

**PROPOSITION 36 INFORMATION FOR PERSONS WHO WERE SERVING A LIFE SENTENCE
UNDER THE THREE STRIKES LAW ON NOVEMBER 7, 2012
by Appellate Defenders, Inc.**

PROPOSITION 36: This handout is for persons who on November 7, 2012, were serving a Three Strikes life term for an offense that is *not* classified as a serious or violent felony under Penal Code section 667.5(c) or 1192.7(c). Starting Nov. 7, 2012, Proposition 36 changed the Three Strikes law. The changes include:

New limits to third strike life sentence: Under the new law, a person generally qualifies for a Three Strikes life sentence only if his/her current conviction is for a *serious or violent* felony. The old law required a life sentence for *any* felony conviction after two or more strikes. After Proposition 36, the sentence for a third-strike felony that is not serious or violent generally is now double the normal one. *But there are some important exceptions* – see ELIGIBILITY section below.

Resentencing procedure: Proposition 36 also created a new procedure, a petition under Penal Code section 1170.126, for eligible persons who had already been sentenced when the proposition passed. Other procedures may be available, too. Ask your lawyer what would be best for your situation.

ELIGIBILITY: You qualify for resentencing under Proposition 36 *only if you meet ALL of these requirements:*

Sentence you are now serving: To qualify for resentencing, you must now be serving a life sentence under the Three Strikes Law. Proposition 36 does not apply to those serving a two-strike sentence.

Your current offense: For you to qualify for a Proposition 36 lower sentence, the offense for which you are *now* serving time:

- must not be a serious one under Penal Code section 1192.7(c) or a violent one under section 667.5(c).
- must not be enhanced by Health and Safety Code section 11370.4 or 11379.8 (large amount of drugs).
- must not be unlawful intercourse under Penal Code section 261.5 (defendant 21 or older with a minor under age 16) or spousal rape under section 262.
- must not require *mandatory* sex offender registration under Penal Code section 290(c) – *except* that violations of sections 266, 285, 286(b)(1), 286(e), 288a(b)(1), 288(e), 311.11, and 314 do **not** disqualify you. Crimes that may lead to *discretionary* registration do not disqualify you. (Ask your lawyer if you are unsure.)
- must not be a crime in which you used a firearm, were armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.

Your prior strikes: For you to qualify for a Proposition 36 lower sentence, the prior convictions (“strikes”) bringing you under the Three Strikes Law:

- must not include a “sexually violent offense” listed in Welfare & Institutions Code section 6600.
- must not include oral copulation, sodomy, or sexual penetration with a child who was then under 14 and more than 10 years younger than you (Penal Code, §§ 288a, 286, 289).
- must not include a lewd or lascivious act involving a child under 14 (Penal Code, § 288).
- must not include murder, attempted murder, gross vehicular manslaughter while intoxicated or attempted gross vehicular manslaughter while intoxicated (Penal Code, §§ 187-191.5) or solicitation to commit murder (§ 653(f)).
- must not include assault with a machine gun on a police officer or firefighter (Penal Code, § 245(d)(3)).
- must not include possession of a weapon of mass destruction (Penal Code, § 11418).
- must not include any serious or violent felony punishable by life imprisonment or death.

RESENTENCING UNDER SECTION 1170.126: The right to resentencing under Penal Code section 1170.126 is not automatic. You must file a petition, and the court may deny it by finding an unreasonable danger to public safety.

Petition: File a petition for recall of the sentence under section 1170.126 in the court that sentenced you.

- **Time limit:** You have two years from November 7, 2012. Penal Code section 1170.126(b) does allow late petitions for “good cause.” But complying with the time limit is far better, because there is no guarantee a court will find “good cause” for one filed later. See the section below, called “Court’s decision and ‘danger to public safety,’” for possible strategic reasons not to file too *early*.
- **Who files:** It is best if this petition is filed by counsel. But if that is not possible, you can file it yourself. (See attached sample.)

- **Contents of petition:**

- List all offenses for which you are *now* serving time under the Three Strikes Law.
- List all prior felonies used as strikes.
- Ask for counsel.

Trial court's decision and "danger to public safety": If you are eligible for resentencing, the court must give you the new third-strike sentence under Proposition 36 (doubled sentence), *unless* the court finds your release would be "an unreasonable risk of danger to public safety," based on factors like criminal history and prison behavior. Your *petition* does not have to show your release would not be dangerous; that will be decided later. *But* you and your attorney should consider what evidence might be introduced on this matter. If you have had recent disciplinary problems or need some time to show rehabilitation, it may be to your advantage to delay the petition for a while and work on building a record of good behavior in prison.

Important: A section 1170.126 petition may not be the best option for you. (See last section of this handout, on CHOOSING AMONG ALTERNATIVES.) Consult your lawyer.

ACTIONS TO CONSIDER: If you had already been sentenced to a life sentence for a third strike when Proposition 36 went into effect on November 7, 2012, you should consider these actions:

Decide whether you qualify and consult your lawyer: Try to decide whether you are eligible for resentencing under Proposition 36. See the section above on ELIGIBILITY. If you are eligible for resentencing or are not sure, *consult your trial and/or appeals lawyer, to make sure you do the most beneficial thing and do not run any risks.* Also, your lawyer may be taking action, and it is important not to do something that could interfere.

Identify the available procedures. The procedures available depend on where in the legal process your case was on Nov. 7, 2012, and where it is now. (If you had *not yet been sentenced* on Nov. 7, 2012, the judge should have used the new law when you were sentenced. Appeal if you think there was an error. The rest of this handout does not apply to you.)

Case "not final" on Nov. 7, 2012 – Estrada: If you were sentenced before Nov. 7, 2012, and your case was "not final" on that date, we think you have a *right* to Proposition 36 resentencing under the case of *In re Estrada* (1965) 63 Cal.2d 740. *Estrada* is the lead case for the right to a lower sentence if a case was "not final" when a new law reducing the penalty went into effect. At the start of 2013, however, no court had yet decided whether *Estrada* applies to Proposition 36, and so the law is not settled.

What is "not final"? Your case was "NOT final" under *Estrada* if: (a) you had not appealed but the 60-day period for appealing had not yet expired on Nov. 7, 2012; or (b) you appealed and did not petition for review but the time for granting review had not expired on Nov. 7 (see Cal. Rules of Court, rule 8.512); or (c) you appealed and petitioned for review and the California Supreme Court denied review *on or after* August 9, 2012. There are other possible situations; ask your lawyer.

If your case was "not final" on Nov. 7, 2012, how do you get *Estrada* resentencing?

- **Now on appeal:** If your case is now on appeal, it was "not final" on Nov. 7, 2012. Your appeals lawyer will decide how to get you the benefit of the new Three Strikes law.
- **California appeal is no longer available:** If your case was "not final" on Nov. 7, 2012, but a California appeal is no longer available, you may claim the right to resentencing under *Estrada* by filing a habeas corpus petition in the trial court. ([Judicial Council form MC-275](#).) A California appeal is no longer available, if, for example: (a) you did not appeal and the time to appeal is now past; or (b) you appealed but did not petition for review and the time for the Cal. Supreme Court to grant review is now past; or (c) the Cal. Supreme Court denied review. Besides habeas corpus, a section 1170.126 petition would also be available. But that may be less favorable – see CHOOSING AMONG ALTERNATIVES, below.

Case already "final" on Nov. 7, 2012: You can file a petition under Penal Code section 1170.126. (See RESENTENCING UNDER SECTION 1170.126, above.)

CHOOSING AMONG ALTERNATIVES: We think you can file a section 1170.126 petition even if other procedures are available. *But the other procedures may be better*, because the trial court can refuse to resentence under section 1170.126 if it finds your release would create an unreasonable danger, while the same is not true of cases eligible for *Estrada* resentencing on appeal or habeas corpus. On the other hand, a section 1170.126 petition may be *faster* than some other remedies. That would be important if you would be entitled to release on or near the time of the resentencing. Discuss this with your lawyer.