THE BATTLE IS JOINED: *ESTRADA* v. 1170.126

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This article addresses the battle over the ways defendants sentenced to a third-strike life sentence before November 7 can take advantage of Proposition 36, the Three Strikes Reform Act of 2012. The proposition essentially replaces the previous indeterminate life sentence with a second-strike, doubled sentence for many (but not all) defendants whose third strike was a non-violent, non-serious felony.

INITIAL SKIRMISH

The immediate controversy for appellate attorneys involves two remedies, which are not equivalent in the relief they offer.[1] The first is ***In re Estrada*** (1965) 63 Cal.2d 740, which presumes the enacting body intended the lower sentences to apply to all cases not yet final when the new law became effective unless a contrary intent is expressed. The second is **Penal Code section 1170.126**, enacted as part of Proposition 36, which allows a petition for resentencing to the trial court and mandates the lower sentence – *unless* the trial court finds the defendant's release would be dangerous to society.

Because section 1170.126 has a rather open-ended "unreasonable risk of danger to public safety" exception to the right to a lower sentence, it is less favorable to defendants whose cases are not yet final than is *Estrada* relief, which *mandates* the reduced sentence if the defendant meets the eligibility criteria.

ADI has concluded that post-sentencing defendants on appeal who meet the requirements of Proposition 36 are entitled to a remand for resentencing and a reduced sentence under *Estrada*. In this conclusion, we are joined by the other appellate projects and the judicial Three Strikes experts, Judge Couzens and Justice Bigelow, whose memo on Proposition 36 has been distributed to the entire judiciary.

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[1] **Caution**: Another potential retroactivity argument for Proposition 36 is based on equal protection principles. We encourage attorneys to explore that avenue in addition to *Estrada*. The arguments and remedies discussed here are focused on *Estrada* and do not necessarily apply to equal protection. For example, equal protection arguments often seek full retroactivity (to all cases), whereas *Estrada* gives only limited retroactivity (for non-final cases). Further, equal protection is a federal constitutional right, whereas *Estrada* is a principle of California statutory construction, not a constitutional one. (*People v. Floyd* (2003) 31 Cal.4th 179, 184-188.) Counsel must keep these nuances in mind when formulating their arguments.

The initial reaction of some observers, on the other hand, has been that the exclusive remedy for defendants already sentenced is new Penal Code section 1170.126. That has been the position of the Attorney General, we understand, to the extent they have been heard on this matter so far. A Third District panel originally did so hold, but has since granted rehearing on its own motion.[2] ADI agrees a section 1170.126 remedy is by its own terms *available* to defendants on appeal, but for reasons given in this article disagrees with the position that no *other* remedy – specifically, *Estrada* – is available.

Estrada

As stated above, *In re Estrada*, *supra*, 63 Cal.2d 740 establishes a rule of statutory interpretation: Absent evidence to the contrary, courts presume the intent of the enacting body (the electorate or Legislature) in reducing the penalty for a crime was to apply the reduced penalty to all cases not yet final. As *Estrada* stated:

> When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply . . . to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.

(63 Cal.2d at p. 745.)

Estrada can be applied on appeal when the amendment becomes effective during the appeal. (*People v. Babylon* (1985) 39 Cal.3d 719, 722 ["defendant is entitled to the benefit of a change in the law during the pendency of his appeal"; reversing convictions because amendment made defendants' acts non-criminal].) It can also be applied on habeas corpus if the direct appeal is over but the amendment was enacted before the case became final. (*In re Pine* (1977) 66 Cal.App.3d 593, 596.)

In *People v. Brown* (2012) 54 Cal.4th 314 the Supreme Court clarified that *Estrada* is an exception to the general rule of prospectivity set out in Penal Code section 3

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[2] *People v. Conley* (C070272).

and applies only to a *mitigation of the penalty* for a particular crime,[3] not to changes favorable to defendants in some other way, such as enhanced conduct credits.

> *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. (Cf. *People v. Nasalga* (1996) 12 Cal.4th 784, 792, fn. 7 [declining request to reconsider *Estrada*].)

(*People v. Brown*, *supra*, at p. 324.) Proposition 36 is a classic example of an "act mitigating the punishment" and a legislative or electoral determination that a reduced sentence is adequate to protect society. Therefore it should be applied in all cases to which it can legally be applied, namely, those not yet reduced to a final judgment when it was enacted.

It is presumed that the electorate or Legislature is aware of previous decisional law when it enacts a new statute. (*Walters v. Weed* (1988) 45 Cal.3d 1, 10-11; *People v. Garrett* (2001) 92 Cal.App.4th 1417, 1432.) *Estrada* is an example of such decisional law. As *People v. Nasalga* (1996) 12 Cal.4th 784, 792, footnote 7, held, in declining to reconsider *Estrada*, the Legislature has been aware of that principle of interpretation for decades, has had ample opportunity to override it, and has never done so. Unless Proposition 36 explicitly evidences a different intent, therefore, it is reasonable to presume the electorate expected and intended the courts to apply *Estrada*. The question whether section 1170.126 "evidences a different intent" is the subject of the present debate.

Penal Code Section 1170.126

Section 1170.126, enacted as part of Proposition 36, establishes a new discretionary statutory sentence recall procedure. Any person serving a third-strike indeterminate term of life for a non-serious/non-violent felony conviction, "whether by trial or plea," may file in the sentencing court a petition for recall of sentence. It must be filed within two years of the effective date of Proposition 36 (Nov. 7, 2012) "or at a later date upon a showing of good cause." (Pen. Code, § 1170.126, subd. (b).) It is intended to

[3]Outright repeal, or decriminalization of an act, is included in "mitigation" for *Estrada* purposes. (*People v. Rossi* (1976) 18 Cal.3d 295, 299–300.)

apply exclusively to persons presently serving an indeterminate (life) third strike sentence and thus does not apply to "second strike" terms. (§ 1170.126, subd. (c).)

The petition need only state the current offense and the prior offenses constituting "strikes." (Pen. Code, § 1170.126, subd. (d).) If the judge determines the person is eligible for a reduced term under Proposition 36, a hearing is held. The court "shall" impose the reduced sentence, *unless* in light of the evidence at the hearing the court determines the defendant's release would pose an "unreasonable risk of danger to the public safety." (§ 1170.126, subd. (f).) The court must consider such matters as the defendant's criminal history and record in prison. (§ 1170.126, subd. (g).)

Critically, subdivision (k) of section 1170.126 specifically provides the statute is not intended to supplant other remedies that might be available.

ARGUMENTS

In this writer's opinion, the arguments are lopsidedly in favor of *Estrada*'s applicability and against the theory that section 1170.126 is an exclusive remedy. Indeed, it is difficult to formulate an argument to the contrary that is at least coherent, much less persuasive.

Statutory text: subdivision (k)

The language of the text is the beginning and often the end of statutory construction. If the plain language of the statute is unambiguous and does not involve an absurdity, then the plain meaning governs, and further interpretation is neither necessary nor proper. (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 519; *People v. Boyd* (1979) 24 Cal.3d 285, 294; *Lewis v. Clarke* (2003) 108 Cal.App.4th 563, 567.)

That is the case with section 1170.126 in Proposition 36. Subdivision (k) explicitly provides:

> Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant.

If the voters intended to make section 1170.126 an exclusive remedy, such a provision would be both meaningless and self-defeating.

When a statute expressly disclaims an intent to supplant other remedies, it must be seen as cumulative, not exclusive. (*Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 223 [when statute states its remedies are in addition to any others that may be available, its remedies are nonexclusive].) A new statutory remedy is deemed exclusive only if it exhibits "a legislative intent to displace all preexisting or alternative remedies." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 80.) Subdivision (k) explicitly states the very **opposite** intent.

To construe section 1170.126 as the exclusive remedy is to read subdivision (k) out of the statute altogether. Proper interpretation attempts to give meaning to every provision where possible and not to render any part of the statute surplusage. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118.)

For all of these reasons, it is impossible to find exclusivity while still maintaining any fidelity to the text of the statute.

Function of section 1170.126: full retroactivity

A court may ask: If *Estrada* is available retroactively to post-sentencing defendants and is more favorable to them, then why did the electorate include section 1170.126 at all in Proposition 36? No one would want or need that section. Wouldn't application of *Estrada* make section 1170.126 surplusage in its entirety, in violation of the canons of statutory interpretation?

The answer is in the limitations of *Estrada* itself, which applies a reduction in sentence only to cases *not yet final*. That means defendants whose cases were already final at the time of the enactment are not eligible for *Estrada* relief.[4]

Only *full* retroactivity would achieve the objectives of reducing overcrowding and relieving taxpayers of the burden of paying for "housing or long-term health care for elderly, low-risk, non-violent inmates serving life sentences for minor crimes." (Three Strikes Reform Act of 2012, § 1, ¶ (4).) Very probably a large majority of defendants serving a life term for a third strike are past finality, given the length of time the Three

[4]Note: The *Estrada* right to an amelioration of sentence requires the case be non-final *when the new law is enacted*. It does not require the case *still* be non-final when relief is sought and/or granted. Thus a defendant whose case became final after November 7 can seek *Estrada* relief, even if the case has since become final. *Estrada* relief is then available through habeas corpus. (Indeed, *Estrada* itself was a habeas proceeding.)

Strikes Law has been in effect. Certainly most of the "elderly" ones are. Arguably, then, the principal function for section 1170.126 is to extend the initiative to qualifying inmates who have relatively minor third felonies but are beyond *Estrada*'s reach.

Alternative meanings of subdivision (k)'s "other rights and remedies"

A court might agree that the remedy of section 1170.126 is by the very terms of subdivision (k) non-exclusive, but ask whether the electorate had other rights and remedies than *Estrada* in mind when it enacted that provision. Might it have intended to exclude *Estrada* but not certain other forms of relief?

Again, the plain language of the statute controls. Subdivision (k) refers to "*any* rights and or remedies otherwise available to the defendant." (Emphasis added.) It does not say "some" of those rights or remedies, nor does it specifically exclude *Estrada*, nor does it enumerate some, leaving out *Estrada*. I reiterate an earlier point: The electorate is presumed to have been aware of *Estrada*. Therefore failure to exclude it from the reach of subdivision (k) signifies a positive intent to include it among the rights and remedies not abrogated or diminished by the proposition.

Even if one goes beyond the surface language, there is nothing in the ballot pamphlet suggesting a reason to exclude *Estrada* but not some other forms of relief. The stated purpose of Proposition 36 is to confine third strike life sentencing to those who pose the greatest risk to society and to relieve taxpayers of the burden of housing and caring for low-risk inmates convicted of relatively minor third strikes. Applying *Estrada* to eligible inmates is fully consistent with these goals.

Only this scenario for section 1170.126 fits the language and objectives of Proposition 36: To achieve its goals, the electorate wanted to provide all qualifying inmates with *some* remedy. It created section 1170.126 to cover those who might not have any other remedy. But it also was aware that other remedies might be more effective or efficient in a given case, and it did not want to prevent the use of those. Thus section 1170.126 provides an alternative avenue of relief even for defendants in that category.

CONCLUSION

For these reasons, **ADI attorneys should press for *Estrada* relief in applicable cases now on appeal.** Please keep an eye on our web page for further developments and sample materials.