

FIRST DISTRICT APPELLATE PROJECT

PROPOSITION 36 – THREE STRIKES REFORM

Preliminary Analysis and Suggested Approach for Appellate Attorneys

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This is a very rough sketch of the principal provisions of Prop. 36. (The complete text of the initiative is attached separately.) The initiative significantly curtails the availability of third-strike life sentences going forward. It also establishes a mechanism for inmates currently under third-strike terms to petition for recall of their sentences and for resentencing to a second-strike term under the revised statutes. However, the recall provision is discretionary.

Please see pp. 14-17 of this memo for a summary of recommended steps in both currently pending and older cases.

OVERVIEW OF PROP. 36

Limitation of third-strike sentences

The initiative revises both versions of the “three strikes” law – Pen. Code § 667(b)-(i) (legislative version) and § 1170.12 (1994 ballot initiative). For convenience, this memo will track § 1170.12. With one possible exception (§ 1170.12(a)(8), discussed below under “mandatory consecutive sentencing”), the revisions affect only third-strike sentences and have no effect on second-strike terms.

As reported in the press, the principal limitation is the restriction of third-strike life terms to cases in which *the current offense is a “serious felony”* (§ 1192.7(c)) *or a “violent felony”* (§ 667.5(c)). For the most part, if the current crime isn’t “serious” or “violent,” the defendant is to be sentenced under second-strike provisions only. § 1170.12(c)(2)(C). However, there are several significant exclusions – relating to both the current offense and the priors.

Current offense – specific non-serious/violent offenses still subject to three strikes

The following non-serious or -violent current offenses are still subject to third-strike sentences. The prosecution must “plead and prove” that the current offense comes within

one of the following categories, § 1170.12(c)(2)(C)(i)-(iii):

- Drug offenses with weight/volume enhancements (Health & Saf. Code §§ 11370.4, 11379.8).
- Unlawful intercourse (defendant 21 or older; minor under age 16) (§ 261.5(d)); spousal rape (§ 262).
- “Any felony offense that results in mandatory registration as a sex offender” under § 290(c), except convictions under the following provisions: §§ 266, 285, 286(b)(1), 286(e), 288a(b)(1), 288a(e), 314, 311.11. (§ 1170.12(c)(2)(C)(ii).)
 - In other words, these listed offenses (§ 266, etc.) are “exceptions to the exception.” They are not subject to third-strike sentencing, even though they are mandatory registration offenses.
- During the current offense, “the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§ 1170.12(c)(2)(C)(iii).)
 - Note that these categories do not line up exactly with existing enhancements, such as 12022 or 12022.7. (See “Construction of revised scope, etc.,” pp. 4-5 below for further discussion of this provision.)

Nature of prior strikes

The defendant is also still subject to third-strike sentencing, regardless of the non-serious/violent status of the current offenses, if one of his prior strikes came within any of the following categories (§ 1170.12(c)(2)(C)(iv)):

- A “sexually violent offense,” as defined in the SVP law (Welf. & Inst. § 6600(b)). This includes all of the principal sexual assault offenses (i.e., offenses subject to 3-6-8 DSL triads), such as rape, forcible oral copulation, foreign object penetration, etc.
- Lewd or lascivious act under § 288 or various other felonies involving a victim under the age of 14 and a defendant 10 or more years older than the victim under designated subdivisions of §§ 288a, 286, 289.
- “Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.” (§ 1170.12(c)(2)(C)(iv)(IV).)
 - In addition to murder, this range includes gross vehicular manslaughter while intoxicated (§ 191.5), but it does not include voluntary manslaughter, involuntary manslaughter, or non-DUI vehicular manslaughter (all of which are under § 192).
- Solicitation of murder (§ 653f).
- Assault with a machine gun on a police officer or firefighter.
- Possession of a weapon of mass destruction (§ 11418(a)(1)).

- “Any serious and/or violent felony offense punishable in California by life imprisonment or death.”
 - In addition to murder, attempted murder, and various sex offenses, this category would include aggravated mayhem, kidnapping for ransom, and kidnapping for robbery.

Deletion of mandatory consecutive sentencing with other offense

Here’s one provision which appears to have gone largely unnoticed. *The initiative deletes current § 1170.12(a)(8)*, which provides, “Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.” Note that, unlike other Prop. 36 revisions, the deletion of 1170.12(a)(8), appears to affect both second- and third-strike sentencing (because the deleted provision referred to the overall statute (“this section”). Prior law mandated consecutive sentencing between a second- or third-strike offense or any pre-existing sentence “the defendant is already serving.” Presumably, now there will be discretion between concurrent or consecutive sentencing “unless otherwise provided by law.”

Recall Procedure

Prop. 36 establishes a new *discretionary* statutory “recall petition” procedure, § 1170.126, which is “intended to apply exclusively to persons presently serving an indeterminate” third strike sentence and does not apply to “second strike” terms. § 1170.126, subds (a) & (c). “Any person serving [a third-strike] indeterminate term of life imprisonment” for a non-serious/violent felony conviction, “whether by trial or plea, ... may file a petition for a recall of sentence,” within 2 years of the effective date of Prop. 36 (i.e., by Nov. 7, 2014) “or at a later date upon a showing of good cause.”

Eligibility. The eligibility criteria for a potential sentencing recall basically mirror Prop. 36’s revisions of § 667’s and 1170.12’s “third strike” provisions. § 1170.126(e). That is, an inmate currently serving a “third strike” term may file a § 1170.126 recall petition if he would not be subject to third-strike sentencing under the newly-revised versions of 667 and 1170.12. By cross-referencing those statutes, § 1170.126 essentially incorporates the same restrictions and exceptions. That is:

- the inmate’s current offense must not have been a serious or violent felony, § 1170.126(e)(1);
- the current offense cannot fall into one of the other categories still subject to third strikes, §§ 1170.126(e)(2), 1170.12(c)(2)(C)(i)-(iii) (drug quantity enhancements; designated sex offenses; arming with firearm or deadly weapon or intent to inflict GBI);
- the prior strikes cannot fall into any of the categories itemized in the revised statutes,

§§ 1170.126(e)(3), 1170.12(c)(2)(C)(iv).

Contents of petition. The petition “shall specify all of the currently charged felonies, which resulted in” the third-strike sentence, “and shall also specify all the prior convictions alleged and proved” as strikes. § 1170.126(d).

The petition is to be filed “before the trial court that entered the judgment of conviction.” § 1170.126(b). Other provisions make clear that the petition is to be heard by the “original sentencing court” – i.e., the sentencing judge – unless that judge “is not available to resentence the defendant.” § 1170.126(j).

Discretion to resentence. “Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the [eligibility] criteria in subdivision (e). If the petitioner satisfies the [eligibility] criteria ..., the petitioner shall be resentenced pursuant to [the revised provisions of § 667 and § 1170.12], unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” § 1170.126(f).

The statute enumerates criteria “the court may consider” “in exercising its discretion”: “the petitioner’s criminal history” (including “type of crimes,” “extent of injury,” and “remoteness”); “the petitioner’s disciplinary record and record of rehabilitation while incarcerated”; and “any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.” § 1170.126(g).

The statute allows a defendant to “waive his or her appearance in court for the resentencing” if he executes a written waiver. § 1170.126(i). “Under no circumstances” may a resentencing result in a longer sentence. § 1170.126(h).

“Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant.” § 1170.126(k).

PRELIMINARY ANALYSIS AND QUESTIONS

Construction of Revised Scope of “Third Strike” Sentencing

For the most part, the revised versions of § 667 and § 1170.12 appear clear as to which cases remain subject to “third strike” indeterminate terms and which will result only in “second-strike” sentencing. The threshold question, of course, is whether the current offense is “serious” or “violent.” There is already ample precedent teasing out the requirements for each of the serious/violent categories, including which of those require additional *Guerrero*-

type proof beyond the bare fact of conviction under a particular statute. (Cf. *People v. Guerrero* (1988) 44 Cal.3d 343.)

There are two ways that a current non-serious/violent offense will still be subject to third-strike sentencing: The current offense comes within one of the categories listed in revised § 1170.12(c)(2)(C)(i)-(iii); or one of the pled-and-proven strikes comes within one of the categories in revised § 1170.12(c)(2)(C)(iv). All of the prior offense categories appear to correspond to conviction statutes; in other words, none of these appear to require additional *Guerrero*-proof beyond the judgment identifying the conviction.

Most of the current conviction categories similarly correspond to conviction statutes or other enhancement findings. The one problematic current offense category (or set of categories) is § 1170.12(c)(2)(C)(iii): “During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” These categories do not line up with existing enhancements, such as §§ 12022 or 12022.7. The GBI provision is entirely different than § 12022.7, because the crux is the *intent* to cause GBI (not an element of 12022.7), rather than whether GBI actually occurred.

The “use” and “arming” provisions are especially noteworthy. Presumably, these terms have their customary meaning and refer to *personal*, rather than vicarious use or arming, although the statute does not include the word “personal.” Perhaps most importantly, “arming” under this provision should be construed consistently with other statutes (e.g., § 12022(a)). **Mere possession of a firearm or deadly weapon** (e.g., under §§ 12021 or 12020) **should not be enough, by itself, to qualify as “arming.”**

Nonetheless, even if a § 12021 conviction does not automatically come within this exclusion, the underlying facts of many such cases will likely come within the meaning of “arming,” such as where a felon was carrying a loaded firearm on his person. Application of this provision to 12021 and other weapon possession cases tried after Prop. 36 should be straightforward: A defendant will only be subject to third-strike sentencing if the prosecution “pleads and proves”(§ 1170.12(c)(2)(C)) that he was “armed” – that is, the prosecution must charge arming in the accusatory pleading and obtain a specific jury finding (or an admission) on that allegation. Because the statute requires the prosecution to plead and prove any circumstances triggering third-strike, rather than second-strike, sentencing, there will have to be jury instructions and special verdicts on these allegations.

It is less clear how the courts will apply this provision to cases sentenced before Prop. 36. In determining either a defendant’s eligibility for retroactive application of the revised three-strikes statutes in a pending appeal or his eligibility for § 1170.126 relief, will a court look

only to whether the prosecution “pled and proved” arming or will it consider other portions of the record?

Comparison of Revised “Three Strikes” Statutes and Recall Petition Procedure

The principal and most urgent questions appellate attorneys will face concern the retroactive application of the 1170.12 and 667 revisions – i.e., the limitation of “third strike” indeterminate terms to current serious/violent offenses, to certain other enumerated current offenses (§ 1170.12(c)(2)(C)(i)-(iii)) and to cases involving a specified sub-set of prior strikes (§ 1170.12(c)(2)(C)(iv)).

It’s true that, through the new “recall petition” statute, § 1170.126, Prop. 36 creates a mechanism for previously-sentenced inmates to seek reconsideration of “third strike” terms. The “eligibility” criteria of § 1170.126(e) mirror the revised statutes’ dividing line between second- and third-strike sentences. That is, any third-strike inmate who would be subject only to a second-strike sentence under the revised versions of 1170.12 and 667 is *eligible* to petition for recall of his sentence.

But Prop. 36 does not put previously sentenced inmates on a par with unsentenced defendants. An unsentenced defendant convicted of a non-serious/violent felony, who does not come within any of the other current or prior offense categories of § 1170.12(c)(2)(C) cannot be sentenced to a third-strike indeterminate term, regardless of the court’s view of his dangerousness. In contrast, under the new § 1170.126 procedure, *eligibility* for a sentence recall is only the threshold stage of the process. Even though the inmate would not currently be subject to third-strike sentencing under §§ 667 and 1170.12, as revised, the court retains discretion to let the third-strike term stand if it finds that resentencing “would pose an unreasonable risk of danger to public safety.” § 1170.126(k).

§ 1170(d) Recalls Where Still in 120-Day Window

In light of that disparity between the revised three-strikes statutes and the § 1170.126 recall procedure, there is good reason to employ every available means and argument to bring defendants within coverage of the revised statutes, rather than rely only on the discretionary remedy. One option is to ask the sentencing court to “recall” the third-strike sentence under the pre-existing recall statute, § 1170(d), if the case is still within the 120-day window for the superior court to act. If the superior court does agree to recall the sentence – and actually orders the recall by Day 120 – then the defendant would be resentenced under the law extant at the time of sentencing – i.e., the Prop. 36 revisions of §§ 667 and 1170.12.

Ideally, trial counsel should seek an 1170(d) recall. If appellate counsel spots a case which appears to qualify, he or she should immediately contact trial counsel to ensure that the

attorney acts in time. And, if trial counsel is not willing to pursue an 1170(d) recall, appellate counsel should do so.

Appellate attorneys should also be alert for third-strike cases early in the pipeline that appear to qualify. On recently-docketed, pre-record appeals, appellate counsel will be able to make only a preliminary judgment on apparent eligibility for second-strike sentencing under the revisions. We will typically be able to tell from the abstract of judgment and other preliminary documents whether the current offense is serious/violent or comes within any of the other exclusion categories. But, at that stage, we typically will not have information on the nature of the prior strikes.

Time is of the essence in identifying any cases potentially qualifying for § 1170(d) recalls and in ensuring that someone (either trial or appellate counsel) initiates that process. Remember that it is not enough for counsel to request a recall within 120 days of sentencing. The court must act (i.e., order a recall) by Day 120. (It is not necessary that the actual resentencing hearing occur within 120 days of judgment, only that the trial court orders a recall within that period.)

Retroactivity under *Estrada*

For pending appeals that are already past the 120-day § 1170(d) window (or in which the trial court refuses an 1170(d) request to recall the sentence), it will be necessary to pursue an *Estrada* retroactivity argument in the appeal itself. Specifically, appellate counsel should argue for retroactive application of the three-strikes amendments to all defendants whose cases are not yet “final.” Under *In re Estrada* (1965) 63 Cal.2d 740, and its progeny, a “legislative mitigation of the penalty for a particular crime” is presumed to apply retroactively to all cases not yet “final,” including all pending direct appeals, unless there is some explicit indication of legislative intent that the sentence reduction will be prospective only (e.g., a savings clause). Accord, e.g., *People v. Nasalga* (1996) 12 Cal.4th 784.

The Supreme Court recently cautioned that the “broad” language of the *Estrada* opinion should not be read as trumping Pen. Code § 3's more general presumption of prospective application of all provisions of that Code. However, the Court reaffirmed the basic *Estrada* rule: “*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments.” *People v. Brown* (2012) 54 Cal.4th 314, 325. In *Brown* itself, the Court denied retroactive application of the 2010 legislation establishing a more generous formula for earning conduct credits. However, that holding is readily distinguishable as arising from

considerations unique to conduct credits – the legislation was construed as intended to encourage *future* good conduct in jail and prison.

Proposition 36 is a classic example of “ameliorative” sentencing legislation, representing the voters’ express judgment that, in their prior form, the “three strikes” laws swept too broadly and diverted precious resources away from punishment of the most serious and dangerous offenders. The express intent of Prop. 36 is to “[r]estore the Three Strikes law to the public’s original understanding by requiring life sentences only when a defendant’s current conviction is for a violent or serious crime” and to “[s]ave hundreds of millions of dollars every year” in the process. See Prop. 36, § 1 (“Findings and Declarations”).

Standing alone, the revisions of §§ 667 and 1170.12 would seem to come squarely within the *Estrada* rule (even as qualified in *Brown*). However, Prop. 36’s concurrent establishment of the recall petition procedure (§ 1170.126) will complicate the argument. In contrast to a classic *Estrada* situation, Prop. 36 is not silent on the subject of previously-sentenced third-strikers. Through its enactment of § 1170.126, Prop. 36 establishes a mechanism for “persons presently serving an indeterminate [third-strike] term” to petition for reconsideration of their sentences (subd. (a)), but the remedy is discretionary, not automatic (as it otherwise would be for non-final sentences under *Estrada*). The Attorney General’s Office has already taken the position that § 1170.126 provides the exclusive remedy for inmates currently under third-strike sentences.

Though the existence of the § 1170.126 remedy unquestionably complicates the *Estrada* argument, it does not defeat it. Section 1170.126 demonstrates an intent to afford some form of relief to a much broader group of third-strike inmates than a traditional *Estrada* construction would allow. It allows “any” third-strike inmate meeting the statute’s eligibility criteria to petition for sentence recall, *even inmates whose cases have long been final and would not be entitled to any relief under Estrada*. Moreover, the statute explicitly provides, “Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant.” § 1170.126(k). **Those “otherwise available” “rights and remedies” should include the longstanding *Estrada* rule of construction.** Hence, defendants whose convictions are not yet “final” should receive the benefit of the third-strike revisions, per *Estrada*, while those whose cases are final may petition for discretionary relief under § 1170.126.

Prop. 36 “shall be liberally construed to effectuate [its] purposes” of “protection of the health, safety, and welfare of the people ... of California.” Prop. 36, § 7. And the initiative’s declarations of intent make clear that confining third-strike sentences to the most violent criminals (per the 667/1170.12 revisions) and conserving law enforcement resources accordingly will serve those purposes. Prop. 36, § 1. Consequently, following *Estrada* and

applying the 667/1170.12 revisions to all non-final cases will serve that mandate of “liberal construction.”

As with other new, broadly-applicable developments, **counsel should brief *Estrada* arguments in all currently-pending appeals where the defendant’s current and prior offenses would render him ineligible for a third-strike term under the revisions.** If the appeal has already been briefed, counsel should seek leave to file a supplemental brief and, if necessary, should also raise the issue via petitions for rehearing and/or review.

Finally, note that there will also be opportunities to raise these arguments in some post-affirmance cases. The California Supreme Court’s more recent *Estrada*-line cases have adopted the federal definition of “finality.” “A judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.” *People v. Nasalga* (1996) 12 Cal.4th 784, 789 fn. 5. Consequently, in addition to pending direct appeals, the *Estrada* argument should apply equally to any post-affirmance case which, as of Nov. 7, 2012, was still in the 90-day window after the denial of California Supreme Court review – that is, *any case in which the Supreme Court denied review on or after Aug. 9, 2012.* (If a cert. petition was filed, the case would not become final until the denial of cert. Consequently, the *Estrada* argument would be available if the cert. petition was still pending as of Nov. 7, 2012.)

In those recently-concluded appeals, it will no longer be possible to raise the *Estrada* issue in the direct appeal itself. Instead, in those cases, the only available vehicle for presentation of the *Estrada* retroactivity argument would be a state habeas corpus petition. (Because *Estrada* simply represents a state law statutory construction principle, not a federal claim, a cert. petition requesting a “GVR” back to state court is not an option.)

Finally, a state habeas petition would also be an available remedy in a case where a petition for review is currently pending. (Counsel should check with FDAP (or the relevant appellate project) regarding that option.)

§ 1170.126 Petitions – Substantive and Practical Questions

Petition contents and statutory standard. Before addressing the critical question of *who* will be available to prepare § 1170.126 petitions (both for defendants with pending appeals and post-affirmance defendants), it is useful to consider the statute’s rather elementary description of the allegations required for a petition and the statutory standard for the discretionary decision whether to resentence: “The petition ... shall specify all of the currently charged felonies, which resulted in the [third-strike] sentence ..., and shall also specify all of the prior [strike] convictions alleged and proved” § 1170.126(d).

§ 1170.126(f), in turn, provides that, “[u]pon receiving a petition for recall of sentence ..., the court shall determine whether the petitioner satisfies the [eligibility] criteria in subdivision (e).” Those “eligibility” criteria (like the required contents of the petition) solely concern the nature of the current offense and the prior pled-and-proven strikes – i.e., a non-serious/violent current offense, current offense not in the categories listed in § 1170.12(c)(2)(C)(i)-(iii), and prior strikes not listed in § 1170.12(c)(2)(C)(iv).

Most significantly, the statute states the substantive standard in the following terms: “If the petitioner satisfies the [eligibility] criteria in subdivision (e), **the petitioner shall be resentenced** pursuant to [the second-strike provisions of §§ 667 and 1170.12] **unless the court, in its discretion, determines** that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” § 1170.126(f) (emphasis added).

This is not the first California sentencing statute to employ this structure – i.e., the court “shall” impose A, or, “in its discretion” may choose B. Section 190.5(b) provides that a 16- or 17-year-old convicted of special-circumstance murder “shall” receive LWOP “or, at the discretion of the court, 25 years to life.” The case law has consistently construed this formulation as establishing the “shall” option as the “presumptive punishment,” “and the court’s discretion” to choose the alternative disposition “is concomitantly circumscribed to that extent.” *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1142; accord, e.g., *People v. Blackwell* (2011) 202 Cal.App.4th 144, 154-155; *People v. Murray* (2012) 203 Cal.App.4th 277, 281; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089. Thus, as the courts have construed § 190.5(b), “16 or 17 year-olds who commit special circumstance murder *must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life.” *Guinn* at 1141 (emphasis in original.) Though the court retains “circumscribed discretion” to select the latter disposition, the “shall”/“or” formulation makes the former sentence (LWOP in the case of § 190.5(b)) “generally mandatory.” *Guinn* at 1142.

The *Guinn* statutory analysis (which subsequent cases have also embraced) is equally applicable to construction of the similarly-formulated § 1170.126(f) standard – with the noteworthy difference that (consistent with the overall stated purposes of Prop. 36) § **1170.126(f) effectively establishes the *less severe* sentence, a reduction to a second-strike term, as the “presumptive” disposition** and allows only “circumscribed” discretion to adopt the more punitive course of letting the third-strike sentence stand.

In some respects, § 1170.126(f) is even more susceptible to this “presumption” construction than § 190.5(b). *Guinn* essentially read “unless” into § 190.5(b) (which is phrased as “or, at the discretion of the court”). But § 1170.126(f) explicitly employs a “shall”/“unless” formulation (“unless the court, in its discretion, determines ...”). Moreover, while *Guinn*

viewed the court's discretion as "circumscribed," § 190.5(b) does not explicitly list any discretionary criteria, and the court is free to consider any aggravating and mitigating circumstances listed in the sentencing rules. *Guinn*, 28 Cal.App.4th at 1149. However, § 1170.126 explicitly circumscribes the court's discretion by limiting the ground for denial of a recall petition to a determination that resentencing "would pose an unreasonable risk of danger to public safety" (subd. (f)) and listing specific factors "the court may consider" (subd. (g)) ("criminal conviction history," "disciplinary record," "record of rehabilitation," etc.).

"Getting in the door" and appointment of counsel. The presumptive structure of the § 1170.126 standard has important implications for our practical questions regarding preparation of recall petitions and representation. There are strong grounds for arguing that **a relatively modest initial petition, establishing the inmate's "eligibility" for resentencing, should be considered a sufficient prima facie showing to require appointment of counsel** for all further proceedings.

Obviously, if determination of a § 1170.126 petition is itself considered a form of "resentencing" proceeding, then a right to appointed counsel must attach, because any sentencing or resentencing is a critical phase for Sixth Amendment purposes. But appointment of counsel should also be required at a very early stage even if 1170.126 is viewed as a form of "post-conviction" proceeding.

As discussed above, a petition establishing an inmate's "eligibility" – i.e., that neither the current offense nor the proven strikes come within any of the exclusion categories – should be sufficient to trigger a presumption in favor of resentencing. Longstanding California law in other post-conviction contexts requires appointment of counsel when a post-conviction petition states a prima facie case for relief or requires a hearing. *In re Clark* (1993) 5 Cal.4th 750, 780 (habeas corpus); *People v. Shipman* (1965) 62 Cal.2d 226, 231-232 (coram nobis). If establishment of an inmate's "eligibility" (§ 1170.126(e)) is sufficient to give rise to a presumption in favor of resentencing (our construction of § 1170.126(f)), then *proof of eligibility should be considered tantamount to a prima facie case and should require appointment of counsel* for all further proceedings on the petition, pursuant to *Clark* and *Shipman*.

Under this analysis, an eligible third-strike inmate (possibly assisted by former trial or appellate counsel) *should* be entitled to appointment of counsel in the sentencing court, upon filing a § 1170.126 petition reciting the current offense(s) and the proven "strikes," accompanied by an appointment motion. In other words, this combination of the "presumption" construction of the § 1170.126(f) substantive standard and the appointment-of-counsel standard developed in other post-conviction contexts should support a right to

appointment upon the filing of a fairly simple initial petition. This analysis suggests that it should *not* be essential for the *initial* filing to make a pre-emptive showing addressing the § 1170.126(g) discretionary factors (prison disciplinary record, proof of rehabilitation, etc.) to rebut any possible claim of “unreasonable risk of danger to public safety.” The right to appointment of counsel should kick in *before* there is any consideration of possible denial of the petition on dangerousness grounds (based either on the prosecution’s opposition or on the court’s own concerns).

Appeal. The statute does not explicitly indicate whether the denial of an 1170.126 petition to “recall” a sentence would be an appealable disposition. Due to the “recall” nomenclature, there may be an initial assumption that an 1170.126 denial is not appealable, but that would be unwarranted. A court’s refusal to “recall” a prison sentence under § 1170(d)(1) is not appealable, because there is no right to move for such a recall in the first place. *People v. Pritchett* (1993) 20 Cal.App.4th 190, 194. A court may order a conventional 1170(d) recall only on its own motion. However, that rationale should not apply to a § 1170.126 denial: The statute does confer a right to petition for a recall and establishes governing criteria, including that a court “shall” resentence the inmate to a second-strike term if he meets the eligibility criteria, “unless” it finds an unreasonable risk of danger to public safety. § 1170.126(f). Consequently, the denial of a defendant’s § 1170.126 petition should be appealable as an order after judgment affecting substantial rights. § 1237(b). Moreover, as part of any such 1170.126 appeal, the defendant should also be able to challenge any denial of a motion for appointment of counsel.

Practical considerations – representation and preparation of the initial petition. § 1170.126 is fundamentally a trial-level procedure. It bears much greater resemblance to a sentencing or resentencing hearing than to appellate or habeas practice. And, if the courts follow the apparent intent of Prop. 36 that resentencing should be the norm for “eligible” inmates, *most* 1170.126 petitions should proceed to actual resentencing hearings which would, of course, be handled by appointed trial-level counsel. For these reasons, **it would be preferable for former trial counsel** (rather than current or former appellate counsel) **to prepare § 1170.126 petitions and to handle all further proceedings on the petitions (including any actual resentencing) in the great majority of cases.** Consequently, before undertaking preparation of a § 1170.126 petition on behalf of a current or former client, appellate counsel should first contact trial counsel and determine whether that attorney is willing to prepare the petition.

We may be cautiously hopeful that Public Defender Offices, especially the larger offices, will set up systems to take on these petitions for their former clients. (The same will likely be true for those counties with an Alternate Defender Office.) We are still at a very early stage of post-Prop. 36 planning, so we do not yet have information regarding which Public Defender Offices will be taking on these tasks or their schedules or procedures for doing so.

The more difficult representation questions are likely to concern defendants who were represented at trial by “conflict panel” attorneys (or by retained counsel). However much they may want their former clients to have a shot at resentencing, attorneys on trial panels may have concerns whether any 1170.126 work on behalf of former clients will be compensable – especially if (contrary to our “presumption” analysis) they believe that an initial petition will require a fully developed mitigation showing, rather than just satisfaction of the eligibility criteria. It is possible that, in some counties, the Public Defender’s Office may initiate the § 1170.126 process for all apparently eligible inmates (including those originally represented by conflict counsel) or that the conflict panels will be authorized to file 1170.126 petitions for former clients. Again, we will have to await further information regarding how each First District county is responding to Prop. 36.

There will likely be some situations in which trial counsel will not be available or willing to assist in preparation of a § 1170.126 petition. At least for First District cases, we expect that preparation of the *initial petition* should be compensable as within the scope of appellate counsel’s appointment *if the inmate’s direct appeal is still pending and trial counsel is unavailable to prepare and file the petition*. (Attorneys with cases in other districts should check with the respective appellate projects.) Again, however, the preference is that the Public Defender’s Office (or other trial counsel) should prepare the § 1170.126 petition in most instances. Appellate counsel should consider drafting a petition only if it is clear that trial counsel will not be doing so. Appellate counsel should also check with the FDAP consulting attorney for the latest information on § 1170.126 petitions, including any available form pleadings and any available information on § 1170.126 practice in that county.

Even in the First District, it is doubtful whether any work beyond preparation of the initial petition could potentially be compensable under the appellate appointment (e.g., preparation of any reply brief, and any hearing(s) on the petition). Appellate counsel would be expected to file an appointment-of-counsel motion in superior court concurrently with the petition itself. Any work after the initial preparation of the petition would then be compensable through the superior court appointment. (Ordinarily, the motion would probably recommend that the superior court appoint from its regular panel – especially if appellate counsel is from a distant county.)

If the appeal is no longer pending, any assistance by appellate counsel in preparation of an initial 1170.126 petition would not be compensable under the previous appellate appointment. Our hope is that the courts will construe the statute consistently with this memo’s analysis and will deem a petition showing an inmate’s eligibility sufficient to trigger a right to appointed counsel. In that situation, an appellate attorney might be able to draft a petition for a former client in a fairly short time (especially if form petitions are available).

Law school clinics and other organizations may be available to assist third-strike inmates who might otherwise “fall through the cracks” – i.e., where the inmate’s former counsel is not available or willing to assist in preparation of a petition. It bears repetition that we are at a very early stage of this process. We expect that there will be further discussions among different players in the defense community within the coming weeks.

One other important point to bear in mind: There should not be any rush to get a petition on file. The statute itself establishes a two-year window for filing 1170.126 petitions (i.e., until Nov. 7, 2014). It will inevitably take time to sort out which Public Defender Offices, conflict panels, etc., will be taking on these tasks, and which cases may fall to appellate counsel. There are estimated to be approximately 3000 third-strike inmates eligible to petition for relief. If Public Defender Offices, clinics, and/or other organizations step up to take on these tasks, it will take time to work through the cases.

In addition to these practical considerations, there may be tactical advantages to deferring § 1170.126 filings in some individual cases. (For example, if an inmate had a recent disciplinary problem, it might be preferable to delay filing and to “age” the violation for a year or so.)

For the time being, **appellate counsel may wish to *identify* any former third-strike clients who appear eligible for § 1170.126 petitions.** (Although counsel will no longer have the appellate record, it should be possible to make a preliminary determination of possible eligibility based on the nature of the current offense; in some instance, the briefs and/or counsel’s record notes may also indicate the nature of the prior strikes.) FDAP will continue to follow the situation in the First District counties. In the meantime, if a former client inquires about possible Prop. 36 relief, the best course would be to refer him to the Public Defender’s Office for that county. If it appears that a former client may be at risk of “falling through the cracks” – having no § 1170.126 petition filed – contact FDAP to discuss possible options for that inmate.

SUMMARY – PRELIMINARY ADVICE FOR PANEL ATTORNEYS

Appellate counsel should **immediately determine which current third-strike clients appear to meet the Prop. 36 criteria** – that is, defendants whose convictions are not final and whose current offenses and proven strikes would require second-strike sentences, rather than third-strike life terms, under the revised versions of §§ 667 and 1170.12. Counsel may also consider examining the cases of former three strikes clients to determine if they may be eligible for § 1170.126 recall petitions.

In the coming months, we expect to have further information and guidance for panel

attorneys, including information on which Public Defender Offices and conflict panels will be undertaking preparation of § 1170.126 petitions. In the meantime, here is an outline of recommended steps, depending upon the stage of a case:

Recently filed appeals:

- **For recently-filed third-strike appeals, including pre-record cases, counsel should determine as soon as possible whether the client may be eligible for a lesser sentence under the revised statutes.** If the case is still within the 120-day window for a § 1170(d) sentence recall, appellate counsel should urge trial counsel to file an 1170(d) request immediately. If trial counsel is unwilling or unable to do so, appellate counsel should submit an 1170(d) request to superior court. Under these circumstances (where time is of the essence and trial counsel has declined to act), the preparation of the 1170(d) request should be deemed compensable under the appellate appointment, at least in the First District. (Counsel should check with the relevant appellate project regarding compensation practices in other districts.) However, any actual resentencing hearing will require appointment of counsel at the superior court level and would not be covered under the appellate appointment.
- If the trial court refuses to recall the sentence within the 120-day period, counsel should pursue the *Estrada* retroactivity argument on appeal, as outlined below under “Other currently pending appeals.”

Other currently pending appeals:

- If a defendant’s appeal is still pending, counsel should raise the *Estrada* retroactivity issue in the appeal – i.e., that the defendant is automatically entitled to the benefit of the sentence reduction, since his case was not yet “final” on Nov. 7, 2012. If the appeal has already been briefed, counsel should seek to file a supplemental brief.
- For pending appeals, appellate counsel should also ascertain whether trial counsel will be preparing a § 1170.126 petition on the defendant’s behalf. Preparation by trial counsel is the preferred option for a variety of reasons.
- If trial counsel is not available or willing prepare an 1170.126 petition, it *may* be necessary for appellate counsel to prepare the initial petition. **But appellate counsel should first consult with his or her project attorney to determine the most current information concerning the 1170.126 process in particular counties.** Appellate counsel should not attempt to prepare and file an 1170.126 petition, until we have a better sense of the institutional responses to the procedure throughout the

state. (And, for appeals outside the First District, counsel should check with the relevant appellate project regarding compensability.)

- If it does become necessary for appellate counsel to pursue an 1170.126 petition, preparation of the *initial* § 1170.126 petition should be considered compensable under the appellate appointment, if the appeal is currently pending. However, a motion for appointment of counsel should be filed in superior court concurrently with the petition, so that all subsequent work will be covered by a superior court appointment.

Recently decided appeals:

- If the state appeal has been decided, but the case was still within the “finality” window as of Nov. 7, 2012 (i.e., within 90 days of the California Supreme Court’s denial of review), counsel should consider raising the *Estrada* argument by way of a state habeas petition. Counsel should check with the FDAP buddy regarding preparation of an *Estrada* habeas petition.

Closed cases:

- Appellate counsel may want to review the cases of former third-strike clients to determine if they are eligible for § 1170.126 petitions.
- Appellate attorneys are likely to receive inquiries from former clients regarding possible Prop. 36 relief. Generally, appellate counsel should respond by encouraging the inmate to write to their trial counsel or the relevant Public Defender’s Office. To assist the Public Defender in assessing the inmate’s eligibility, the defendant’s letter should list both his current offenses and his prior strikes.
- One way or another, we anticipate that most eligible inmates should ultimately receive assistance from Public Defender’s Offices or other sources. Consequently, appellate counsel should discourage inmates from attempting to file pro. per. petitions.
- Within a few months, it should be more clear which clients will be represented by Public Defenders’ Offices (or other trial counsel) on 1170.126 petitions and which may require assistance from other sources. **Appellate counsel should check with his or her FDAP consulting attorney regarding the latest information regarding 1170.126 petitions in that county.** Appellate counsel should advise FDAP if it appears that an eligible client may be left without any assistance in seeking 1170.126. In some instances, there may be other possible sources of assistance for a former appellate client (e.g., a law school clinic).

- If it appears that a former client will otherwise have no assistance, appellate counsel *may* choose to assist in filing an initial 1170.126 petition and appointment motion (or in drafting a petition for the client to file in pro. per.) However, any such assistance by appellate counsel would be pro bono and would not be compensable under the old appellate appointment. In those situations, it will be essential to press for appointment of counsel in superior court at the earliest possible stage.