coastline along the Pacific Ocean.

Orange County is known as the home of Disneyland. It is only the 47th largest county in California at 785 square miles, but had the second highest population in 2000 at 2,846,289, making it the second densest county in the state.<sup>2</sup> Orange County had a

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<sup>1</sup> California State Association of Counties, *How Did Our 58 Counties Get Their Names?* (Sacramento, 2003), [http://www.csac.counties.org/counties\\_close\\_up/county\\_history/county\\_names.html](http://www.csac.counties.org/counties_close_up/county_history/county_names.html) (accessed August 20, 2003).

<sup>2</sup> The counties with the largest and most dense populations were Los Angeles and San Francisco, respectively. California State Association of Counties, *Square Mileage by County* (Sacramento, 2003), [http://www.csac.counties.org/counties\\_close\\_up/county\\_web/county\\_mileage.html](http://www.csac.counties.org/counties_close_up/county_web/county_mileage.html) (accessed August 20, 2003); California Department of Finance, Demographic Research Unit, *Census 2000, SF1 Profile: State and County Population Summary* (Sacramento, 2003), [http://www.dof.ca.gov/html/demograp/scdc\\_products.htm](http://www.dof.ca.gov/html/demograp/scdc_products.htm) (accessed October 22, 2003); California Department of Finance, *California County*

greater population than 20 of the country's states, including Mississippi, Kansas, and Arkansas.<sup>3</sup> Cities of Orange County include Santa Ana (337,977), Anaheim (328,014), Huntington Beach (189,594), Garden Grove (165,196), Irvine (143,072), Orange (128,821) and Fullerton (126,003).<sup>4</sup> The racial mix in 2000 was 51 percent white, 31 percent Latino, 13 percent Asian, 1.5 percent black, and 3 percent other.<sup>5</sup> In 1999 its registered voters were 51 percent Republican and 32 percent Democrat.<sup>6</sup> The county has had a reputation for being very conservative--but with a growing Latino population has seen political changes--the most recent being the 1998 election of Democrat Loretta Sanchez over outspoken Republican Bob Dornan as a U.S. Representative. Orange County's per capita income in 2000 was an average of \$33,805--ranked 9th highest of the 58 counties, and an unemployment rate of 2.5 percent--4th lowest of the 58 counties.<sup>7</sup>

From 1993 to 2001 Orange County's crime rate was significantly lower than the rest of California. Orange County had an average violent crime rate index of 408 per 100,000 people when the California average was 832.<sup>8</sup> During the same time period, compared to the rest of the state, Orange County experienced a similar reduction in

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*Profiles* (Sacramento, 2003), [http://www.dof.ca.gov/HTML/FS\\_DATA/profiles/pf\\_home.htm](http://www.dof.ca.gov/HTML/FS_DATA/profiles/pf_home.htm) (accessed October 22, 2003).

<sup>3</sup> U.S. Census Bureau, *States Ranked by Population: 2000 (Table 1)*, PHC-T-2 (Washington DC, 2001), <http://www.census.gov/population/cen2000/phc-t2/tab01.xls> (accessed July 29, 2003).

<sup>4</sup> *Square Mileage by County; Census 2000, SF1 Profile: State and County Population Summary*.

<sup>5</sup> *California County Profiles*.

<sup>6</sup> A.G. Block and Claudia Buck eds., *California Political Almanac: 1999-2000*, 6th ed. (Sacramento: State Net, 1999).

<sup>7</sup> *California County Profiles*.

<sup>8</sup> California Criminal Justice Statistics Center, *Reported Crimes and Crime Rates by Category and Crime by County, 1992-2001 (Table 1)* (Sacramento, 2003), <http://caag.state.ca.us/cjsc/datatabs.htm> (accessed October 22, 2003).

violent crime but a greater reduction in property crime.<sup>9</sup> Prior to the enactment of the Three Strikes law, Orange County had experienced a decrease in its crime rate index of 16 percent from 1991 to 1994.<sup>10</sup>

As Table 11.1 indicates, as of December 31, 2002 Orange County has used the Three Strikes law at lower rates in comparison to the rest of the state when based on population, arrests, and convictions, but not when based on violent crime.

As of July 31, 2002, the racial breakdown of third strikers from Orange County was about 37 percent white, 32 percent Latino, 21 percent black, and 5 percent other.<sup>11</sup> Based on relative population, blacks were 20 times and Latinos 47 percent more likely to get a third strike than whites--which was more than the state multiple of 12.4 times for blacks and about the same multiple of 46 percent for Latinos.

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<sup>9</sup> Orange County had a 44 percent decrease in violent crime and a 48 percent decrease in property crime from 1993 to 2001. In comparison, the state average was a 43 percent decrease in violent crime and 39 percent decrease in property crime. *Reported Crimes and Crime Rates by Category and Crime by County, 1992-2001 (Table 1)*.

<sup>10</sup> California Criminal Justice Statistics Center, *Reported Crimes and Crime Rates by Category and Crime by County: 1991 to 2000 (Table 1)* (Sacramento, 2002), <http://caag.state.ca.us/cjasc/datatabs.htm> (accessed August 7, 2002).

<sup>11</sup> California Department of Corrections: Data Analysis Unit, *Third Strikers in the Institution Population by County of Commitment, Offense Group and Racial/Ethnic Group, July 31, 2002* (Sacramento, 2002).

Table 11.1: Percentage of Third Strikers in the Prison Population at December 31, 2002 from Orange County as Compared to the Rest of the State and its County Ranking per Offense Category Based on Population, Violent Crime, Arrests and Convictions

Third Strike	Population			Violent Crime		Arrests		Convictions	
	Number	Percent	Rank	Percent	Rank	Percent	Rank	Percent	Rank
Murder 1	8	50%	22	110%	17	99%	17	60%	21
Murder 2	6	50%	21	108%	17	97%	18	59%	22
Manslaughter	1	28%	18	61%	16	55%	16	33%	17
Veh. Manslaughter	1	182%	7	397%	7	355%	7	217%	7
Robbery	58	42%	27	93%	22	76%	35	51%	29
Assault DW	9	27%	36	59%	32	50%	29	32%	35
Other Assault	22	56%	28	122%	19	104%	17	67%	26
Rape	2	16%	28	35%	28	31%	28	19%	28
Lewd Act w Child	19	85%	24	186%	19	140%	13	102%	20
Oral Copulation	0	0%	20	0%	20	0%	20	0%	20
Sodomy	0	0%	9	0%	9	0%	9	0%	9
Penet w/ Object	1	52%	13	113%	10	85%	11	62%	12
Other Sex Off.	4	31%	25	68%	22	51%	23	37%	25
Kidnaping	3	38%	22	82%	17	66%	17	45%	18
Crimes-Person	134	44%	40	96%	31	81%	23	52%	37
Burglary 1st	47	66%	26	144%	16	65%	24	79%	21
Burglary 2nd	39	100%	12	217%	7	99%	12	119%	8
Grand Theft	4	38%	18	82%	14	48%	16	45%	17
Petty Theft	17	55%	13	120%	11	71%	14	66%	15
Rec. Stolen Prop.	9	62%	20	135%	14	80%	20	74%	17
Vehicle Theft	12	62%	17	136%	14	107%	13	75%	17
Forgery/Fraud	5	92%	14	202%	9	129%	10	111%	11
Other Prop.	1	31%	12	68%	0	0%	0	37%	12
Crimes-Prop.	134	69%	22	151%	11	97%	22	82%	17
CS Possession	40	69%	19	150%	14	88%	16	82%	17
CS Possess-sale	14	54%	21	118%	18	70%	21	65%	19
CS Sub.-sales	13	76%	13	166%	9	97%	12	91%	11
CS-Manufact.	0	0%	13	0%	13	0%	13	0%	13
CS-Other	2	51%	8	111%	7	65%	7	61%	7
Marij. Poss-Sale	0	0%	5	0%	5	0%	5	0%	5
Marij. Sales	2	81%	7	176%	4	104%	6	97%	6
Other Marij. Off.	0	0%	3	0%	3	0%	3	0%	3
Crimes-Drugs	71	64%	24	140%	18	83%	22	77%	22
Escape	0	0%	9	0%	9	0%	9	0%	9
DUI	0	0%	14	0%	14	0%	14	0%	14
Arson	0	0%	12	0%	12	0%	12	0%	12
Poss. Weap.	15	43%	30	94%	26	66%	26	52%	29
Other Off.	12	93%	16	204%	0	0%	0	112%	15
Crimes-Other	27	49%	32	107%	26	83%	21	59%	30
Crimes-Nonperson	232	64%	22	141%	13	83%	21	77%	22
Total	366	55%	30	120%	24	79%	25	66%	28

Source: See footnote 16 in chapter 6.

## Michael Capizzi and Scott Baugh

Michael Capizzi, District Attorney of Orange County from 1990 to 1998, and Scott Baugh, State Assemblyman from Orange County from 1995 to 2002, both Republicans, had their paths cross to the political detriment of both. In addition, both had their own roles in the California Three Strikes law's history. Ironically, their paths probably would not have crossed except for the Three Strikes law.

The story begins in 1994 after Republicans, riding the Three Strikes "tough on crime" platform, were able to go from a 47 to 33 minority to a 41 to 39 majority in the State Assembly--the first time they had a majority in the Assembly since 1970.<sup>12</sup> Republicans were looking forward to putting a member of the GOP in as assembly speaker. In addition, they were relieved to finally conclude Democrat Willie Brown's tenure as speaker, the longest in state history. But then Brown did what appeared impossible. He expelled one of the Republican members and convinced Republican Paul Horcher of Diamond Bar to become an independent and vote for him. Horcher, however, was quickly recalled by angry voters from his district. But Brown pulled his magic again when he was able to persuade Republican Doris Allen of Huntington Beach to run for speaker with the backing of Democrats.<sup>13</sup>

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<sup>12</sup> James J. Rawls and Walton Bean, *California: An Interpretive History*, 7th ed. (New York: McGraw-Hill, 1998), 464; Jennifer Kerr, "GOP Leading in Assembly Balloting," *San Francisco Examiner*, November 9, 1994, B4; Robert B. Gunnison, "Showdown Day Arrives in Assembly," *San Francisco Chronicle*, December 5, 1994, A1.

<sup>13</sup> Steven A. Capps, "Legislature Seethes with Plots, Plans," *San Francisco Examiner*, December 11, 1994, C1. After the 1994 election, Republican Richard Mountjoy of Monrovia won seats simultaneously on both the state assembly and senate and claimed he could remain on the assembly until his choosing. The Democrats disagreed and were able to oust him from his assembly seat by a 40 to 39 vote because a person cannot vote on their own ouster and they had also received the vote of Paul Horcher who had switched from being a Republican to an Independent after the November election. Greg Lucas, "GOP Turncoat Names Politician Who Advised Him," *San Francisco Chronicle*,

Republicans in Orange County responded again and had a recall election for Allen. Scott Baugh, a Huntington Beach attorney for the Union Pacific Railroad, was talked into running in the recall by his friend, Republican U.S. Representative Dana Rohrabacher. In the recall election, Baugh faced two other Republicans and one Democrat. Because the candidate with the highest vote total replaces a recalled official--regardless of the percentage of the vote--Baugh and Rohrabacher were concerned that the three Republican candidates would split the vote and the lone Democrat would then win.<sup>14</sup>

What followed was a scandal of major or minor proportions depending on who was asked. In an attempt to spread the Democratic vote, Republicans convinced Laurie Campbell to jump into the campaign as a Democrat. Baugh, however, had received a \$1,000 campaign donation from Campbell and her husband and then appeared to intentionally hide this fact from required public disclosure.<sup>15</sup> At first Baugh denied knowing Campbell, but later revealed that he had known the Campbell family for eight

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December 20, 1994, A15; Greg Lucas, "Willie Brown Pulls Coup, Keeps Power," *San Francisco Chronicle*, January 24, 1995, A1. Horcher was recalled by voters from his district on May 16, 1995 by a 62.5 percent to 37.5 percent vote. Only five prior recalls had made it to the ballot in the history of California and the last successful recall had been in 1914 when San Francisco voters ousted state Senator Edwin Grant. Greg Lucas, "Voters Oust Horcher by Big Margin: GOP Picks Up Seat in Recall Election," *San Francisco Chronicle*, May 17, 1995, A1. Republicans once again thought they had a full majority but were exasperated by another defection in Republican Doris Allen.

Assemblymember Allen said she would not vote for a Democrat but decided to take the speaker position herself with the help of Brown and the Democrats. It was believed she defected from GOP wishes because she was angered at Republican leaders who backed Ross Johnson rather than herself for the state senate in a special election in her district earlier in the year. At the same time, Brown decided he had enough of the state assembly and announced he would be running for mayor of San Francisco. "Transition in the Assembly," *Sacramento California Journal Weekly*, June 5, 1995; Block and Buck eds., *California Political Almanac: 1999-2000*, 241.

<sup>14</sup> Block and Buck eds., *California Political Almanac: 1999-2000*, 241.

<sup>15</sup> Block and Buck eds., *California Political Almanac: 1999-2000*, 241-242.

years.<sup>16</sup> Campbell was thrown out of the election race by a Sacramento judge, one of the Republicans running against Baugh was persuaded to drop out of the contest, and Baugh easily won the recall on November 28, 1995.<sup>17</sup> Republicans finally were in full control and elected Curt Pringle of Garden Grove as the Speaker of the Assembly in January of 1996.<sup>18</sup>

Orange County District Attorney Michael Capizzi, however, investigated the possible legal violations and had Baugh's home searched by law enforcement officers. Baugh, extremely upset about the raid, claimed that he was assaulted by police officers during the search.<sup>19</sup> Another issue involved petitions that Cambell turned in to qualify for the ballot. She swore in an affidavit that she was the sole signature gatherer and others said the same. Later it was admitted that staff from Rohrabacher's and Pringle's offices had helped gather signatures, and four persons pled guilty to misdemeanor election fraud and perjury.<sup>20</sup>

Baugh was indicted with 22 counts of criminal conduct, including many felonies. Orange County Republicans fumed, claiming Capizzi was overzealous and

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<sup>16</sup> "Republicans Protest Raid on Home of New Orange County Assemblyman," *Fresno Bee*, December 25, 1995, B15.

<sup>17</sup> Larry Gerber, "Assemblywoman Loses Recall Vote," *San Francisco Examiner*, November 29, 1995, A6.

<sup>18</sup> Allen had given up the speaker position after five months and handed it to Republican Brian Setencich of Fresno who was elected with his, Allen's, and the Democrat's votes. Setencich tried to hold onto his position by saying he was going to give full power back to the Republicans now that they had the majority, but the Republican caucus decided to vote for Pringle instead. Pamela Martineau, "Republicans Hope Allen Recall Will End Political Games," *Los Angeles Metropolitan News Enterprise*, November 30, 1995, 10.

<sup>19</sup> "Republicans Protest Raid on Home of New Orange County Assemblyman."

<sup>20</sup> Block and Buck eds., *California Political Almanac: 1999-2000*. Campaign laws required the candidate to be the sole signature gatherer to win a spot on the ballot. Robert B. Gunnison and Greg Lucas, "Election Fraud Probe Could Weaken Speaker," *San Francisco Chronicle*, March 16, 1996, A13.

that the matter would be better handled by the Fair Political Practices Commission, which can only issue fines, not jail time. "I see a district attorney acting like a fascist," Rohrabacher said. "He's basically out to hurt people who are in my political family."<sup>21</sup> They also claimed that Capizzi was using the issue for political grandstanding since he wanted to run for state attorney general in 1998.<sup>22</sup> Backing their claims was the fact that Capizzi had referred to the Baugh case in letters seeking campaign contributions just a week after he had announced he would run for attorney general.<sup>23</sup>

If Capizzi was using the indictments against Baugh as a means to help achieve higher office, he couldn't have picked a worse strategy. Baugh, Rohrabacher, Pringle, and many others in the GOP made Capizzi a pariah to the Republican Party. In February of 1997 at a state Republican meeting in Sacramento, a resolution was passed urging Capizzi not to run for attorney general or any other public office because of his prosecution of Baugh.<sup>24</sup> Baugh and Rohrabacher filed a complaint against Capizzi with the state bar--which was later dismissed.<sup>25</sup> At the November 1997 State Republican Party Convention in Anaheim organizers gave Capizzi's opponent in the Republican primary for attorney general, David Sterling, a high-profile committee chairmanship and prime-time convention speaking opportunities. Officials said, however, that they could not even find room for Capizzi to set up a campaign table in the hotel lobby. When Stirling was talking to reporters about the Baugh indictments he said the

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<sup>21</sup> Gunnison and Lucas, "Election Fraud Probe Could Weaken Speaker."

<sup>22</sup> "GOP's Orange County Shadow," *Fresno Bee*, April 1, 1996, B4.

<sup>23</sup> "Scott Baugh," *Los Angeles City News Service*, January 26, 1998.

<sup>24</sup> "Capizzi," *Los Angeles City News Service*, February 24, 1997.

<sup>25</sup> "Capizzi Cleared," *Los Angeles City News Service*, September 16, 1997.

prosecution constituted an abuse of power of Capizzi. “There are certain violations of law that are of a technical nature,” Stirling said, “but it is important that we not elevate certain possible violations of law into felonies.”<sup>26</sup>

Capizzi had decided not to run for re-election as District Attorney and focused his full efforts on the attorney general position. The other major issue that confronted Capizzi during his leadership in the District Attorney’s office was the Orange County Bankruptcy in 1994 (see chapter 2). Some complained that his office was overzealous in prosecuting some of the county officials, and others complained that he was not diligent enough in getting longer sentences or enough restitution from those who were prosecuted.<sup>27</sup> According to polls taken by the *Los Angeles Times*, Capizzi’s approval ratings slipped significantly from May of 1994--before the bankruptcy--to October 1996--after all the publicity surrounding the bankruptcy and campaign-related prosecutions.<sup>28</sup>

Capizzi lost to Stirling in the March 1998 primary by a 2 to 1 margin.<sup>29</sup> Stirling then lost the November election to Democrat contender Bill Lockyer.<sup>30</sup> In 1999 a judge decided that there was a conflict of interest in having the new District Attorney of Orange County handle the prosecution of Baugh and the matter was handed over to the

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<sup>26</sup> "Southern Exposure," *Sacramento California Journal*, November 1, 1997. Capizzi pointed out that it was ironic that many of the same Republicans who said he was overzealous in his prosecution of Baugh were also the same people who vocally called for an investigation into allegations of election fraud when Democrat Loretta Sanchez defeated Republican Bob Dornan for U.S. Representative. “There is some inconsistency in the position of those critics, some might even suggest hypocrisy,” said Capizzi. "'98 Attorney General's Race Unsettled, Crowded," *Sacramento California Journal*, February 1, 1997.

<sup>27</sup> See, for example, "Southern Exposure."

<sup>28</sup> "Southern Exposure--Michael Capizzi," *Sacramento California Journal*, January 1, 1997.

<sup>29</sup> "Stirling's Win by Margin of 2-1 Surprise," *Ventura County Star*, June 4, 1998, A11.

<sup>30</sup> Block and Buck eds., *California Political Almanac: 1999-2000*, 53-54.

state's attorney general. Ironically, it was Democrat attorney general Lockyer who then declined to prosecute Baugh and handed the case over to the Fair Political Practices Commission.<sup>31</sup>

With the indictments hanging over his head and the first-hand experience of a police search, Baugh had a new attitude toward the criminal justice system. In 1999 he sided with defense attorneys and pushed forward bills that allowed those who appear before a grand jury to have a lawyer present, gave compensation to a wrongly convicted man, and prohibited police training that circumvents a suspect's right to remain silent and have a lawyer present.<sup>32</sup> "As legislators, we have a responsibility to change things when we find abuses," Baugh said. "I'm promoting fundamental fairness."<sup>33</sup>

On January 30th 1999, Baugh announced at a meeting with members of Families to Amend California's Three Strikes (FACTS) that he was going to introduce a bill in the Assembly to amend the Three Strikes law.<sup>34</sup> Baugh said his bill would not be as broad as SB79 (a bill introduced by Senator Tom Hayden to confine the law to only violent and serious offenses), but would probably target the removal of some minor crimes such as possession of a controlled substance and petty theft from the Three Strikes law. Baugh said his desire to change the law stemmed from the election fraud accusations against him and because of a brother with a criminal record who was a methamphetamine addict. Baugh said he thought he could get 10 other Assembly

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<sup>31</sup> Block and Buck eds., *California Political Almanac: 1999-2000*, 242; Cathy Franklin, "Baugh," *Los Angeles City News Service*, March 26, 1999.

<sup>32</sup> Block and Buck eds., *California Political Almanac: 1999-2000*, 243.

<sup>33</sup> Bill Ainsworth, "Lawmaker Gets Real-Life Criminal Justice Lesson," *San Francisco Recorder*, May 12, 1997, 1.

<sup>34</sup> I was present at this meeting and had subsequent conversations with Baugh's office.

Republicans to support his bill which, combined with Democrat votes, would meet the two-thirds legislative requirement to amend the law. In February, however, Baugh backed down and said he would introduce a bill to only study the effects of the Three Strikes law. In April, after being elected the minority GOP assembly leader, he decided that he was not going to put forward his own study bill but instead would support a similar bill (SB873) put forward by Democrat state Senator John Vasconcellos of San Jose. SB873, needing only a majority vote, was passed by both the senate and assembly, but was vetoed by Governor Gray Davis on September 10, 1999.<sup>35</sup>

Michael Capizzi worked for the District Attorney's office in Orange County for 25 years before succeeding Cecil Hicks as District Attorney in 1990. He was once president of the Orange County Bar Association, president of the California District Attorney's Association (CDAA), and had been selected as "California Prosecutor of the Year" by the CDAA.<sup>36</sup>

In February of 1994 Capizzi announced he supported the Three Strikes law and said the legislation was long overdue. Capizzi said the Klaas tragedy had fueled legitimate public concerns about putting dangerous felons in prison and keeping them there. "The public does not want to live with that potential danger, and there's no reason they should," he said. When questioned about the possible overcrowding of the court system, Capizzi saw it differently, saying that the measure could end up saving the court system time and money, eliminating the prospect of seeing the same offenders

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<sup>35</sup> See the legislative history of SB873 at [http://info.sen.ca.gov/cgi-bin/pagequery?type=sen\\_bilinfo&site=sen&title=Bill+Information](http://info.sen.ca.gov/cgi-bin/pagequery?type=sen_bilinfo&site=sen&title=Bill+Information). Baugh was termed out of office in 2000 and became a lobbyist.

<sup>36</sup> Felicia Cousart, "DA Running for Attorney General Post," *Fresno Bee*, January 22, 1998, A3; "Editorial: For Attorney General--Lockyer, Capizzi," *Fresno Bee*, May 25, 1998, B6; "'98 Attorney General's Race Unsettled, Crowded."

over and over. “Rather than have 30 arrests, 30 prosecutions and 30 victims” for the same offender, he said, “it might be far more economical to put him in prison for life for three convictions.”<sup>37</sup>

When Capizzi took over the reigns of the District Attorney’s office in 1990, he continued Hick’s policy of not allowing prosecutors to plea bargain with defendants.<sup>38</sup> Since the Three Strikes law appeared to say that plea bargaining was not allowed (see chapter 5), Capizzi felt all the more justified in imposing his ban in such cases. This policy quickly resulted in Orange County having an overcrowded court system and a reputation for giving third strikers with minor felonies sentences of 25 years-to-life.<sup>39</sup> Capizzi was also eyeing the state’s Attorney General’s office, and the 1998 election brought out many politicians eager to show their “tough on crime” credentials. An opinion piece written by Jim Wasserman stated the following:

In some faiths, people bow before religious icons. In California, we give homage to political icons. And the most holy and sacred, as evidenced by the last three months of political campaigning, is “Three Strikes and You’re Out.” The veneration has reached levels that

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<sup>37</sup> Eric Lichtblau, "Assessing Hits, Errors of '3 Strikes' Crime Bill in O.C.," *Los Angeles Times*, February 6, 1994, A-1.

<sup>38</sup> The policy was seen as “tough on crime” but questioned by a *Los Angeles Times* multi-part series as actually overly generous in classifying possible felony cases as misdemeanors. The reasoning was that because defendants did not have anything to lose, they were more likely to go to trial. Since this would result in too many trials for the court system to handle, the prosecutors’ office was extra stringent on which cases they would prosecute as felonies. The two major criteria prosecutors looked at were: (1) the chance of getting a guilty verdict, and (2) the likelihood the defendant would get time in prison. In cases where the defendant could be charged with a felony but did not receive any prison time, the prosecutor’s office saw little difference in simply charging the person with a misdemeanor instead. “If they’re not going to state prison,” Capizzi said, “then you’ve got to question whether you’ve been calling them right as felonies.” Dan Weikel, Mark Platte and Mark Landsbaum, "Lagging on the Felony Front," *Los Angeles Times*, July 30, 1995, A1; Mark Platte, Dan Weikel and Mark Landsbaum, "Approaches to Felonies Differ--as Do Results," *Los Angeles Times*, July 31, 1995, A1.

<sup>39</sup> Henry Weinstein, "'3 Strikes'-Spawned Crush of Cases Crowds Out Civil Suits; Law: Courtroom Crunch Delays Non-Criminal Trials," *Los Angeles Times*, November 30, 1994, A-1; Stephanie Simon, "Civil Courts Also Feel Squeeze of '3 Strikes' Cases," *Los Angeles Times*, August 13, 1995, A-1.

even satire can't touch. It's become the greatest sideshow of the candidate season, the very public devotion before the altar of Three Strikes. From commercials, endorsements and news, you'd think the '98 election was a referendum on Three Strikes alone. . .

Even U.S. Sen. Barbara Boxer, anathema to conservatives, pays public homage. Jane Harman running for governor said she supports Three Strikes. Dave Stirling running for attorney general said he helped write it. (His poor opponent Mike Capizzi can only claim to support it).

Because Capizzi's prosecutors were not allowed to plea bargain, judges were left to try to apply the law with whatever mercy they felt was reasonable.<sup>40</sup> As described in chapter 5, however, the judges did not know if they had discretionary power until the *Romero* decision in 1996 and they feared the threat of reversals on an appeal if they went too far. In addition, the discretion used by judges varied, based on each particular judge's sentencing philosophy: thus, defendants were subject to the random judicial assignment system and those who won might get a sentence of only four years, while those who lost could get 25 years-to-life.<sup>41</sup>

One person who lost the judicial assignment lottery in 1994 was Doug Rash. Rash received a 25 years-to-life sentence for possession of .4 grams of cocaine. The drugs were found in Rash's pockets at a party in a hotel room. Rash had prior burglary

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<sup>40</sup> An article in the *Orange County Register* reviewed many cases where judges had to use their discretion to avoid non-violent offenders getting a life sentence. Capizzi responded by saying that lenient sentences had yanked the teeth from the law. "It's taught them one lesson and one lesson only-- they may be treated with leniency again and will beat the system again," he said, "and the important deterrent effect of Three Strikes is lost." Stuart Pfeifer, "Second Chances vs. 'Three Strikes' Law," *Orange County Register*, October 26, 1997, 1.

<sup>41</sup> A 1997 study by the *Orange County Register* found that judges reduced sentencing in 71 percent of the 175 Three Strike cases they heard. Martin Wisckol, "Second Thoughts on 'Three Strikes' Law," *Orange County Register*, December 6, 1998, 1.

convictions from 1985 and 1987. The first burglary charge was for the alleged theft of an electronic piano keyboard belonging to Rash's brother--but really involved a scheme to defraud through an insurance recovery claim. Rash's mom says her son pled guilty to the burglary charge so others involved would not also be charged in the fraud scheme. The second burglary conviction resulted from Doug and a friend breaking into the friend's ex-girlfriend's house so that he could recover his audio CDs. The father of the ex-girlfriend saw the two of them, called the police; and after being apprehended, Doug and his friend pled guilty to the burglary charge.

Another one of those who lost the lottery was Shane Reams (mentioned in previous chapters). Reams was given a sentence of 25 years-to-life in 1996 when he stood 30 feet away from a \$20 sale of crack cocaine and the prosecutor claimed he was aiding and abetting the sale. The person who conducted the sale was given a sentence of four years and was released from prison after serving only two years. Reams' priors stemmed from some residential burglaries in 1986 and 1990 in which a total of less than \$1,000 in goods was stolen. In one of the burglaries, Reams' mother suspected her son and talked him into turning himself in--a decision she now regrets.

The *Orange County Register*, having a reputation as a conservative and libertarian paper, had many articles, opinion pieces, and editorials in favor of amending the Three Strikes law to only violent offenders. In addition, they also criticized Capizzi for what they viewed as his overuse of the law.<sup>42</sup>

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<sup>42</sup> "A Foul Third Strike," *Orange County Register*, May 17, 1998, 2; Alan W. Bock, "The Law Strikes Out," *Orange County Register*, July 19, 1998. In November of 1998 with Governor Wilson having only two months left in office, Capizzi asked the governor for one of the judgeships that the governor still had left to fill. Wilson did not grant Capizzi his request--a move many believed was the result of

## Anthony Rackauckas

Tony Rackauckas was a gang member as a teenager and had been convicted of assault with a deadly weapon.<sup>43</sup> Turning his life around, he became a deputy district attorney in Orange County for 16 years, went into private practice as a defense attorney for several years, and then was appointed to a Municipal Court judge position in 1990.<sup>44</sup> He was then promoted to the Superior Court in 1993 and is one of the few people in California to have had discretion as a judge and as a district attorney during the Three Strikes era. During his judgeship, a third striker would probably have considered himself or herself lucky had they been assigned to Rackauckas. Sitting on the bench, Rackauckas was not afraid to use his discretion when he believed it was warranted.

According to *Orange Coast* magazine, out of 17 Three Strike cases heard by Rackauckas, 11 were reduced from felony convictions to misdemeanors.<sup>45</sup> In 1997 the *Orange County Register* reviewed the case of Ronnie Lara, Jr. who had avoided a third strike when Rackauckas reduced a felony charge of check forgery down to a misdemeanor. Lara had a prior record that included 20 violent felony convictions-- including kidnapping and 16 counts of armed robbery. Rackauckas gave him the

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the continuing grudge the Republican Party had against Capizzi for the Baugh indictments. "Capizzi," *Los Angeles City News Service*, December 31, 1998. Capizzi went into private practice and appears to have specialized in defending police officers and departments involved in police brutality cases. "Former Orange County DA to Advise Riverside Chief," *Associated Press*, March 10, 1999. Richard Brooks, "Clashing Laws Bedevil Police," *Riverside Press Enterprise*, August 12, 2001, B2. John Cote, "Dunn's Legal Freeze Upheld: Judge OK With SJ Board's Vote to Cut Sheriff's Lawyer," *Modesto Bee*, February 12, 2003, B1. "Police Records," *Los Angeles City News Service*, December 27, 2001. In 1999 Capizzi ran in an election for a local judge position. GOP leaders backed his opponent, and Capizzi lost. Stuart Pfeifer, "Capizzi Plans to Run for Judge," *Orange County Register*, October 14, 1999. Martin Wisckol and Stuart Pfeifer, "Capizzi's Past Colors Bench Bid," *Orange County Register*, December 7, 1999.

<sup>43</sup> R. Scott Moxley, "Third Strike," *OC Weekly*, September 1, 2000, 10.

<sup>44</sup> Cathy Franklin, "D.A. Race," *Los Angeles City News Service*, February 10, 1998.

<sup>45</sup> Michael Heller, "Yer Out!," *Orange Coast*, November 1998, 93-104.

reduced sentence because Rackauckas said he believed Lara, who recently converted to Christianity, and said he would devote his life to his family.<sup>46</sup>

In 1997, state officials investigated whether Assistant District Attorney Brent Romney had asked a secretary to locate the files of 13 Three Strike cases handled by Rackauckas when he was a judge. At the time, Romney was planning to run against Rackauckas for District Attorney. Most thought Romney was attempting to make Rackauckas appear soft on crime.<sup>47</sup> Later, attorney general Dan Lungren's office declined to charge Romney with any crime.<sup>48</sup>

When Rackauckas was campaigning for District Attorney, he promised that if elected he would give his prosecutors greater discretion. "By discretion," Rackauckas said he meant more than just reducing the level of charges to induce a defendant to plead guilty. "I'm talking about professional judgment, like prosecutors dealing without compromise with [hardened] criminals ... [and], on the other hand, dealing differently with someone who is not a danger to society." Rackauckas complained that the policy under Capizzi resulted in judges being thrust into the discretionary role when it was better done by prosecutors, who had talked to witnesses, victims, and law enforcement officers. Prosecutors lose credibility with judges, he said, if they handle each case as if it is the worst crime and worst defendant. Rackauckas's opponent, Wallace Wade, an administrator who supervised Orange County bankruptcy

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<sup>46</sup> Pfeifer, "Second Chances vs. 'Three Strikes' Law."

<sup>47</sup> Steve Lowery, "Three Strikes Stinks!" *Orange County Weekly*, August 7, 1998, 18-22.

<sup>48</sup> "Afternoon Headlines," *City News Service*, November 26, 1997.

investigations, said that if he was elected he would not change the basic charging and sentencing policies.<sup>49</sup>

Rackauckas's reputation for taking a reasonable approach with the Three Strikes law was well known. Wade, by comparison, promised to enforce the statute "vigorously."<sup>50</sup> In response to the Capizzi-Baugh conflict, Rackauckas promised the Republican Party that he would reduce the office's involvement in political corruption cases.<sup>51</sup>

The Orange County Deputy District Attorneys Association, which represented 175 of the 230 deputies in the office, endorsed Rackauckas.<sup>52</sup> In the June 1998 primary, Rackauckas beat Wade by a 61.5 percent to 38 percent vote and since a majority was achieved by Rackauckas, no run-off election was necessary.<sup>53</sup> In March of 2002 Rackauckas beat Wade again by a nearly identical margin of 62 percent to 38 percent.<sup>54</sup>

After taking office in January of 1999, Rackauckas said that he met with supervisors and trial prosecutors and impressed upon them his thinking about their use of the discretion he had given them. "I've tried to avoid making what we do plea bargaining," said Rackauckas. He encouraged his prosecutors to evaluate their cases and agree to less than the minimum sentence, reduce charges, and waive a prior strike when it was reasonable. Rackauckas said that his goal was "to get the most appropriate

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<sup>49</sup> Franklin, "D.A. Race."

<sup>50</sup> Flier handed out by Wallace Wade during campaign.

<sup>51</sup> Matt Coker, "Clockwork Orange," *OC Weekly*, July 28, 2000.

<sup>52</sup> Franklin, "D.A. Race."

<sup>53</sup> Franklin, "D.A. Race."

<sup>54</sup> Stuart Pfeifer and Monte Morin, "Orange County D.A. Lowers the Boom After Election Win," *Los Angeles Times*, March 7, 2002, B11.

sentence in each case. My experience is that if we are not going to use our discretion, the judges will take it from us.”<sup>55</sup>

Rackauckas issued a policy memo to all the deputy prosecutors stating that “a standardized policy can neither anticipate all that justice may require in any given case, nor substitute for the professional judgment of the individual prosecutor.” The memo warned that “nontrial dispositions are not to be viewed or employed as tools of caseload management.” The need was for a resolution “that serves the public interests in accountability, punishment, reformation and deterrence, under the law.” Rackauckas gave an example of two first-degree burglary cases, one in which a professional thief clears a home of its furniture and possessions, and a second in which a teen-ager selling magazines door to door walks into an open garage and steals a bicycle. “You have two people who the law treats in the same manner,” he said. “You have to look at the facts and look at the defendants and use your professional judgment to determine an appropriate sentence for each.”<sup>56</sup>

According to Judge Gregory H. Lewis, the maximum was the regular sentencing recommendation by prosecutors when Capizzi was in office. Since Rackauckas became District Attorney, he said, the deputies began participating in pre-plea discussions and sometimes recommended lesser sentences rather than automatically recommending the maximum.<sup>57</sup>

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<sup>55</sup> John McDonald, "More Choice in the Courts," *Orange County Register*, May 3, 1999.

<sup>56</sup> McDonald, "More Choice in the Courts."

<sup>57</sup> McDonald, "More Choice in the Courts."

Judge Carl Biggs, a former prosecutor under Capizzi, said that the policy of recommending only the maximum undermined the credibility of the prosecutor's position. "It's like the boy who cried wolf," Biggs said. "If every time we have a minor case the DA says 10 years, then pretty soon I'll ignore it. If the DA says 30 days most of the time, when they say 10 years, I'll listen."<sup>58</sup>

The *Orange County Register* interviewed judges and defense attorneys from the Superior Court in Santa Ana and the five branch courts about three strikes. Some saw little difference at some branches, and some saw "a big difference." In most cases, prosecutors using their discretion appeared to be progressing, but slowly.<sup>59</sup>

Rackauckas's tenure as District Attorney has been rocky with a host of family and friends who have ended up in the criminal justice system. Rackauckas had a daughter-in-law arrested on drunk driving charges and his son was arrested on possession of controlled substance charges when he was found by police naked and asleep in a truck carrying drug paraphernalia and two grams of cocaine.<sup>60</sup> Rackauckas's pledge to lessen prosecution of political corruption cases may have come back to haunt him.<sup>61</sup> In every year Rackauckas has been District Attorney, actions deemed political,

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<sup>58</sup> McDonald, "More Choice in the Courts."

<sup>59</sup> McDonald, "More Choice in the Courts."

<sup>60</sup> R. Scott Moxley, "Toxic Politics," *OC Weekly*, December 20, 2002, 20.

<sup>61</sup> Rackauckas kept his promise by revamping the Felony Projects Unit--the department that handles political corruption cases--replacing many of the experienced prosecutors in the unit with young, inexperienced attorneys.

based on favoritism, or involving a conflict of interest have occurred.<sup>62</sup> In addition, Rackauckas's office handled some cases where they appeared to be overly zealous.

During his election campaign Rackauckas was criticized for asking for and taking donations from deputy district attorneys. After being elected he was then accused of promoting a disproportionate number of prosecutors in the office who had given him the campaign donations.<sup>63</sup> Rackauckas was criticized for creating a \$73,000 salaried media relations director for the District Attorney's office and then hiring a reporter who had covered his campaign and was friends with his wife to fill the position.<sup>64</sup> In 1999 one of Rackauckas's prosecutors, Bryan Ray Kazarian, was arrested for passing confidential information to drug ring leaders.<sup>65</sup> In September of 2000, Rackauckas admitted that his office may have wrongly convicted Dwayne McKinney for murder during a restaurant robbery in 1980. After an appellate court said the case needed to be retried, Rackauckas decided to dismiss the case for lack of evidence. Ironically, the prosecutor who aggressively persuaded the jury of McKinney's guilt and even pushed for the death penalty 19 years earlier was Rackauckas.<sup>66</sup>

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<sup>62</sup> Shirley Grindle, a longtime government observer and author of campaign-reform laws, said, "Under Capizzi, the District Attorney's office was apolitical," she said. "Under Rackauckas, it's been nothing but political. This county will rue the day Rackauckas was elected." Coker, "Clockwork Orange."

<sup>63</sup> "OC District Attorney," *Los Angeles City News Service*, June 4, 1999.

<sup>64</sup> R. Scott Moxley and Anthony Pignataro, "Tori! Tori! Tori!," *OC Weekly*, July 12, 2002, 12.

<sup>65</sup> "Orange County Prosecutor Among Dozen Arrested on Drug Charges," *Associated Press*, June 7, 1999; Stuart Pfeifer, "Suspect Allegedly Talked of Link to DA," *Orange County Register*, June 9, 1999.

<sup>66</sup> "Man Released After 19 Years in Prison for Murder Conviction," *Associated Press*, January 31, 2000. The appellate court overturned the verdict because witnesses to the crime revealed two decades later a police officer had pointed to McKinney as the suspect minutes before a photographic lineup. Known at the time of the trial, but apparently dismissed as irrelevant by the jury, was that the killer was described as a clean-shaven, 6-foot-3-inch black man who did not walk with a limp. At the time the crime was committed McKinney was 5-foot-9, had a heavy goatee, and 27 days before the murder

On Aug. 14, 2000 an Orange County jury unanimously voted that a 22-year-old Laguna Niguel woman, Shantae Molina, was not guilty on all charges of murder. Molina responded with a \$25 million lawsuit claiming she was the victim of an “abusive” district attorney’s office and “unethical” police officers.<sup>67</sup> A week later, Arthur Carmona--a Costa Mesa teenager who was convicted of two armed robberies in 1998--walked out of state prison after two and a half years. A key witness’s testimony had been recanted. Questioned as legal, or at least unethical, was the fact that Carmona was not able to get his freedom until after signing a document absolving the Irvine Police Department and the District Attorney’s office of any wrongdoing in his arrest.<sup>68</sup>

In February of 2001 Rackaukas made the decision to settle a case against Arnel Management Co. without consulting with any of the investigators who had been working on it for 15 months. Arnel, which manages apartments, was being investigated for not returning millions of dollars owing to its tenants. Linked to the investigation was George Argyos, a Newport Beach billionaire, who was known to fund many political campaigns in Orange County--including a \$1,000 contribution to the 1998 Rackaukas campaign. That spring Argyos was named by President George W. Bush as ambassador to Spain. Steve Douglass, the lead investigator on the case, resigned and, referring to Rackaukas, said he never witnessed such an egregious misuse of power by a law-enforcement official.<sup>69</sup>

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had a severe injury to his right calf from a shot-gun blast--giving him a painful limp that lasted many months. Moxley, "Third Strike."

<sup>67</sup> Moxley, "Third Strike."

<sup>68</sup> Moxley, "Third Strike."; Cathy Franklin, "Carmona Dismissal," *Los Angeles City News Service*, August 21, 2000.

<sup>69</sup> Dave Wielenga, "The 'Just Us' System," *OC Weekly*, May 18, 2001, 15.

In March of 2001 Rackauckas pulled two of his investigators off a case involving a friend of his, Peter DiCarlo--a wealthy Newport Beach businessman who was a frequent contributor to Republicans. DiCarlo had previously given Rackauckas a \$5,000 campaign contribution. DiCarlo claimed he was a victim of an extortion attempt. Rackauckas pulled the two investigators off the case because he said they were treating DiCarlo more like a criminal than a victim. Rackauckas later had his office drop the case and referred it to the state's Attorney General. Because DiCarlo had been previously investigated by organized crime units, newspaper accounts expressed concerns with the Rackauckas-DiCarlo friendship and Rackauckas's handling of the investigation.<sup>70</sup>

In December of 2001, a former chief assistant to Rackauckas, Devalis Rutledge, settled a discrimination lawsuit against Rackauckas and the District Attorney's office. Part of the discrimination lawsuit filings claimed that when Rackauckas was a judge he had an unethical, secret affair with prosecutor Kay Anderle. Rackauckas denied the allegation, but left his wife and later married Anderle. Rutledge's suit was settled just before Rackauckas was scheduled to testify.<sup>71</sup>

In March of 2002, the day after beating Wade for re-election, Rackauckas transferred Wade and some of his supporters to the family-support division. The unit was scheduled to be broken off from the District Attorney's office and become part of a state agency on July 1st. During the campaign Wade had been highly critical of

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<sup>70</sup> "DA Probe," *Los Angeles City News Service*, February 15, 2001.

<sup>71</sup> "Suit Settled," *Los Angeles City News Service*, December 7, 2001. Moxley, "Toxic Politics."

Rackauckas's "political" maneuvers.<sup>72</sup> In 2003, Wade took Rackauckas to arbitration and the arbitrators sided with Wade, saying that because Wade was a prosecutors' union officer, he could not be transferred to another location against his wishes. Rackauckas responded by giving Wade an office in the District Attorney's office building, but said he was still considered an employee of the family-support division of the state agency. As of this writing, Wade indicated that he would take the case back to arbitration because he believed the original ruling had given him the right to a job with the District Attorney's office--not just an office at the building.<sup>73</sup>

In June of 2002 an Orange County Grand Jury report announced that the Jury had secretly asked attorney general Bill Lockyer to help investigate Rackauckas in August of 2001. The report listed 92 findings and gave 64 recommendations critical of Rackauckas for intervening in criminal cases on behalf of campaign contributors, giving special treatment to his wife who worked as a deputy district attorney, and generally punishing his enemies while rewarding friends and political backers. Rackauckas responded by saying the investigation was "an unfortunate waste of taxpayer resources." He also said his office had taken action on 30 of the 63 recommendations, but was disregarding the rest.<sup>74</sup>

In December of 2002 Rackauckas was criticized for an \$8 million settlement he received in negotiations with ARCO for leaks of MTBE at 102 of 132 Orange County

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<sup>72</sup> Pfeifer and Morin, "Orange County D.A. Lowers the Boom After Election Win."

<sup>73</sup> Stuart Pfeifer, "Rackauckas Rival Still Fighting for Job," *Los Angeles Times*, August 17, 2003.

<sup>74</sup> "Rackauckas," *Los Angeles City News Service*, August 26, 2002.

gas stations. According to *OC Weekly*, the estimated damages were in excess of \$100 million and the settlement appeared to be politically motivated.<sup>75</sup>

## Orange County and Three Strikes

In March of 2002 the *Los Angeles Times* reviewed more than 1,000 Orange County third strike cases and found that nearly 90 percent of them were handled without a trial- “a significant increase” over Capizzi’s record. In addition, nine out of ten third strike cases resulted in the defendants getting strikes waived, and 90 percent of these cases were the result of plea-bargaining with the District Attorney’s office.<sup>76</sup>

Table 11.2 shows the number of third strikers admitted to prison from Orange County per year. While the year 1999 shows a lower percentage decrease in the use of the law from the previous year as compared to the rest of the state, the years 2000 and 2001 demonstrate a significant decrease in the use of the law under Rackauckas as compared to the when Capizzi was District Attorney.

Table 11.2: Third Strikers Admitted to Prison by Delivery Date for Orange County and the Total for California from April 1994 Through December 2001

	1994	1995	1996	1997	1998	1999	2000	2001	Total
Orange County	1 0%	43 12%	73 21%	57 16%	65 19%	57 16%	30 9%	21 6%	347 100%
California	134 2%	866 12%	1,333 18%	1,248 17%	1,174 16%	1,022 14%	813 11%	635 9%	7,225 100%

Source: California Department of Corrections: Data Analysis Unit, *Number of 2<sup>nd</sup> and 3<sup>rd</sup> Strike Commitments by the Type of Admission, County of Commitment and the Striker Commitment Case Delivery Date: April 1994 Through December 2001* (Sacramento, 2002).

<sup>75</sup> Moxley, "Toxic Politics."

<sup>76</sup> "Third Strike," *Los Angeles City News Service*, February 15, 2002.

Table 11.3: The Average Annual Number of Third Strikers by Type of Offense for Orange County Prior to and After June 30, 1999

Third Strike	Average Prior to 30-Jun-99	Average After 30-Jun-99	Percentage Decrease
Murder 1	1.33	0.57	57%
Murder 2	0.22	1.43	-543%
Manslaughter	0.22	0.00	100%
Veh. Manslaughter	0.22	0.00	100%
Robbery	8.67	5.43	37%
Assault DW	2.00	0.00	100%
Other Assault	2.89	2.57	11%
Rape	0.44	0.00	100%
Lewd Act w Child	2.67	2.00	25%
Oral Copulation	0.00	0.00	
Sodomy	0.00	0.00	
Penet w/ Object	0.22	0.00	100%
Other Sex Off.	1.11	-0.29	126%
Kidnapping	0.67	0.00	100%
Crimes-Person	20.67	11.71	43%
Burglary 1st	9.78	0.86	91%
Burglary 2nd	6.67	2.57	61%
Grand Theft	0.22	0.86	-286%
Petty Theft	2.89	1.14	60%
Rec. Stolen Prop.	1.78	0.29	84%
Vehicle Theft	2.00	0.86	57%
Forgery/Fraud	0.67	0.57	14%
Other Prop.	0.44	-0.29	164%
Crimes-Prop.	24.44	6.86	72%
CS Possession	7.33	2.00	73%
CS Possess-sale	2.89	0.29	90%
CS Sub.-sales	2.67	0.29	89%
CS-Manufact.	0.00	0.00	
CS-Other	0.44	0.00	100%
Marij. Poss-Sale	0.00	0.00	
Marij. Sales	0.44	0.00	100%
Other Marij. Off.	0.00	0.00	
Crimes-Drugs	13.78	2.57	81%
Escape	0.00	0.00	
DUI	0.00	0.00	
Arson	0.00	0.00	
Poss. Weap.	2.89	0.57	80%
Other Off.	1.33	1.71	-29%
Crimes-Other	4.22	2.29	46%
Crimes-Nonperson	42.44	11.71	72%
Total	63.11	23.43	63%

Source: California Department of Corrections: Data Analysis Unit, *Third Strike Cases by Offense and Ethnic Group by County: June 30, 1999* (Sacramento, 1999).

Table 11.3 shows the breakdown by offense for the average number of third strikers sent to prison under Capizzi versus Rackauckas.<sup>77</sup> Under Rackauckas there was a 43 percent decrease in third strikers for violent crimes and a 72 percent decrease for nonviolent crimes.

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<sup>77</sup> The cutoff point of June 30, 1999 was used because statistics were available for this date and not readily available for an earlier time period. Because of a time lag when prisoners are transported from county jail to state prison facilities, and because Rackauckas's new policy was slow to be implemented, the June 30, 1999 cutoff point is still a good proxy for analyzing the difference between Capizzi's tenure as District Attorney and Rackauckas's. When calculating the average number of third strikers, the time period for Capizzi was calculated as four and a half years because the yearly data indicate only one third striker was sent to prison in 1994 (see Table 11.2). The time period used for Rackauckas was three and a half years.