


GENERAL OFFICE MEMORANDUM 12-093

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: JACQUELYN LACEY   
Chief Deputy District Attorney

SUBJECT: PROPOSITION 36

DATE: NOVEMBER 7, 2012

Proposition 36, approved by California voters, takes effect today.<sup>1</sup> The Proposition narrows the previous law by imposing indeterminate sentences only when the current crime is a serious or violent felony, or if an enumerated exception applies based upon the nature of the current or prior crimes. Proposition 36 amends both Penal Code sections 667 and 1170.12.<sup>2</sup> The new law also allows inmates to “petition” for “resentencing,” if they are currently serving a Three Strikes indeterminate sentence and would have qualified for a mandatory second strike sentence under the new scheme.

**Current Offenses Which Qualify For Indeterminate Sentencing**

According to the Proposition, the current offenses which remain subject to an indeterminate sentence include any:

- Serious or violent felony.<sup>3</sup>
- Controlled substance offense with an allegation pursuant to Health and Safety Code section 11370.4 or 11379.8 after being admitted or found true (weight enhancement).
- Offense pursuant to section 261.5, subdivision (d) (sexual intercourse by a person over 21 upon a minor under the age of 16), or 262 (spousal rape).

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1. Penal Code section 1170.125 now reads, “Notwithstanding Section 2 of Proposition 184, as adopted at the November 8, 1994 General Election, for all offenses committed on or after November 7, 2012, all references to existing statutes in Sections 1170.12 and 1170.126 are to those sections as they existed on November 7, 2012.” (Penal Code § 1170.125.)

2. All references are to the Penal Code unless otherwise specified.

3. Sections 667.5, subdivision (c) and 1192.7, subdivision (c).

- Crime requiring mandatory sex offender registration pursuant to section 290, subdivision (c), except, section 266h, subdivision (a) (pimping and pandering), section 266i, subdivision (a) (pandering with a minor), section 314 (indecent exposure) or section 311.11 (possession of child pornography).<sup>4</sup>
- Commission of any offense during which the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.<sup>5</sup>

(§ 667, subd. (e)(2)(C)(i), (ii), (iii); §1170.12, subd. (c)(2)(C)(i), (ii), (iii).)

### **Prior Offenses Which Qualify For Indeterminate Sentencing**

When the current crime is a non-serious, non-violent felony, a number of prior convictions will exempt a defendant from the mandatory second strike sentencing scheme and qualify for indeterminate sentencing. These prior convictions include:

- All crimes listed within Welfare and Institutions Code section 6600, subdivision (b),<sup>6</sup> section 288a, subdivision (c) (oral copulation of a child under 14 years of age by a person more than 10 years older), section 286, subdivision (e) (sodomy of a child under the age of 14 by a person more than 10 years older), and section 289, subdivision (j) (sexual penetration of a child under 14 years of age by a person more than 10 years older), and section 288, subdivisions (a), (b)(1) (lewd or lascivious act upon a child under 14 years old).
- Homicide and attempted homicide offenses within the meaning of sections 187 through 191.5.
- Assault upon a peace officer or firefighter with a machine gun under section 245, subdivision (d)(3).

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4. These exceptions to the current crime being subjected to an indeterminate sentence fit within the meaning of *People v. Hofsheier* (2006) 27 Cal.4th 1185, 1208-1209. The offenses which require section 290 registration are: section 187 committed for the purpose of a sex crime, section 220 except assault to commit mayhem, 243.4, 261, subdivision (a), 262, subdivision (a)(1) when involving the use of force or violence with a state prison sentence, sections 264.1, 266, 266.c, 266j, 267, 269, 285, 286, 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, 311.1, 311.2, subdivisions (b), (c), (d), 311.3, 311.4, 311.10, 647.6, former section 647a, 653f, subdivision (c), “any offense involving lewd or lascivious conduct under section 272, or any felony violation of section 288.2, any statutory predecessor that includes all elements of one of the above mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses.”

5. Includes sections 148, subdivisions (c), (d), 245, 245.2, 245.3, 245.5, 245.6, 246, 246.3, 247, 374c, 417, 417.3, 417.8, 626.9, 626.95, 422.75, subdivision (c), 487, subdivision (d)(2), 1203.061, subdivision (a), 1203.095, 4574, subdivision (a), 12021, 12021.5, 12022, 12022.3, 12022.4, 12022.5, 12022.7, 12022.53, 12022.55, 22410, 22900, 23900, 24510, 24610, 24710, 25100, 25300, 26100, 27500, 27545, 29800, 29805, 29815, 29820, 29900, 30210, 30600, 32625, 31500, 33600, and Health & Safety Code sections 11370.1, subdivision (a), 11550, subdivision (e).

6. Includes sections 261, subdivision (a), 262, 264.1, 269, 286, 288, 288a, 288.5, 289, and any violations of sections 207, 209, and 220 when the offenses are committed with an intent to commit any of the above-listed sex crimes.

- Solicitation to commit murder pursuant to section 653f.
- Possession of a weapon of mass destruction pursuant to section 11418, subdivision (a)(1).
- Any serious or violent felony punishable in this state by life imprisonment or death.<sup>7</sup>

(§ 667, subd. (e)(2)(C)(iv); § 1170.12, subd. (c)(2)(C)(iv).)

Notwithstanding these provisions, the trial court may still exercise its discretion under section 1385 to avoid imposing an indeterminate sentence. (§ 667, subd. (f)(2); § 1170.12, subd. (d)(2).)

The Proposition also eliminates the requirement of consecutive sentencing when the defendant is already serving another sentence. (See § 1170.12, subd. (a)(8) as enacted on November 8, 1994.)

### **No Retroactive Application**

Since the Proposition contains a “saving clause,” it is not retroactively applied to non-final judgments.<sup>8</sup> (*In re Estrada* (1965) 63 Cal.2d 740, 744-745; footnote 1, *post.*) Thus, despite the fact that the Proposition lessens a defendant’s punishment; he or she is not automatically entitled to a reduced sentence. (See footnote 1, *post.*)

### **Petition For Recall of Indeterminate Sentences**

Although final judgments are never entitled to automatic retroactive application, Proposition 36 creates a limited exception to this rule. It adds section 1170.126 providing a method for recalling previously imposed indeterminate sentences for those defendants whose cases would now be subject to mandatory second strike sentencing. (§ 1170.126, subd. (j).) Unless good cause is shown, the petition must be filed within two years of the passage of the Proposition. (§ 1170.126, subd. (b).) The trial court is not obligated to grant the petition. (§ 1170.126.)

Once the petition is filed, the inmate has the burden to establish whether he or she qualifies for resentencing and whether a determinate sentence would place the public in unreasonable risk of danger. (§ 1170.126, subs. (e), (f).) When making the latter decision, the trial court may consider the inmate’s criminal conviction history, injury to victims, and the length of the prison

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7. Includes sections 205, 206, 209, subdivisions (a), (b)(1), 209.5, subdivision (a), 217.1, subdivision (b), 218, 220, subdivision (b), 269, subdivisions (a)(1), (2), (3), (4), (5), 273ab, subdivisions (a), (b), 451.5, subdivision (a), 667.51, subdivision (d), 4500, 11418, subdivisions (b)(1), (2), 18745, 18755, subdivisions (a), (b) and allegations pursuant to 186.22, subdivisions (b)(4), (5), 667.51, subdivision (c), 667.61, subdivisions (a)/(d) (a)/(e), (b)/(e), (j)(1), (2), (l), 667.7, subdivision (a), 667.71, 667.75, 12022.53, subdivision (d), California Rules of Court, rule 4.421(c)/section 1170.81.

8. On direct appeal, a defendant has 60 days after sentencing to file a notice of appeal, otherwise the judgment is final. (Cal. Rules of Court, rule 8.308.) If the notice was filed, the Court of Appeal’s decision becomes final 30 days after issuance. (Cal. Rules of court, rule 8.366.) After the Court of Appeal’s decision is final, a defendant has 10 days to file a petition for review with the California Supreme Court. (Cal. Rules of Court, rule 8.500.) Following the California Supreme Court’s decision, either on the merits or by denial of review, the defendant has 90 days to file a petition for writ of certiorari in the United States Supreme Court. (U.S.C.S. Supreme Ct., rule 13.)

commitments as well as the remoteness of the prior crimes. (§ 1170.126, subd. (g)(1).) Also, the trial court may consider the inmate's disciplinary and rehabilitation record while incarcerated along with any other evidence which may be relevant to the decision. (§ 1170.126, subds. (g)(2), (3).) The inmate may sign a waiver exempting him or her from personally appearing in court. (§ 1170.126, subd. (i).)

### **Conclusion**

With the passage of Proposition 36, the mandatory second strike sentencing scheme applies as outlined above and only to those offenses committed on or after November 7, 2012. However, if the defendant has previously been given an indeterminate Three Strikes sentence, he or she may file a resentencing petition with the trial court which decides whether or not it should be granted.