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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	No.
	)	
	)	DCA No. B298366
Plaintiff and Respondent,	)	
	)	
v.	)	Superior Court
	)	(Los Angeles)
LEVEL OMEGA HENDERSON,	)	No. BA437882
	)	
Defendant and Petitioner.	)	
	)	

PETITION FOR REVIEW

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA, LOS ANGELES COUNTY

Honorable Frederick N. Wapner, Judge

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Defendant and Petitioner.	)	

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Appellant and petitioner Level Henderson seeks review by this Court following a published decision of the Court of Appeal, Second Appellate District, Division Seven, filed on September 14, 2020, affirming his convictions and sentence, a copy of which is attached to this Petition as an Appendix. As set forth below, review is necessary to secure uniformity of decision and to settle important questions of law. (See Cal. Rules of Court, rule 8.500(b)(1).)

QUESTIONS PRESENTED

1) Did the trial court misunderstand the scope of its discretion over petitioner's sentence when it explicitly stated on the record that it could not impose concurrent sentences on two serious felonies, even though both were committed on the same occasion?

2) Did trial counsel's failure to interview or subpoena a key defense witness prior to trial deprive petitioner of his Sixth and Fourteenth Amendment rights to effective assistance of counsel?

REASONS FOR REVIEW

This Petition for Review asks the Court to resolve a split of authority in the intermediate appellate courts over whether, following recent amendments to the initiative version of the Three Strikes law, trial courts are now prohibited from imposing concurrent sentences in cases involving multiple serious or violent felonies committed on the same occasion. Until now, every court to address this issue held that trial court retain such discretion. (See, e.g., *People v. Marcus* (2020) 45 Cal.App.5th 201; *People v. Gangl* (2019) 42 Cal.App.5th 58; *People v. Buchanan* (2019) 39 Cal.App.5th 385; *People v. Torres* (2018) 23 Cal.App.5th 185.) Although the state conceded in this case that the uncertainty stemmed entirely from an apparent "drafting error" in the recent amendments, the Court of Appeal here set itself up as an island in a sea of contrary authority. As discussed below, the Court of Appeal's decision cannot be squared with the plain language of the amended initiative version, the legislative version of the Three Strikes law, or this Court's jurisprudence.

This Petition for Review also asks the Court to determine if defense counsel rendered ineffective assistance by failing to interview and call a key defense witness who provided petitioner's post-conviction investigator with exculpatory statements. Because this is an important question of constitutional law, review is appropriate as to this issue as well.

STATEMENT OF THE CASE

On August 4, 2015, the Los Angeles County District Attorney filed an information charging petitioner Level Henderson as follows:

Count 1:	assault with a firearm on Daniel Tillett (§ 245, subd. (b));
Count 3[1]:	possession of a firearm by prohibited person (§ 29800, subd. (a)(1))
Count 4:	aggravated assault on Daniel Tillett (§ 245, subd. (a)(4));
Count 5:	assault with a firearm on William Aguilar (§ 245, subd. (b)).

(2 CT 100-103.) All counts were alleged to have occurred on March 19, 2015. (*Ibid*.) The state further alleged that petitioner suffered four prior strikes (§§ 667.5, subd. (c), 1192.7), four prison priors (§ 667.5, subd. (b)), and two serious-felony priors (§ 667, subd. (a)(1)). (2 CT 103-105.)

Opening statements and the state's case began on October 5, 2015. (2 CT 120.) The state rested the following day. (2 RT 247.) The defense case began and ended October 6, 2015, when the defense rested without calling any witnesses. (2 CT 123.)

The jury began deliberating on October 7, 2015. (2 CT 125.)

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[1] The trial court dismissed count 2 at the prosecutor's request on October 6, 2015. (2 RT 257.)

Deliberations continued the following day, when the jury asked for several readbacks. (2 CT 142-143.) After deliberating for over four hours on October 6 and 7, 2015, the jury found petitioner guilty as charged. (2 CT 125, 142-145.)

On January 20, 2016, petitioner fired his appointed attorney and moved to represent himself. (2 RT 371-373.) Petitioner continued to represent himself until February 14, 2018, when new counsel was appointed. (2 RT 393-394.) Counsel then brought a new trial motion, which was heard and denied on January 11, 2019. (2 RT 396-399.)

At an April 25, 2019 bench trial, the trial court found the prior conviction allegations true. (2 RT 403-411.) Petitioner was then sentenced on the same day. (2 CT 313-316.) The trial court granted the defense request to strike three of petitioner's four prior strikes, all of his prison priors, and one of the two serious felony priors. (2 RT 411-423.) The trial court then sentenced petitioner to a total term of 27 years, calculated as follows: the high term of 9 years on count 1, doubled for the prior strike; consecutive to one-third the middle term of two years on count 5, doubled for the prior strike; consecutive to five years for the remaining serious felony prior. (2 RT 424-425.)

Petitioner filed a timely notice of appeal on May 10, 2019. (2 CT 344.) On September 14, 2020, the Court of Appeal affirmed petitioner's convictions and sentence in a published decision. (See Appendix 1-23.) Petitioner did not seek rehearing.

This Petition for Review follows.

STATEMENT OF FACTS

For purposes of this petition only, petitioner adopts the Statement of Facts set forth in the appellate court's opinion. (See Appendix 2-6.)

ARGUMENT

I. REVIEW IS APPROPRIATE TO RESOLVE A SPLIT OF AUTHORITY IN THE INTERMEDIATE APPELLATE COURTS AND DETERMINE WHETHER THE TRIAL COURT MISUNDERSTOOD THE SCOPE OF ITS DISCRETION OVER PETITIONER'S SENTENCE.

Counts 1 and 5 both charged petitioner with assault with a firearm against different victims during the same incident. (See 2 CT 100-103.) At sentencing, the trial court stayed the other counts related to this incident, counts 3 and 4, pursuant to Penal Code section 654. (See 2 RT 411-425.) The trial court also struck the prison prior allegations and all but one of the prior strike allegations. (*Ibid*.) After imposing the high term on count 1, however, the trial court sentenced petitioner to serve the sentence on count 5 consecutive to count 1. (2 RT 424-425.) The trial court's comments reflect its belief that such a sentence was mandatory under the 2012 amendments to the initiative version of the Three Strikes law:

> As to count 5, 245(b) the Three Strikes law requires that on serious or violent felonies, two or more, that they be sentenced consecutively. Therefore, he's sentenced to the mid term of six years, one-third of that is two, doubled is four . . . .

(2 RT 425.)

On appeal, petitioner argued that a new sentencing hearing was required because the trial court failed to recognize its

discretion to impose a concurrent sentence on count 5. (Appellant's Opening Brief ("AOB") 26-34.) Petitioner argued that recent developments in the case law showed that the trial court was mistaken in its understanding of the law on this point. (AOB 27-30.) He explained that numerous courts have held, in cases decided mostly after sentencing in this case, that trial courts retain discretion to impose concurrent sentences in cases involving serious or violent felonies committed on the same occasion. (*Ibid*.) Acknowledging his attorney's failure to object, petitioner argued that the issue was nevertheless cognizable on appeal because the law was still relatively unsettled at the time of sentence, or else defense counsel's failure to object constituted ineffective assistance. (AOB 30-34.)

The Court of Appeal rejected petitioner's arguments on the merits. (See Appendix 10-22.) The appellate court acknowledged that every court to address the issue has held that trial courts retain discretion to impose concurrent sentences in cases involving multiple serious felonies committed on the same act or occasion. (See *ibid*.) Departing entirely from those cases, however, the Court of Appeal held that the 2012 Three Strikes Reform Act in fact eliminated this longstanding discretion and consecutive sentences are now mandatory for multiple serious or violent felonies, even if these were committed on the same act or occasion. (Appendix 17-22.) Review is appropriate.

Petitioner was charged under both the legislative version of the Three Strikes law (§ 667), as well as the initiative version (§ 1170.12). (See 2 CT 103.) The legislative version, section 667,

subdivision (c)(6) currently reads:

> If there is a current conviction for more than one felony count *not committed on the same occasion*, and *not arising from the same set of operative facts*, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

And subdivision (c)(7) of the same section still reads:

> If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

In *People v. Hendrix* (1997) 16 Cal.4th 508, 511 ("*Hendrix*"), this Court faced the question of whether the legislative version of the Three Strikes law required consecutive sentences when a defendant, in a currently charged case, "commits serious or violent felonies against multiple victims at the same time." This Court answered that question in the negative. (*Id*. at pp. 511-514.) The Court arrived at this conclusion based on a reading of subdivisions (c)(6) and (c)(7) together:

> Thus, when a defendant is convicted of two or more current serious or violent felonies "not committed on the same occasion, and not arising from the same

> set of operative facts," not only must the court impose the sentences for these serious or violent offenses consecutive to each other, it must also impose these sentences "consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." By implication, consecutive sentences are not mandated under subdivision (c)(7) if all of the serious or violent current felony convictions are "committed on the same occasion" or "aris[e] from the same set of operative facts."

(*Id*. at p. 512.) Because subdivision (c)(6) applies to *all* felonies, including serious and violent felonies, according to this Court any contrary reading would render subdivision (c)(7) "duplicative" of subdivision (c)(6). (See *id*. at p. 513.)

However, in 2012 voters passed the Three Strikes Reform Act ("Reform Act"). (See Prop. 36.) Whereas before the amendments the legislative and initiative versions were "nearly identical" (People v. Superior Court (Romero) (1996) 13 Cal. 4th 497, 504), section 1170.12, subdivision (a)(7) was modified to refer to "subdivision (b)" rather than "paragraph (6)" of that section:

> If there is a current conviction for more than one serious or violent felony as described in ~~paragraph (6) of this~~ **subdivision (b)**, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner

prescribed by law.

(§ 1170.12, subd. (a)(7), as amended by Prop. 36, § 4, as approved by voters Gen. Elec. (Nov. 6, 2012), boldface and strike-through added.) Section 1170.12, subdivision (a)(6) was left unchanged.[2]

Thus, under the amended statute, section 1170.12, subdivision (a)(6) still requires that *any* felony -- including a serious or violent felony -- not committed on the same occasion be sentenced consecutively. By implication, and pursuant to this Court's decision in *Hendrix*, *any* felony -- again including a serious or violent felony -- that *was* committed on the same occasion still does *not* result consecutive sentencing pursuant to section 1170.12, subdivision (a)(6). (See *Hendrix*, *supra*, 16 Cal.4th at p. 513.) The amendments to section 1170.12, subdivision (a)(7) now merely require "the sentences for those serious and/or violent felonies (imposed either consecutively or concurrently as required or allowed under § 1170.12, subd. (a)(6)), must 'run consecutive *to the sentence for any other offense, whether felony or misdemeanor, for which a consecutive sentence may be imposed*.'" (*People v. Torres*, *supra*, 23 Cal.App.5th at p. 201, quoting with emphasis *Hendrix*, *supra*, 16 Cal.4th at p. 518 (conc. opn. of Mosk, J.); see also *People v. Marcus*, *supra*, 45 Cal.App.5th at pp. 212-214; *People v. Gangl*, *supra*, 42

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[2] The Reform Act did not make any changes to the corresponding legislative version of the Three Strikes law, and thus section 667, subdivisions (c)(6) and (c)(7) still read just as they did when this Court decided *Hendrix*.

Cal.App.5th at p. 69; *People v. Buchanan*, *supra*, 39 Cal.App.5th at pp. 391-392.)

Given that the Court of Appeal's contrary reading of section 1170.12, subdivision (a)(7) is at odds with every other court to have addressed the issue, review is appropriate to resolve this split of authority.

II. REVIEW IS APPROPRIATE BECAUSE TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE, IN VIOLATION OF PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS, BY FAILING TO INTERVIEW A KEY DEFENSE WITNESS PRIOR TO TRIAL.

There was no dispute in this case as to whether petitioner and Tillett fought each other on the night of the charged crimes -- they did. The only question for the jury to answer in this case was whether petitioner used a gun during that fight and then pointed this gun at Aguilar. In deciding the central question of the gun, the jury heard two types of evidence.

First, there was the physical evidence. Police recovered a pink handgun from a recently cleaned common area shared by four apartments, including the apartment to which petitioner retreated after police arrived. (See 1 RT 153-159, 163-165.) There was no visible blood on the gun. (2 RT 238.) Police recovered fingerprints from the gun's magazine, but these were not petitioner's fingerprints. (See 2 RT 240-242.)

Then there was the eyewitness testimony. Out of the three possible witnesses to the events that night, the state only called one: William Aguilar. Mr. Aguilar testified that he saw petitioner and Daniel Tillett fighting, after which petitioner walked to his car, retrieved something -- which Aguilar at various times described as a either a holster or a tan (but not pink) gun -- and walked back towards Tillett before going back to his car and driving away. (1 RT 57-61, 65-67, 1 RT 99-103, 131-132.) When Aguilar approached the area where Tillett and his girlfriend,

Tiffany Gregory, were, Aguilar testified that petitioner returned, hit Tillett with a gun, punched him with an open fist, and then pointed the gun towards Aguilar and Tiffany, who had just asked him not to kill her child's father. (1 RT 70-76.)

Defense counsel argued in closing arguments that petitioner never had a gun. (See 2 RT 308-314.) In support of this position, counsel pointed to the differences between the tan object Aguilar saw and the pink gun police found. (*Ibid*.)

Defense counsel's second attack on the state's case involved pointing out the state's failure to call Tiffany to testify. (2 RT 292-293, 301-302.) The prosecutor predictably pounced on this in rebuttal, telling the jury it could be sure Tiffany had nothing helpful to offer petitioner given defense counsel's own failure to call her as a witness in his case. (2 RT 333.)

Petitioner's own pro per investigation following the verdicts shows the prosecutor's argument was not true: Tiffany in fact *did* have helpful testimony. She told petitioner's investigator that she never saw petitioner with a gun that night. (2 CT 257-258.) Petitioner and Tillett fought, sure, but there was no gun. (*Ibid*.) Tiffany made clear that she would have testified as such were she called as a witness. (*Ibid*.)

Additionally, Tiffany confirmed that petitioner's attorney never "subpoenaed" her. (2 CT 257.) The parties below read this portion of her declaration to mean that defense counsel never interviewed her before trial. (See 2 CT 268-269 [prosecutor's opposition to motion for new trial].) This reading was of course supported by Tiffany's willingness to testify on these points, and

defense counsel's failure to call her so she could do so. (See 2 CT 257.)

On appeal, petitioner argued that reversal was required because defense counsel rendered ineffective assistance of counsel. (AOB 14-25.) Petitioner explained that, to the extent counsel decided not to call Tiffany without ever interviewing her -- as the prosecutor conceded had happened -- counsel's performance was per se deficient. (AOB 17-20.) Alternatively, recognizing that Tiffany's declaration was somewhat ambiguous, petitioner argued that counsel could have no tactical reason for failing to call Tiffany given her willingness to testify that petitioner did not have a gun that night. (*Ibid*.) Finally, as to prejudice, petitioner argued there was a reasonable probability that a single juror would have voted to acquit after hearing from Tiffany, particularly given the problems with Aguilar's conflicting testimony and the objective record of jury deliberations showing jurors did not buy Aguilar's testimony hook, line, and sinker. (AOB 21-25.)

The Court of Appeal rejected petitioner's claims. (See Appendix 6-10.) The court acknowledged that trial counsel would have rendered deficient performance for failing to interview Tiffany before deciding not to call her, but the court found that the record did not "affirmatively show" that trial counsel in fact failed to so interview her. (Appendix 9-10.) Review is appropriate.

Both the United States and California constitutions guarantee defendants in criminal cases the right to assistance of

competent counsel. (See U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15; Corenevsky v. Superior Court (1984) 36 Cal.3d 307, 319.) To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's errors there is a "reasonable probability" that the result of the proceeding would have been different. (Strickland v. Washington (1984) 466 U.S. 668, 693.)

Here, contrary to the appellate court's decision, the record indeed "affirmatively show[s]" (Appendix 9) that trial counsel failed to have Tiffany interviewed. First, the prosecutor conceded that counsel never had Tiffany interviewed. (2 CT 268-269.) Tiffany's declaration, too, while saying simply that trial counsel never "subpoenaed" her, makes clear that she would have testified that she never saw petitioner with a gun that night. (See 2 CT 257-258.) Given that Tiffany was never called to offer this testimony, it stands to reason that defense counsel never contacted her to learn of the favorable testimony she was prepared to give.

Counsel's decision not to interview Tiffany before deciding whether to call her was per se unreasonable, and thus *Strickland*'s first prong is satisfied. (See, e.g., Lord v. Wood (9th Cir. 1999) 184 F.3d 1083, 1095 [defense lawyer decides not to call a witness without ever having interviewed that witness; held, the decision cannot be characterized as a reasonable tactical decision entitled to deference]; Accord Howard v. Clark (9th Cir. 2010) 608 F.3d 563, 571; Riley v. Payne (9th Cir. 2003) 352 F.3d 1313,

1324.)

Briefly, although the Court of Appeal did not reach the issue, counsel's failure to interview Tiffany is "sufficient to undermine confidence in the outcome" of the trial. (Strickland v. Washington, supra, 466 U.S. at p. 694.) Here, there were fingerprints on the gun's magazine, but these were not petitioner's (2 RT 240-242); no blood was found on the gun, which would be expected if petitioner struck Tillett with it (2 RT 238); Aguilar's testimony directly conflicted with his statements to police and his prior testimony (2 RT 208); and the jury here deliberated for multiple days and asked for numerous readbacks before finally convicting petitioner (2 CT 125, 142-143). Had trial counsel interviewed Tiffany and then called her, Tiffany's testimony would have flatly contradicted Aguilar's testimony on which the state's case entirely relied. On this record, there is more than a reasonable probability that at least one juror would have voted to acquit after hearing from Tiffany. (See People v. Centeno (2014) 60 Cal.4th 659, 677.)

Review is appropriate to remedy this violation of petitioner's Sixth and Fourteenth Amendment rights to effective assistance of counsel.

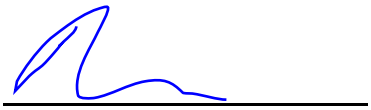
CONCLUSION

For all the reasons set forth above, review is appropriate.

Dated: October 23, 2020.

Respectfully submitted,

RUDOLPH J. ALEJO



By: Rudolph J. Alejo
Attorney for Petitioner
Level Henderson

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief is 1.5-spaced, that a 13-point proportional font was used, and that there are 3,230 words in the brief.

Dated: October 23, 2020.

Rudolph J. Alejo

APPENDIX

Filed 9/14/20

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LEVEL OMEGA HENDERSON, Defendant and Appellant.	B298366 (Los Angeles County Super. Ct. No. BA437882)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed.

Rudolph J. Alejo, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Blythe J. Leszkay and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found Level Omega Henderson guilty on two counts of assault with a semiautomatic firearm (one for each of two victims), one count of possession of a firearm by a felon, and one count of assault by means likely to produce great bodily injury. The trial court sentenced Henderson to a prison term of 27 years, which included consecutive terms on the two convictions for assault with a semiautomatic firearm.

Henderson argues his trial lawyer provided ineffective assistance by failing to call a percipient witness. Henderson also argues he is entitled to a new sentencing hearing because the trial court did not recognize it had discretion under the three strikes law to impose concurrent sentences on the two convictions for assault with a semiautomatic firearm. We conclude Henderson has not shown in this appeal that his trial attorney provided ineffective assistance at trial because the record does not disclose why his lawyer chose not to call the witness or that his attorney's decision was below the standard of care. We also conclude the trial court did not have discretion to impose concurrent sentences on the two convictions for assault with a semiautomatic firearm. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Henderson Gets into a Fight*

In March 2015 Henderson fought with Daniel Tillett in the courtyard of an apartment complex. At one point Henderson walked away from the area where they were fighting and went to his car. William Aguilar, who had been making some repairs at the apartment building, saw Henderson open the trunk of the car

and walk back toward the courtyard holding a semiautomatic handgun. Aguilar called the 911 emergency operator.

A few minutes later Henderson returned to his car and drove away.[1] After Henderson left, Aguilar went to the courtyard and saw Tillett and a woman named Tiffany. Tillett was bleeding from his face. Aguilar agreed to take Tillett to the hospital, but before they left, Henderson returned to the courtyard holding the same gun Aguilar had seen before. With his right hand Henderson hit Tillett in the face with the butt of the gun, and with his left hand he hit Tillett with an uppercut to his jaw. Tillett fell to the ground. Tiffany yelled at Henderson, "Please do not kill my baby's daddy." Henderson pointed the gun in a "sweeping motion" at both Tiffany and Aguilar. Aguilar ran to his truck, saw a police car, and flagged it down.

Two police officers went to the apartment complex and saw Henderson standing over Tillett on the ground. Henderson hit Tillett several more times before fleeing to a vacant apartment unit. The officers did not follow Henderson into the apartment. Five minutes later, Henderson walked out of the apartment unarmed. The police searched the apartment and discovered a torn window screen in the bathroom. The police also found a semiautomatic handgun on the ground in a small atrium "directly below the window." The only access to the atrium was through the windows of a few apartments and the roof of the apartment building.

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[1] It is not clear whether Henderson encountered Tillett again between when Aguilar first saw Henderson and when Henderson returned to his car.

B. *The People Charge Henderson with Multiple Crimes*

The People charged Henderson with one count of assault with a semiautomatic firearm on Tillett (Pen. Code, § 245, subd. (b), count 1),[2] one count of assault with a semiautomatic firearm on Aguilar (count 5), one count of possession of a firearm by a felon (§ 29800, subd. (a)(1), count 3), and one count of assault by means likely to produce great bodily injury on Tillett (§ 245, subd. (a)(4), count 4).[3] The People alleged that Henderson had four prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12), that Henderson had two prior serious felony convictions within the meaning of section 667, subdivision (a)(1), and that Henderson served four prior separate prison terms within the meaning of section 667.5, subdivision (b).

C. *A Jury Convicts Henderson on All Counts*

At trial the People called several witnesses, including Aguilar and the two police officers who arrived at the apartment complex. The People did not call Tillett or Tiffany. The parties stipulated Henderson had been convicted of a felony. Henderson did not call any witnesses. The jury found Henderson guilty on all counts.

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[2] Statutory references are to the Penal Code.

[3] The People also charged Henderson with one count of possession of a firearm with a prior violent conviction (§ 29900, subd. (a)(1), count 2), but at trial the court granted the People's motion to dismiss that count.

D. *The Trial Court Denies Henderson's Motion for New Trial*

Prior to sentencing, the trial court granted Henderson's motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525]. After several continuances, however, and at Henderson's request, the court appointed new counsel for Henderson. Henderson filed a motion for new trial, attaching a handwritten declaration from Tiffany stating that, "during the course of the physical altercation" between Henderson and Tillett, she did not see Henderson "with any weapon" and that she saw Henderson and Tillett "fighting with their fists only." Henderson also attached a transcript of his investigator's interview with Tiffany where Tiffany stated that neither the prosecutor nor Henderson's prior attorney subpoenaed her to testify and that, had she been served with a subpoena, she would have testified. Henderson argued, among other things, that his prior lawyer rendered ineffective assistance by failing to "fully investigate and secure the attendance of" Tiffany at trial. The trial court denied Henderson's motion for new trial.

E. *The Trial Court Sentences Henderson*

In a bifurcated proceeding, the trial court found true all of the prior conviction allegations. On Henderson's motion, the court struck three of Henderson's four prior serious or violent felony convictions under the three strikes law, one of his two prior serious felony convictions under section 667, subdivision (a)(1), and all of his four prior prison terms under section 667.5, subdivision (b). The trial court sentenced Henderson to a prison term of 27 years, consisting of the upper term of nine years on

count 1, doubled under the three strikes law, a consecutive term of four years on count 5 (one-third the middle term of six years, doubled under the three strikes law), and five years for the remaining enhancement under section 667, subdivision (a)(1). The court also imposed and stayed under section 654 a three-year term on count 3 and a four-year term on count 4. Henderson timely appealed.

DISCUSSION

A. *Henderson Has Not Shown His Trial Counsel Provided Ineffective Assistance at Trial*

Henderson argues his trial attorney provided ineffective assistance by failing to interview Tiffany and call her to testify at trial. Henderson contends his attorney's performance was deficient because Tiffany's statement that she did not see Henderson with a gun "would have directly supported" Henderson's theory at trial that he "never used a gun" during his fight with Tillett. The People argue Henderson cannot establish his trial counsel's performance was deficient because the record does not disclose why counsel did not call Tiffany as a witness.

"To make out a claim that counsel rendered constitutionally ineffective assistance, 'the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different.'" (*People v. Hoyt* (2020) 8 Cal.5th 892, 958 (*Hoyt*); accord, *People v. Mai* (2013) 57 Cal.4th 986, 1009.) "Whether

counsel's performance was deficient, and whether any deficiency prejudiced defendant, are mixed questions of law and fact subject to our independent review." (*In re Gay* (2020) 8 Cal.5th 1059, 1073.)

"Usually, 'ineffective assistance [of counsel claims are] more appropriately decided in a habeas corpus proceeding.'" (*Hoyt*, *supra*, 8 Cal.5th at p. 958.) On direct appeal, "we may reverse 'only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation.'" (*People v. Arredondo* (2019) 8 Cal.5th 694, 711; see *People v. Mai*, *supra*, 57 Cal.4th at p. 1009.) "'All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding.'" (*Hoyt*, at p. 958.)

Henderson does not argue (1) or (2), and nothing in the record affirmatively discloses his trial counsel had no rational tactical purposes for not interviewing Tiffany or calling her as a witness or indicates that anyone asked his attorney why she did not or that she failed to respond to such an inquiry. Henderson argues only (3): His trial counsel's decision not to call Tiffany was "per se unreasonable"; i.e., there could be no satisfactory explanation for her decision.

But there were several reasons Henderson's trial counsel may have decided not to call Tiffany, reasons to which we defer. (See *People v. Carrasco* (2014) 59 Cal.4th 924, 989 ["The decision whether to call certain witnesses is a 'matter[ ] of trial tactics and strategy which a reviewing court generally may not second-guess.'"]; *People v. Wang* (2020) 46 Cal.App.5th 1055, 1088 [defendant failed to show "there could be no rational tactical

purpose for defense counsel's failure to call" a witness where the record did "not affirmatively reveal the lack of a rational tactical purpose for not calling the . . . witness"]; cf. *People v. Bolin* (1998) 18 Cal.4th 297, 334 ["Whether to call certain witnesses is . . . a matter of trial tactics, unless the decision results from unreasonable failure to investigate."].) First, Henderson's trial counsel may not have found Tiffany's account of the incident and proposed testimony credible. (See *Lord v. Wood* (9th Cir. 1999) 184 F.3d 1083, 1095, fn. 8 ["A lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor—factors we are not in a position to second-guess."].) Even if Tiffany told trial counsel she did not see Henderson with a gun, counsel reasonably could have concluded, based on her evaluation of Tiffany as a witness, that the risks of putting Tiffany on the stand and having her say something different or harmful were too great. (Cf. *People v. Freeman* (1994) 8 Cal.4th 450, 522-523 [there was "no basis for finding ineffective assistance of counsel" where the reviewing court could not "determine on appeal the tactical reasons for the approach counsel took," counsel may have preferred making an argument to the jury "to having witnesses testify and be subject to cross-examination," and "we do not know what the witnesses might have said if asked"].)

Second, had trial counsel for Henderson called Tiffany to testify at trial, the prosecutor may have elicited additional facts on cross-examination that supported the People's case or damaged Henderson's defenses. For example, Aguilar testified that he did not see the beginning of the fight between Henderson and Tillett and that he did not see what happened after he observed Henderson walk from his car to the apartment complex

with the gun. And by the time Aguilar saw Tillett, Tillett was already bleeding from his face. Tiffany's testimony could have filled in some of the gaps in Aguilar's testimony. In addition, the People charged Henderson not only with assault with a semiautomatic firearm, but also with assault by means likely to produce great bodily injury. Even if Tiffany testified she did not see Henderson with a gun, she may have testified she saw Henderson hit Tillett, which would have provided further evidence in support of the latter charge.

Third, in closing argument Henderson's trial counsel used Tiffany's (and Tillett's) absence from the trial to argue the People had not met their burden of proof beyond a reasonable doubt. In particular, counsel argued the People "denied" the jury the true story by failing to call the people "who know the real story about what happened" and "who know the full picture." (See *Harrington v. Richter* (2011) 562 U.S. 86, 109 [131 S.Ct. 770] ["To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates."].)

To be sure, if there were evidence Henderson's trial counsel did not even try to find and interview Tiffany, Henderson might be able to show his attorney's performance was deficient. (See *In re Gay*, *supra*, 8 Cal.5th at p. 1076 [an attorney's duty to render effective assistance includes the "'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary'"]; see, e.g., *id.* at p. 1078 [where the defendant was charged with shooting a police officer, his attorney acted unreasonably in failing to interview two witnesses who may have testified the codefendant was the shooter]; *Riley v. Payne* (9th Cir. 2003) 352 F.3d 1313, 1317-1319

[attorney acted unreasonably by failing to interview a witness who was with the defendant and the victim shortly before the alleged assault occurred and would have offered testimony favorable to the defendant's theory of self-defense].) As Henderson concedes, however, the record does not indicate either way whether, let alone affirmatively show, trial counsel for Henderson attempted to locate and interview Tiffany (or, if she did, what she learned during her investigation). (See *People v. Mayfield* (1993) 5 Cal.4th 142, 188 ["tactical choices presented to us on a silent record . . . are better evaluated by way of a petition for writ of habeas corpus, and on direct appeal we reject them"].)

B. *The Trial Court Did Not Have Discretion To Impose Concurrent Sentences on the Two Convictions for Assault with a Semiautomatic Firearm*

The trial court imposed consecutive sentences on count 1, assault with a semiautomatic firearm on Tillett, and count 5, assault with a semiautomatic firearm on Aguilar. In imposing consecutive sentences for these two convictions, the court stated that, "as to count 5," the "three strikes law requires that on serious or violent felonies, two or more, that they be sentenced consecutively."

Citing *People v. Hendrix* (1997) 16 Cal.4th 508 (*Hendrix*), where the Supreme Court held "consecutive sentences are not mandated under [section 667,] subdivision (c)(7) if all of the serious or violent current felony convictions are 'committed on the same occasion'" (*Hendrix,* at p. 512), Henderson argues the trial court erred in failing to recognize it had discretion to impose

concurrent sentences on counts 1 and 5.[4] The People argue the trial court did not have discretion to impose concurrent sentences because Proposition 36, approved by the voters in 2012, 15 years after the Supreme Court's decision in *Hendrix*, eliminated a trial court's discretion to impose concurrent sentences and requires the court to impose consecutive sentences "where the defendant has multiple current strike convictions." Henderson cites several cases that have agreed with his position. (See *People v. Marcus* (2020) 45 Cal.App.5th 201 (*Marcus*); *People v. Gangl* (2019) 42 Cal.App.5th 58 (*Gangl*); *People v. Buchanan* (2019) 39 Cal.App.5th 385 (*Buchanan*); *People v. Torres* (2018) 23 Cal.App.5th 185 (*Torres*).) In three of these cases, however, a dissenting justice agreed with the People's position. (See *Marcus*, at p. 215 (conc. & dis. opn. of Krause, J.); *Gangl*, at pp. 72-80 (conc. & dis. opn. of Krause, J.); *Buchanan*, at pp. 392-398 (conc. & dis. opn. of Needham, J.).)

We agree with the People and the dissenting justices in *Marcus, Gangl,* and *Buchanan* that Proposition 36 eliminated the trial court's discretion to impose concurrent sentences on multiple current serious or violent felony convictions.

1. Hendrix

Section 667, subdivision (c), provides in relevant part: "Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the

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[4] Henderson does not challenge the trial court's determination that his convictions on counts 1 and 5 were for serious or violent felonies under the three strikes law. (See § 1192.7, subd. (c)(31) [defining assault with a semiautomatic firearm in violation of section 245 as a "serious felony"].)

defendant has one or more prior serious or violent felony convictions, as defined in subdivision (d), the court shall adhere to each of the following: . . . [¶] (6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count . . . . [¶] (7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law."

In *Hendrix*, *supra*, 16 Cal.4th 508 the Supreme Court considered whether a trial court has discretion to impose concurrent sentences under section 667, subdivision (c)(7), where the defendant is convicted of multiple serious or violent felonies the defendant committed at the same time. (*Hendrix*, at pp. 511-513.) The Supreme Court first considered the language of section 667, subdivision (c)(6), and explained that, because subdivision (c)(6) "clearly provides that consecutive sentencing is mandatory for any current felony convictions 'not committed on the same occasion, and not arising from the same set of operative facts,'" by implication "consecutive sentences are not mandatory under subdivision (c)(6) if the multiple current felony convictions are 'committed on the same occasion' or 'aris[e] from the same set of operative facts.'" (*Hendrix*, at pp. 512-513.)

Turning to section 667, subdivision (c)(7), the Supreme Court held that the phrase "'more than one serious or violent felony as described in paragraph (6)' refer[ed] to multiple current convictions for serious or violent felonies 'not committed on the

same occasion, and not arising from the same set of operative facts.'" (*Hendrix*, *supra*, 16 Cal.4th at p. 513.) Therefore, the Supreme Court held, "when a defendant is convicted of two or more current serious or violent felonies 'not committed on the same occasion, and not arising from the same set of operative facts,' not only must the court impose the sentences for these serious or violent offenses consecutive to each other, it must also impose these sentences 'consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.'" (*Hendrix*, at p. 513.) Again, the Supreme Court explained that, "[b]y implication, consecutive sentences are not mandated under subdivision (c)(7) if all of the serious or violent current felony convictions are 'committed on the same occasion' or 'aris[e] from the same set of operative facts.'" (*Hendrix*, at p. 513.) The Supreme Court affirmed these holdings in *People v. Deloza* (1998) 18 Cal.4th 585 and *People v. Lawrence* (2000) 24 Cal.4th 219.

2. *Proposition 36*

Before voters adopted Proposition 36 in 2012, subdivisions (c)(6) and (c)(7) of section 667 were substantially similar to subdivisions (a)(6) and (a)(7) of section 1170.12—the initiative version of the three strikes law. (See former § 1170.12, subds. (a)(6)-(a)(7), added by Prop. 184, § 1, as approved by voters Gen. Elec. (Nov. 8, 1994) and amended by Prop. 36, § 4, as approved by voters Gen. Elec. (Nov. 6, 2012); *People v. Lawrence, supra*, 24 Cal.4th at p. 222, fn. 1 ["'[t]he relevant portions of the initiative version of the three strikes law adopted by the voters in November 1994 (§ 1170.12), and the March 1994 legislative version (§ 667, subds. (b)-(i)), are virtually identical'"].)

Proposition 36 amended section 1170.12, subdivision (a)(7), as follows:[5] "If there is a current conviction for more than one serious or violent felony as described in ~~subdivision (a)(6)~~ **subdivision (b)**, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." (§ 1170.12, subd. (a)(7), as amended by Prop. 36, § 4, as approved by voters Gen. Elec. (Nov. 6, 2012).)

Section 1170.12, subdivision (b), lists the felonies that qualify as serious or violent under the three strikes law. Therefore, because subdivision (a)(7) now refers to serious or violent felony convictions "described in subdivision (b)," rather than serious or violent felony convictions "described in subdivision (a)(6)," section 1170.12, subdivision (a)(7), "now applies not only when [current] serious or violent felonies were not committed on the same occasion or did not arise from the same set of operative facts, but whenever a defendant is convicted of multiple serious or violent felonies." (*Torres*, *supra*, 23 Cal.App.5th at p. 201; accord *Gangl*, *supra*, 42 Cal.App.5th at p. 69; see *Marcus, supra*, 45 Cal.App.5th at p. 212 [section 1170.12, "subdivision (a)(7) no longer applies only to 'serious or violent felonies "not committed on the same occasion, and not arising from the same set of operative facts,"'" but to "all cases where the current multiple felonies are serious and/or violent—

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[5] Strikethrough indicates deleted language; bold indicates added language.

even when those felonies were committed at the same time and involve the same facts"].)[6]

3. *Proposition 36 Eliminated a Trial Court's Discretion To Impose Concurrent Sentences on Convictions for Multiple Serious or Violent Felonies*

"We interpret statutes added or amended by voter initiative . . . in the same manner we interpret those enacted by the Legislature." (*People v. Jessup* (2020) 50 Cal.App.5th 83, 87; see *People v. Valenzuela* (2019) 7 Cal.5th 415, 423 ["In construing [an] initiative, 'we apply the same principles that govern statutory construction.'"].) "Where a law is adopted [or amended] by the voters, 'their intent governs.' [Citation.] In determining that intent, 'we turn first to the language of the statute, giving the words their ordinary meaning.'" (*People v. Buycks* (2018) 5 Cal.5th 857, 879-880; accord, *People v. Herrera* (2020) 52 Cal.App.5th 982, 990.) "'[I]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent . . . of the voters (in the case of a provision adopted by the voters).'" (*People v. Valencia* (2017) 3 Cal.5th 347, 357; accord, *People v. Kelly* (2018) 28 Cal.App.5th 886, 897.) "[W]e presume the voters intended the meaning apparent from that language, and we may not add to the statute

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[6] Proposition 36 did not amend the nearly identical language of section 667, subdivision (c)(7). As the court in *Torres* explained, this appears to have been an oversight. (*Torres*, *supra*, 23 Cal.App.5th at p. 202.) Because "we cannot read the electorate's change of its language as having no meaning," "the later-enacted initiative version of the law controls . . . ." (*Ibid.*)

or rewrite it to conform to some assumed intent not apparent from that language." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571; accord, *Herrera*, at p. 991.)

The plain language of section 1170.12, subdivision (a)(7), as amended, requires a court to impose consecutive sentences on convictions for multiple serious or violent felonies. Subdivision (a)(7) now refers to serious or violent felonies described in subdivision (b)—the provision that defines serious or violent felonies—rather than serious or violent felonies described in subdivision (a)(6). Therefore, it applies "*whether or not* those serious and/or violent felonies were committed on the same occasion and arose under the same set of operative facts." (*Marcus*, *supra*, 45 Cal.App.5th at p. 213; see *Gangl*, *supra*, 42 Cal.App.5th at p. 69; *Torres*, *supra*, 23 Cal.App.5th at p. 201.) Subdivision (a)(7) requires the court to "impose the sentence for each [serious or violent felony] conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced . . . ." Any other conviction for which the defendant may be consecutively sentenced includes the current conviction(s) for the other serious or violent felony or felonies. Therefore, "under the plain language of section 1170.12, subdivision (a)(7), consecutive sentences—including sentences consecutive to each other—must be imposed on more than one serious or violent felony" conviction. (*Buchanan*, *supra*, 39 Cal.App.5th at p. 397 (conc. & dis . opn. of Needham, J.); see *Gangl*, at p. 79 (conc. & dis. opn. of Krause, J.) ["when a defendant is convicted of more than one current serious or violent felony," subdivision (a)(7) "mandates that each serious or violent felony conviction be sentenced 'consecutive to the sentence for any other conviction for which the defendant may be

consecutively sentenced . . . ,' including any other serious or violent felony"].) As a leading treatise on California sentencing law explained: "The amendment to section 1170.12(a)(7) appears to abrogate *Hendrix* as to serious and violent crimes. . . . The change now requires the court to sentence multiple current serious or violent felonies consecutively, *whether or not* they occurred on the same occasion or out of the same set of operative facts." (Couzens et al., California Three Strikes Sentencing (The Rutter Group 2018) § 8:1.)[7]

The court in *Torres* and the majority opinions in *Buchanan*, *Gangl, and Marcus* interpreted amended subdivision (a)(7) of section 1170.12 differently. According to these courts, subdivision (a)(7) requires only that "*other crimes* must be sentenced consecutively to the serious and/or violent felonies sentenced either consecutively or concurrently" under subdivision (a)(6). (*Marcus*, *supra*, 45 Cal.App.5th at pp. 212-213; see *Gangl*, *supra*, 42 Cal.App.5th at p. 71; *Torres*, *supra*, 23 Cal.App.5th at p. 201.) But, according to these opinions, Proposition 36 did not implicitly overrule *Hendrix*, and trial courts still have "discretion to sentence serious and/or violent felon[y convictions] concurrently" under subdivision (a)(6). (*Marcus*, at p. 213; see *Gangl*, at p. 71; *Torres*, at p. 201.)

The problem with this interpretation is that it is not what section 1170.12 says. Before the voters adopted Proposition 36, section 1170.12, subdivision (a)(7), applied to multiple serious or

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[7] The current version of the treatise acknowledges the holding of *Torres* "[n]otwithstanding the amendment" to section 1170.12, subdivision (a)(7).) (Couzens et al., California Three Strikes Sentencing (2019 supp.) § 8:1.)

violent felony convictions "as described by subdivision (a)(6)"—i.e., multiple serious or violent felony convictions not committed on the same occasion and not arising from the same set of facts. Therefore, the Supreme Court's holding in *Hendrix* that courts had discretion to impose concurrent sentences when the defendant committed the felonies on the same occasion or the felonies arose from the same set of facts was consistent with subdivisions (c)(6) and (c)(7) of section 667 and subdivisions (a)(6) and (a)(7) of section 1170.12. But because the voters amended subdivision (a)(7) to refer to felonies described in subdivision (b)—i.e., serious and violent felonies—rather than felonies described in subdivision (a)(6), subdivision (a)(7) now requires the court to impose consecutive sentences on convictions for any and all serious or violent felonies. (See *People v. Santa Ana* (2016) 247 Cal.App.4th 1123, 1142 ["'[a]s a general rule, in construing statutes, "[w]e presume the Legislature [or, here, the electorate] intends to change the meaning of a law when it alters the statutory language [citation], as for example when it deletes express provisions of the prior version"'"]; see also *People v. Mendoza* (2000) 23 Cal.4th 896, 916.) When the voters amended section 1170.12, subdivision (a)(7), they did not include an exception that would allow the court to impose concurrent sentences on felony convictions that fall outside the scope of section 1170.12, subdivision (a)(6). The voters could have approved such an exception, but they did not, and we cannot add it. (See *Johnson v. County of Mendocino* (2018) 25 Cal.App.5th 1017, 1031 ["[w]e cannot add to the initiative a [new provision], in the guise of legal interpretation"]; *People v. Roach* (2016) 247 Cal.App.4th 178, 184 ["to construe [Proposition 47] in the manner appellant requests would require this court to *insert* new

language into the statute," and "[e]ven assuming the result appellant urges would better further the intent of the voters, this court cannot add to the statute on that basis"].)[8]

In *Hendrix* the Supreme court held that section 667, subdivision (c)(6), "applies to *any* current felony conviction," whether or not the felony is serious or violent. (See *Hendrix*, *supra*, 16 Cal.4th at p. 512.) The court in *Torres* reasoned that, because "no change was made to the language of section 1170.12, subdivision (a)(6)," the voters must have intended that courts "retain discretion to impose concurrent sentences for felonies (including serious and/or violent felonies) committed on the same occasion or arising from the same set of operative facts." (See *Torres*, *supra*, 23 Cal.App.5th at pp. 200-201.) The majorities in *Gangl* and *Marcus* adopted similar reasoning. (See *Marcus*, *supra*, 45 Cal.App.5th at p. 211 ["Proposition 36 did not amend section 1170.12, subdivision (a)(6), and therefore, as held by *Hendrix* in its analysis of the parallel provision–subdivision (c)(6) of section 667–subdivision (a)(6) continues to apply to *all* felonies"]; *Gangl*, s*upra*, 42 Cal.App.5th at p. 69 ["Notably, the *Hendrix* court first determined that all felonies must be sentenced under section 667, subdivision (c)(6) before it ever considered the meaning of section 667, subdivision (c)(7)."].)

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[8] As the dissenting justice in *Gangl* observed, the voters could have amended section 1170.12, subdivision (a)(7), to read, for example: If there is a current conviction for more than one serious or violent felony as described in subdivision (b), the court shall impose the sentence for each such serious or violent felony conviction concurrently or consecutively under subdivision (a)(6), and then impose the sentence for any other conviction consecutively. (See *Gangl*, *supra*, 42 Cal.App.5th at p. 78 (conc. & dis. opn. of Krause, J.).)

It is true that section 1170.12, subdivision (a)(6), previously applied and continues to apply to all felonies. But the court in *Torres* assumed, incorrectly in our view, that because the voters did not amend subdivision (a)(6), they intended courts to retain discretion to impose concurrent sentences on multiple serious or violent felony convictions. This assumption ignores the actual language of subdivisions (a)(6) and (a)(7) and the relationship between the two provisions. (See *People v. Murphy* (2001) 25 Cal.4th 136, 142 ["[w]e do not . . . consider the statutory language 'in isolation,'" but instead "look to 'the entire substance of the statute . . . in order to determine the scope and purpose of the provision'"]; *People v. Santa Ana*, *supra*, 247 Cal.App.4th at p. 1141 [same]; see also *Gangl*, *supra*, 42 Cal.App.5th at p. 68 ["we cannot read section 1170.12, subdivision (a)(7) in isolation of the entire section in which it exists," but "must read it in the context of the preceding subdivision"].)

As Justice Mosk explained in his concurring opinion in *Hendrix*, section 667, subdivision (c)(6), provides a "general" rule that applies to "all felonies" (as does section 1170.12, subdivision (a)(6)). (*Hendrix*, *supra*, 16 Cal.4th at p. 518 (conc. opn. of Mosk, J.).) Subdivisions (c)(6) of section 667 and (a)(6) of section 1170.12 require a court to impose consecutive sentences on convictions for felonies that the defendant did not commit on the same occasion and that do not arise from the same set of facts. The rule applies regardless of whether the felonies are serious or violent. Section 1170.12, subdivision (a)(7), adds an additional requirement for one subset of felonies: serious and violent ones. (See *Hendrix*, at p. 518 (conc. opn. of Mosk, J.) [describing section 667, subdivision (c)(7), as a "special" rule "for only 'serious or violent felon[ies]'"].) For convictions for serious or violent felonies

only, amended section 1170.12, subdivision (a)(7), separately requires that the court impose the sentences consecutive to the sentences on other crimes (including each other), regardless of whether the court otherwise would have discretion to impose concurrent sentences. As the dissenting justice in *Gangl* stated: "Concluding that consecutive sentences are (or are not) mandatory under paragraph (6) says nothing about whether they are mandatory under amended paragraph (7). The two subdivisions exist in harmony as separate consecutive sentencing provisions." (*Gangl*, *supra*, 42 Cal.App.5th at pp. 77-78 (conc. & dis. opn. of Krause, J.), fn. omitted.) The voters did not need to amend the general rule of subdivision (a)(6), which continues to apply to all felonies, to create the specific rule of subdivision (a)(7), which applies only to certain felonies.

The majority in *Gangl* also reasoned that its interpretation of section 1170.12, subdivision (a)(7), was consistent with the Official Voter Information Guide of Proposition 36. So is ours. Although where, as here, the statutory language "'is clear and unambiguous,'" there is no need "'to resort to indicia of the intent . . . of the voters'" (*People v. Valencia*, *supra*, 3 Cal.5th at p. 357), the extrinsic evidence of voter intent in approving Proposition 36 supports our interpretation. Nothing in the Official Voter Information Guide suggests the voters intended courts to retain discretion to impose concurrent sentences on convictions for serious or violent felonies. Nor is there any mention of the Supreme Court's holding in *Hendrix* or any discussion (other than the proposed amendments to the Penal Code) of concurrent or consecutive sentences. Moreover, the Legislative Analyst described the purposes of Proposition 36 as "reduc[ing] prison sentences served under the three strikes law

by certain third strikers whose current offenses are nonserious, non-violent felonies." (Ballot Pamp., Gen. Elec. (Nov. 6, 2012) analysis of Prop. 36 by the Legislative Analyst, p. 49.) The proponents of Proposition 36 argued that "[c]riminal justice experts and law enforcement leaders carefully crafted Prop. 36 so that truly dangerous criminals will receive no benefits whatsoever from the reform" and that "[t]he Three Strikes law will continue to punish dangerous career criminals who commit serious violent crimes—keeping them off the streets . . . ." (Ballot Pamp., Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36, p. 52; see *People v. Johnson* (2015) 61 Cal.4th 674, 686 [Proposition 36 "reflect[s] an intent to 'make the punishment fit the crime' and 'make room in prison for dangerous felons'"].) Requiring a court to impose consecutive sentences where the defendant is convicted of multiple serious or violent felonies, rather than leaving sentencing to the trial court's discretion, is consistent with these stated purposes of Proposition 36.

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

DILLON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 8839 N. Cedar Ave #312, Fresno, CA 93720.

On October 23, 2020, I served the within

APPELLANT'S PETITION FOR REVIEW

upon the parties named below by depositing a true copy in a United States mailbox in Fresno, California, in a sealed envelope, postage prepaid, and addressed as follows:

Mr. Level Omega Henderson
CDCR: BJ3438
KVSP
P.O. Box 5102
Delano, CA 93216

LA County Sup. Court
Hon. Fred Wapner
CS Foltz CJC
210 West Temple Street
Los Angeles, CA 90012

and upon the parties listed below through the Truefiling system:

CAP - LA

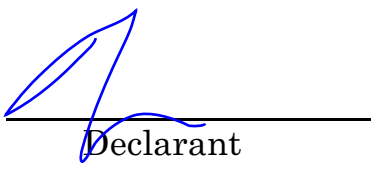
Attorney General

LA County DA

Court of Appeal

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 23, 2020 in Fresno, California.



Declarant

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **People v. Level Omega Henderson**
Case Number: **TEMP-04ZSKS5P**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Rudolph.AlejoEsq@gmail.com**

3. I served by email a copy of the following document(s) indicated below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10/23/2020
Date

/s/Rudolph Alejo
Signature

Alejo, Rudolph (284302)
Last Name, First Name (PNum)

Law Office of Rudolph J. Alejo
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