In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TIMOTHY WAYNE JOHNSON,

Defendant and Appellant.

Case No. S219454

Appellate District, Case No. B249651
Los Angeles County Superior Court, Case No. YA038015
The Honorable William C. Ryan, Judge

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

On November 6, 2012, state voters approved Proposition 36, the Three Strikes Reform Act of 2012 (the Act), which amended Penal Code[1] sections 667 and 1170.12, and added section 1170.126. The Act's effective date was November 7, 2012, and it made changes as follows:

> Under the three strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) as it existed prior to Proposition 36, a defendant convicted of two prior serious or violent felonies would be subject to a sentence of 25 years to life upon conviction of a third felony. Under the Act, however, a defendant convicted of two prior serious or violent felonies is subject to the 25-year-to-life sentence only if the third felony is *itself* a serious or violent felony. If the third felony is not a serious or violent felony, the defendant will receive a sentence as though the defendant had only one prior serious or violent felony conviction, and is therefore a second striker, rather than a third strike, offender. The Act also provides a means whereby prisoners currently serving sentences of 25 years to life for a third felony conviction which was not a serious or violent felony may seek court review of their indeterminate sentences and, under certain circumstances, obtain resentencing as if they had only one prior serious or violent felony conviction.

(*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1285-1286 [italics in original, footnote omitted].) The day after the Act went into effect, appellant sent a letter to a trial court seeking a second strike sentence and arguing that his triggering offense was not a serious or violent felony because it was not in the statutory list of serious or violent felonies on the date of its commission, but voters added it to the current serious felony list by approving Proposition 21 on March 7, 2000. (See *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 574 (*Manduley*) [Proposition 21 amendments discussed].) The trial court concluded that appellant was ineligible for

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[1] All further statutory references are to the Penal Code unless otherwise stated.

relief under section 1170.126, subdivision (e)(1), because his current offense was a serious felony.

QUESTION PRESENTED

This case raises an issue of statutory interpretation: whether, for purposes of determining an inmate's eligibility for recall of sentence under section 1170.126, subdivision (e)(1), a superior court must use: (1) the "current list test," i.e., the post-Proposition 21 enumerated lists of serious or violent felonies in effect on November 7, 2012 (the date Proposition 36 went into effect); or (2) the "commission date test," i.e., the enumerated lists of serious or violent felonies existing at the time the third strike crime was committed.[2]

STATEMENT OF THE CASE

In Los Angeles County Superior Court on November 23, 1998, the District Attorney charged that on or about August 21, 1998, appellant twice attempted to dissuade a witness under section 136.1, subdivision (a)(2), and that he had: (1) three prior serious or violent felony convictions (robbery on April 5, 1984; residential burglary on August 12, 1985; firearm-assault on

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[2] This Court's webpage-docket articulates the question presented here as follows: "For the purpose of determining eligibility for resentencing under the Three Strikes Reform Act of 2012 (Prop. 36, Gen. Elec. (Nov. 6, 2012) [Pen. Code, § 1170.126]), is an offense considered a serious or violent felony if it was not defined as a serious or violent felony on the date the offense was committed but was defined as a serious or violent felony on the effect date of the Act?" In this case, a preliminary issue is: whether the denial of a section 1170.126 recall petition implicates the substantial rights of the inmate and constitutes an appealable order. This issue is pending in *Teal v. Superior Court* (No. S211708, review granted July 31, 2013, argued and submitted September 3, 2014) and *People v. Hurtado* (No. S212017, review granted July 31, 2013, briefing deferred pending disposition in *Teal*). (*People v. Quinones* (2014) 228 Cal.App.4th 1040, 1043, fn. 3 (*Quinones*) ["Although the People contest the point, we shall assume the appeal lies, and address the merits of this case."].)

January 30, 1989) under sections 667, subdivisions (b)-(d), and 1170.12, subdivisions (a)-(d) (the Three Strikes Law); and (2) three prior prison terms under section 667.5, subdivision (b). After a jury found appellant guilty as charged, and found the Three Strikes allegations true, on December 21, 1998, appellant received a prison term of 28 years to life under the Three Strikes Law (25 years to life under the Three Strikes Law, plus three one-year enhancements for the prior prison terms), plus a concurrent Three Strikes term of 25 years to life. (1CT[3] 20-30, 59-61.)

On November 6, 2012, voters approved Proposition 36, and the Act went into effect on November 7, 2012. The next day, appellant sent a letter to the superior court seeking a second strike sentence. His current witness-intimidation crime was not in the list of serious or violent felonies on its commission date in 1998, but voters added his crime to the serious felony list by approving Proposition 21 on March 7, 2000. On February 19, 2013, the superior court denied appellant's petition because his "current offense is a serious felony" under the current (post-Proposition 21) serious felony list in section 1192.7, subdivision (c). (1CT 3, 67, 101.)

In May 2013, defense counsel filed a section 1170.126 petition and request to vacate the February 2013 denial. (1CT 11-100.) The People did not oppose the request. On June 10, 2013, the superior court vacated the February 2013 denial. (1CT 101, 103, 107.) On June 12, 2013, the superior court denied appellant's section 1170.126 recall petition because his "current convictions is [*sic*] for intimidation of a witness (Penal Code section 136.1), which is a serious felony pursuant to Penal Code section

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[3] All "CT" references are to the clerk's transcript in Court of Appeal No. B249651 regarding Los Angeles County Superior Court No. YA038015.

1192.7(c)(37), making Defendant ineligible for resentencing under Penal Code section 1170.126." (1CT 109, 113; see AOB 2.)

On direct appeal, the California Court of Appeal agreed with the superior court in an opinion filed on May 23, 2014. On June 24, 2014, appellant filed the petition for review, which this Court granted on July 30, 2014.

ARGUMENT

FOR PURPOSES OF DETERMINING ELIGIBILITY FOR RESENTENCING UNDER SECTION 1170.126, SUBDIVISION (E)(1), AN OFFENSE IS A SERIOUS OR VIOLENT FELONY IF IT WAS DEFINED AS ONE ON THE EFFECTIVE DATE OF THE ACT

Appellant argues that voters intended the use of the commission date test in deciding a defendant's eligibility for recall of sentence under section 1170.126, subdivision (e)(1). (AOB 1-27.) But, the current list test must prevail over the commission date test because: (1) section 1170.126's use of the present verb tense shows that courts must utilize the definitions of serious or violent felonies in effect on November 7, 2012, in evaluating an inmate's eligibility for resentencing; (2) nothing in the arguments for and against Proposition 36 in the Voters Pamphlet show that a court must decide whether a crime is serious or violent as of the date of the crime's commission instead of Proposition 36's effective date of November 7, 2012, and the electorate did not intend for a defendant, such as appellant, whose triggering offense is currently defined as a serious felony, to be entitled to relief; (3) courts have consistently decided whether a prior offense was a serious or violent felony using the current definitions of serious and violent felonies, rather than the definitions in place at the commission of the prior offense; (4) the use of the current definitions of serious and violent felonies to determine eligibility for resentencing is not inconsistent with section 1170.125; and (5) ex post facto analysis shows

why the current list test must prevail over the commission date test. Hence, the current list test must prevail over the commission date test in determining eligibility for resentencing pursuant to section 1170.126, subdivision (e)(1).

I. STANDARD OF REVIEW

In interpreting a voter initiative, courts apply the "same principles that govern statutory construction." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901 (*Robert L.*); see also *People v. Park* (2013) 56 Cal.4th 782, 796.) Courts thus look "first to the language of the statute, giving the words their ordinary meaning." (*People v. Birkett* (1999) 21 Cal.4th 226, 231 (*Birkett*).) If there is no ambiguity in the language, courts presume that "the lawmakers meant what they said, and the plain meaning of the language governs." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 (*Day*); see also *Kwitset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321.) The language must also be viewed in the context of the whole statute, and the overall scheme must be construed in light of voter intent. (See *Robert L.*, *supra*, 30 Cal.4th at p. 901.) If the language is ambiguous, courts look "to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Birkett*, *supra*, 21 Cal.4th at p. 243.) Courts must interpret an initiative's language to effectuate proponent voter intent. (See *Robert L.*, *supra*, 30 Cal.4th at p. 901; *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114 ["we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less."].)

II. THE USE OF PRESENT VERB TENSE IN SECTION 1170.126 MEANS COURTS MUST UTILIZE THE CURRENT LIST TEST IN DETERMINING WHETHER A TRIGGERING FELONY IS SERIOUS OR VIOLENT

Section 1170.126's use of the present verb tense shows that courts must use the definitions of serious or violent felonies in effect on November 7, 2012, when the Act took effect, in determining an inmate's eligibility for resentencing under subdivision (e)(1).

Section 1170.126, subdivision (b) states:

> [a]ny person serving an indeterminate term of life imprisonment imposed pursuant to [the Three Strikes Law] upon conviction, whether by trial or plea, of a felony or felonies that *are not defined* as serious and/or violent felonies by subdivision (c) of section 667.5 or subdivision (c) of section 1192.7, may file a petition for a recall of sentence.

(Italics added.) Additionally, section 1170.126, subdivision (e)(1) deems an inmate eligible for resentencing if "[t]he inmate is serving an indeterminate term of life imprisonment imposed pursuant to [the Three Strikes Law] for a conviction of a felony or felonies that *are not defined* as serious and/or violent felonies." (Italics added.)

Section 1170.126's use of the present verb tense means that courts must utilize the definitions of serious or violent felonies as they existed on November 7, 2012, in evaluating eligibility for section 1170.126 resentencing. (See *People v. Loeun* (1997) 17 Cal.4th 1, 11 [the use of verb tense by the Legislature or electorate is significant]; section 7 ["words used in this code in the present tense include the future as well as the present"].) Instead of starting his argument by addressing the plain meaning of the present tense verbs in section 1170.126, appellant centers his argument on his preferred construction of a different statute, section 1170.125. (AOB 5-16.) However, as stated, courts look "first to the language of the statute, giving the words their ordinary meaning." (*Birkett, supra*, 21 Cal.4th at p.

231.) If there is no ambiguity in the language, courts presume that "the lawmakers meant what they said, and the plain meaning of the language governs." (*Day*, *supra*, 25 Cal.4th at p. 272.) The present tense verb use proves that the current list test is what voters plainly intended in terms of a court's evaluation of a prisoner's eligibility for section 1170.126 resentencing -- particularly in light of voter approval in March 2000 of Proposition 21's increased statutory list of serious and violent felonies to imprison third strike felons. (See *Manduley*, *supra*, 27 Cal.4th at p. 574; AOB 7 ["Proposition 21 increased the number of offenses that qualified as serious felonies"].)

In addition, section 1170.126, subdivision (e)(2), further demonstrates the significance of the use of present tense language in the statute. It provides that an inmate is eligible for resentencing if his "current sentence *was not* imposed for any of the offenses *appearing* in" sections 667, subdivision (e)(2)(C)(i)-(iii) or 1170.12, subdivision (c)(2)(C)(i)-(iii). (§ 1170.126, subd. (e)(2).) This subdivision uses the term "appearing," rather than "then-appearing" or "appearing at the time" of sentencing. The use of the past tense with respect to sentencing and the present participle with respect to the offenses again supports the conclusion that current definitions of the offenses are determinative. (See *United States v. Hull* (3rd Cir. 2006) 456 F.3d 133, 145 [Congress's use of the present participle [in the statute] connotes present, continuing action"].)

Similarly, section 1170.126, subdivision (a), which provides that the resentencing provisions of the Act apply exclusively to those inmates "whose sentence under this act would not have been an indeterminate life sentence," demonstrates that the statute is intended to apply only to those defendants whose current felony was not contained in sections 667.5, subdivision (c), or 1192.7, subdivision (c), at the time of the Act's enactment. (See also § 1170.126, subds. (b) & (e).)

III. ELECTORAL INTENT SUPPORTS THE USE OF THE CURRENT LIST TEST

Appellant asserts that the electorate enacted section 1170.126 in order to "reduce overcrowding, sav[e] taxpayer dollars, and protect[] the public," and he claims that"[t]he best way to accomplish all the goals of the statute is to have a large pool of eligible defendants, who if they are not unreasonably dangerous can have shorter, less costly terms of imprisonment." (AOB 22.) However, nothing in the arguments for and against Proposition 36 in the official ballot guide show that courts must decide whether a crime is serious or violent as of the date of the crime's commission instead of Proposition 36's effective date of November 7, 2014. (See *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048, 1054-1057 (*Blakely*) [analysis of Proposition 36 voter intent]; *People v. Yearwood* (2013) 213 Cal.App.4th 161, 171 (*Yearwood*) [same].) In fact, the analysis of Proposition 36 conducted by the Legislative Analyst's office used the present tense when referring to disqualifying serious and/or violent felonies, stating, "'This measure limits eligibility for resentencing to third strikers whose current offense *is* non-serious, [and] non-violent . . . .'" (See *People v. Superior Court* (*Martinez*) (2014) 225 Cal.App.4th 979, quoting Voter Information Guide, Gen. Elec., (Nov. 6, 2012) analysis of Prop. 36 by Legis. Analyst, p. 50, italics supplied.) Thus, the electorate would have reasonably believed that the Act would disqualify any defendant whose most recent offense was currently included on the list of serious and/or violent felonies at the time the Act was enacted.

An examination of the materials placed before the voters substantiates this conclusion. As the Court of Appeal in *Yearwood* stated:

> The Act's proponents advanced six arguments in favor of the Act in the Voter Information Guide. The argument headings were titled: (1) "make the punishment fit the crime"; (2) "save California over $100 million every year"; (3) "make room in

> prison for dangerous felons"; (4) "law enforcement support"; (5) "taxpayer support"; and (6) "tough and smart on crime." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36, p. 52, capitalization omitted.) The ballot arguments supporting Proposition 36 were primarily focused on increasing public safety and saving money. The pubic safety argument reasoned, "Today, dangerous criminals are being released early from prison because jails are overcrowded with nonviolent offenders who pose no risk to the public. Prop. 36 prevents dangerous criminals from being released early. People convicted of *shoplifting a pair of socks, stealing bread or baby formula* don't deserve life sentences." (Voter Information Guide, Gen. Elec., *supra*, rebuttal to argument against Prop. 36, p. 53.) Also, "Prop. 36 will help stop clogging overcrowded prisons with non-violent offenders, so we have room to keep violent felons off the streets." (Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 36, p. 52.) The Act's proponents stated that "Criminal justice experts and law enforcement leaders carefully crafted Prop. 36 so that truly dangerous criminals will receive no benefits whatsoever from the reform." (*Ibid.*) The fiscal argument reasoned that the Act could save taxpayers "$100 million every year" that would otherwise be spent "to house and pay health care costs for non-violent Three Strikes inmates if the law is not changed." (*Ibid.*)

(*Yearwood*, *supra*, 213 Cal.App.4th at p. 171 [italics added]; see *People v. White* (2014) 223 Cal.App.4th 512, 522 (*White*) ["The electorate also approved a mandate that the Reform Act be liberally construed to effectuate the protection of the health, safety, and welfare of the People of California"].)

The arguments in favor of Proposition 36 assured voters that "violent repeat offenders [will be] punished and not released early," that the initiative is designed to "continue to punish dangerous career criminals," "keep dangerous criminals off the streets," and that "truly dangerous criminals will receive no benefits whatsoever from the reform." (Voter Information Guide, Gen. Elec., *supra*, argument in favor of Proposition 36,

p. 52.) Construing Penal Code section 1170.126, subdivisions (b) and (e)(1), to refer to those triggering offenses that are currently defined as serious and/or violent supports the Act's public safety purpose by reducing the likelihood that defendants who are currently dangerous will be released from prison due to the Act. The electorate would have had no basis to conclude that a defendant who committed his triggering offense prior to March 9, 2000, should be considered any less dangerous than a defendant who committed his triggering offense after that date.[4] (See *People v. Walker* (2002) 29 Cal.4th 577, 581 (*Walker*) [in construing a statute, a reviewing court must select the interpretation that comports with the intent of the electorate and avoid an interpretation that would "lead to absurd consequences"].) Thus, allowing resentencing of inmates whose triggering convictions are currently defined as serious and/or violent would contradict the aim of the initiative.

Moreover, the Act, considered in its totally, demonstrates that the electorate intended to go beyond the enumerated offenses in Penal Code sections 667.5, subdivision (c), and 1192.7, subdivision (c), to include other triggering offenses that would ultimately disqualify a defendant from resentencing. (See Pen. Code, § 1170.126, subd. (e)(2); see also Pen. Code

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[4] Respondent notes that the purpose of Proposition 21 was "to increase public safety." (*People v. James* (2001) 91 Cal.App.4th 1147, 1151 (*James*).) In addition to defining dissuading a witness as a serious felony, the initiative also added other offenses to the list of enumerated serious felonies, including: making criminal threats (Pen. Code, § 422), assault with a deadly weapon or firearm (Pen. Code, § 245, subd. (a)(1)), assault with acid or a flammable substance (Pen. Code, § 244), shooting from a vehicle (Pen. Code, § 26100, subds. (c)-(d)), and discharge of a firearm at an inhabited dwelling, vehicle, or aircraft (Pen. Code, § 246). (See *People v. Neely* (2004) 124 Cal.App.4th 1258, 1267-1268.)

§§ 667, subd. (e)(2)(C)(i)-(iii), 1170.12, subd. (c)(2)(C)(i)-(iii); *People v. Guilford* (2014) 228 Cal.App.4th 651, 655-662 [petitioner's conviction record [i.e., Court of Appeal's "prior opinion"] contained sufficient evidence that he "intended to cause great bodily injury to another person" under the disqualifying factor in sections 667(e)(2)(C)(iii) and 1170.12(c)(2)(C)(iii) of the Three Strikes Law as amended by Proposition 36]; *White, supra*, 223 Cal.App.4th at pp. 519, 522-527 [record contained sufficient evidence that petitioner was "armed with a firearm" under the disqualifying factor in sections 667(e)(2)(C)(iii) and 1170.12(c)(2)(C)(iii)]; see e.g., *Quinones, supra*, 228 Cal.App.4th at p. 1045 ["Here we have an even stronger [disqualification] case than in *White*"].) The structure of the statutes comprising the Act, together with the relevant indicia of the electorate's intent, demonstrates that the electorate intended that any defendant considered to be currently dangerous would receive no benefit from the Act's enactment. (*White, supra*, 223 Cal.App.4 th at p. 517 ["[E]ven if the resentencing eligibility criteria are satisfied and none of the disqualifying exceptions or exclusions applies, the prisoner is *not* entitled to resentencing relief under the reform Act as a second strike offender if the trial court, in its discretion, determines that such resentencing 'would pose an unreasonable risk of danger to public safety.'"] [italics in original], quoting *Kaulick, supra*, 215 Cal.App.4th at p. 1286, and § 1170.126, subd. (f).) Considered in this light, it makes no sense that the electorate would have intended to permit those individuals whose triggering offenses were defined as serious and/or violent felonies on the date of the Act, but not at the time of conviction, to qualify for resentencing under Penal Code section 1170.126. (See *Walker, supra*, 29 Cal.4th at p. 581.)

As noted by the Court of Appeal below:

> . . . in enacting Proposition 36 the electorate sought to reduce prison overcrowding and save money, while at the same time protecting public safety by ensuring that persons deemed to pose a safety risk remained incarcerated and did not benefit from the Act. Proposition 36 struck this balance by carefully crafting a set of eligibility requirements for inmates seeking sentencing reductions. Chief among those requirements is the noneligibility of persons whose current crime is a serious or violent felony. In other words, the electorate made the judgment that persons whose current offense was defined as a serious or violent felony on November 7, 2012, are deemed to pose too great a risk to public safety to benefit from the resentencing provision.

(*People v. Johnson* (2014) 226 Cal.App.4th 620, 633 (*Johnson*) [review granted here]; Slip Opn. at p. 16.)

Appellant argues that courts should determine eligibility based on the definition of violent and serious felonies in effect at the time of commission in order to increase the number of inmates eligible for resentencing. (AOB 22.) It would be up to the discretion of the sentencing judge, then, to determine whether the inmate poses an unreasonable risk of public safety. (*White*, *supra*, 223 Cal.App.4th at p. 517; *Kaulick*, *supra*, 215 Cal.App.4th at p. 1286.) Regardless of whether or not this would be an effective method of ensuring public safety, it was the intent of the voters to disqualify certain inmates from resentencing altogether, without the benefit of a discretionary determination by a sentencing judge. (§ 1170.126, subd. (e).) If an inmate is serving an indeterminate life sentence for a felony that is considered violent or serious, he or she is not eligible for resentencing. Appellant falls within this category.

Appellant is not serving a third strike sentence for shoplifting a pair of socks, stealing bread or baby formula. (See *White*, *supra*, 223 Cal.App.4th at p. 526 ["the Reform Act is intended to provide resentencing relief to low-

risk, nonviolent inmates serving life sentences for petty crimes, such as shoplifting and simple drug possession."].) In 1998, appellant was sentenced to prison for 28 years to life for his current crime of intimidating a witness, after having served three prior prison terms due to three prior serious or violent felony convictions: robbery on April 5, 1984; residential burglary on August 12, 1985; and firearm-assault on January 30, 1989. Simply put, intimidating a witness "cannot be deemed a petty or minor crime for purposes of the Reform Act." (*White, supra*, 223 Cal.App.4th at p. 526.) In other words, to the extent this Court should allow or create "a large pool of eligible defendants" (AOB 22), appellant fails to prove that he, or any other similarly situated defendant whose triggering offense was added to the list of serious or violent felony offenses by Proposition 21, is reasonably nondangerous to the public such that he should equitably benefit from his proposal. Because appellant's triggering offense under the Three Strikes Law was for an offense currently defined as a serious felony, he was exactly the type of "'truly dangerous criminal'" that the electorate believed would "'receive no benefits whatsoever'" under the "'carefully crafted'" Act. (*Yearwood, supra*, 213 Cal.App.4th at p. 171, quoting Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 36, p. 52.)

IV. SECTION 1170.125 DOES NOT REQUIRE TRIAL COURTS TO USE THE COMMISSION DATE TEST IN DETERMINING WHETHER A DEFENDANT'S TRIGGERING OFFENSE IS A SERIOUS OR VIOLENT FELONY FOR THE PURPOSES OF 1170.126

Appellant contends that sections 1170.125[5] and 1170.126, read together, require that the determination of whether a commitment offense is

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[5] Section 1170.125, which was amended by the Act, provides: 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

(continued...)

a serious felony must be based upon the statutory definition of serious or violent felony at the time of the commission of the commitment offense. (AOB 5.) He argues that because section 1170.125 has been interpreted to require that the determination of whether a *prior* conviction constitutes a strike within the meaning of the Three Strikes Law must be based upon the definitions of serious and violent felonies in effect on the date of the commission of the current offense, a *current* offense cannot be considered a serious felony unless it was so denominated at the time of its commission. (AOB 5-6.) Appellant claims: "There is no indication that the definitions of violent and serious felonies are intended to apply differently with respect to the commitment offense and the prior, 'strike,' offense." (AOB 12.) Appellant is mistaken.

Appellant admits that section 1170.125's purpose was to "codify the requirements of the *ex post facto* clause of the federal Constitution" (AOB 18), but his lengthy reliance on section 1170.125 (AOB 7-20) ignores the significance of that statute's purpose. Courts interpreting pre-Proposition 36 portions of the Three Strikes Law have used the commission date test to avoid ex post facto issues given that a defendant must have notice that the conduct he or she is about to engage in will result in an enhanced punishment. (*James*, *supra*, 91 Cal.App.4th at p. 1150; see *People v. Ringo* (2005) 134 Cal.App.4th 870, 884 (*Ringo*); *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 826-830; *In re Jensen* (2001) 92

(...continued)

existing statutes in Sections 1170.12 and 1170.126 are to those sections as they existed on November 7, 2012.

The Act also amended section 667.1, which now provides: "Notwithstanding subdivision (h) of Section 667, for all offenses committed on or after November 7, 2012, all references to existing statutes in subdivisions (c) to (g) inclusive, of Section 667, are to those statutes as they existed on November 7, 2012.

Cal.App.4th 262, 266, fn. 3; *People v. Hatcher* (1995) 33 Cal.App.4th 1526, 1527-1528; see also *John L. v. Superior Court* (2004) 33 Cal.4th 158, 172-173, 181 (*John L.*); *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1286-1287.) In contrast, the use of the current list test to evaluate eligibility for section 1170.126 resentencing does not involve "retrospectively" defining a prisoner's crime as serious or violent. (AOB 18.)

More specifically, there are no ex post facto concerns in deciding whether to resentence an inmate downward under the Act based on the current list test for serious or violent felonies. Far from receiving enhanced punishment, the inmate stands only to potentially benefit from section 1170.126's ameliorative law. (*People v. Flores* (2014) 227 Cal.App.4th 1070, 1076; see *Dillon v. United States* (2010) 560 U.S. 817, 828 [130 S.Ct. 2683, 177 L.Ed.2d 271] (*Dillon*) ["Notably, the sentence-modification proceedings authorized by [18 U.S.C.] § 3582(c)(2) are not constitutionally compelled. We are aware of no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent Guidelines amendments. Rather, § 3582(c)(2) represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines."]; *Blakely*, *supra*, 225 Cal.App.4th at p. 1062 ["The trial court's determination in the section 1170.126 proceeding that defendant was armed with a firearm during the commission of his current offense did not increase the penalty to which defendant was already subject, but instead disqualified defendant from an act of lenity on the part of the electorate to which defendant was not constitutionally entitled."]; *Kaulick*, *supra*, 215 Cal.App.4th at pp. 1303 ["[D]angerousness is not a factor which enhances the sentence imposed when a defendant is resentenced under the Act; instead, dangerousness is a hurdle which must be crossed in order for a defendant to be resentenced at

all. If the court finds that resentencing a prisoner would pose an unreasonable risk of danger, the court does not resentence the prisoner, and the petitioner simply finishes out the term to which he or she was originally sentenced."] [footnote omitted], 1304-1305 ["The language in *Dillon* is equally applicable here. The retrospective part of the Act is not constitutionally required, but an act of lenity on the part of the electorate. It does not provide for wholesale resentencing of eligible petitioners. Instead, it provides for a proceeding where the original sentence may be modified downward. Any facts found at such a proceeding, such as dangerousness, do not implicate Sixth Amendment issues. Thus, there is no constitutional requirement that the facts be established beyond a reasonable doubt."]; see also *Peugh v. United States* (2013) 569 U.S. ___, ___ [133 S.Ct. 2072, 2081, 186 L.Ed.2d 84] [ex post facto laws include those that "'change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed'"]; *John L., supra*, 33 Cal.4th at p. 181 ["laws inflicting 'greater punishment' than what was authorized when the crime occurred" are ex post facto laws].)

In addition, nothing in the language of section 1170.125 requires courts to employ the commission date test in determining whether a defendant's most recent offense is a serious or violent felony for the purposes of that defendant's eligibility for relief under section 1170.126. First, use of the current list test in evaluating a defendant's eligibility for resentencing under section 1170.126 is not undermined by any interpretation of section 1170.125, which does not apply to appellant given that he committed his third strike in 1998. (1CT 59). Section 1170.125 plainly concerns only those "offenses committed on or after November 7, 2012[.]" Moreover, even if, contrary to the express terms of the statute, section 1170.125 applied to appellant's offenses, that section states that "all references to existing statutes in Sections 1170.12 and 1170.126 are to

those sections as they existed on November 7, 2012." Thus, the references in section 1170.126, subdivision (e)(1) to serious and/or violent felonies as defined by sections 667.5 and 1192.7 would be to those statutes as they currently exist.[6]

Finally, courts have consistently decided whether a prior offense was a serious or violent felony using the current definitions of serious and violent felonies (the current list test), instead of the definitions in place on the date of the prior offense's commission. (See *James*, *supra*, 91 Cal.App.4th at p. 1150; *Ringo*, *supra*, 134 Cal.App.4th 870, 884; see e.g., *People v. O'Roark* (1998) 63 Cal.App.4th 872, 875-876; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631; *Gonzales v. Superior Court* (1995) 37 Cal.App.4th 1302, 1311.) Consistent judicial use of the current list test in

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[6] As noted by the Court of Appeal below:

> "The intent of the amendment to section 1170.125 with . . . respect to the eligibility for resentencing is not entirely clear. . . . [S]ection 1170.125 is amended to provide that '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.' On its face, the amendment with respect to section 1170.126 makes no sense - section 1170.126 only applies to crimes committed prior to November 7, 2012[.] . . . [¶] Likely the intent of the amendment to section 1170.125, when viewed against the opening paragraph to section 1170.126(a), is to limit the ability to request resentencing to those persons who would be eligible for a lower sentence had the crime been committed on or after November 7, 2012. . . . Based on the objective intent of the amendment to section 1170.125 and the opening paragraph of section 1170.126(a), eligibility for resentencing must be based on the interpretation of statutes as they exist on or after November 7, 2012."

(*Johnson*, *supra*, 226 Cal.App.4th at pp. 631-632 [review granted here], quoting Couzens & Bigelow, The Amendment of the Three Strikes Sentencing Law (Nov. 2013), at pp. 25–26; Slip Opn. at pp. 14-15.)

the Three Strikes prior-offense context shows that the current list test is what voters intended that courts use to evaluate eligibility for resentencing under section 1170.126. Thus, an examination of section 1170.126 in the context of the statutory scheme of which it is a part demonstrates that in determining whether an inmate is eligible for resentencing under subdivision (e)(1), a trial court should use the current definitions of serious and violent felonies.

As the Court of Appeal held below, section 1170.125 applies to defendants being sentenced in original proceedings under the Three Strikes Law, and the statute is necessary to avoid any ex post facto concerns created by periodic amendment to sections 667.5 and 1192.7. (*Johnson*, *supra*, 226 Cal.App.4th at pp. 630-631 [review granted here]; Slip Opn. at pp. 12-14.) However,

> [t]he same is not true . . . when a defendant who has already been sentenced petitions for recall and resentencing under section 1170.126. Unlike when considering whether a defendant's current offense is serious or violent in an original proceeding, ineligibility for resentencing under the Act does not raise ex post facto concerns . . . Therefore, section 1170.125 does not require that, for the purposes of the Proposition 36 resentencing procedure, serious and violent felonies must be defined as they were at the time the defendant committed the crime. [Citations.]

(*Id.* at p. 631; Slip Opn. at pp. 13-14.)

CONCLUSION

For the foregoing reasons, this Court should affirm the opinion of the California Court of Appeal because in evaluating a third strike prisoner's eligibility for resentencing under section 1170.126, courts must use the current list test (i.e., use the statutory list of serious or violent felonies in effect on Proposition 36's effective date of November 7, 2012) to determine whether the prisoner's current crime was a serious or violent felony.

Dated: November 3, 2014

Respectfully submitted,

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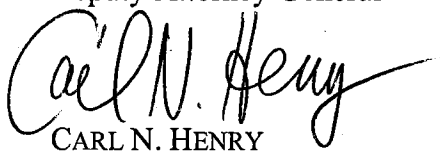

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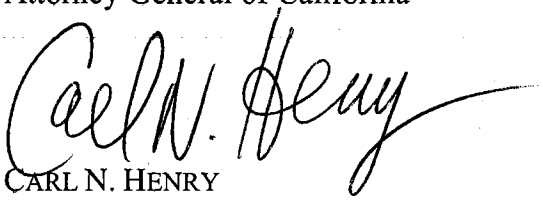
CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 5,038 words.

Dated: November 3, 2014

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE

Case Name: *People v. Johnson*

No.: **S219454**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 4, 2014, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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Sherri R. Carter
Clerk of the Court
To be delivered to
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On November 4, 2014, I caused **eight** copies of the **ANSWER BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **OnTrac Tracking # B10295222979**.

On November 4, 2014, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On November 4, 2014, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be served electronically on the California Court of Appeal by using the Court's Electronic Service Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 4, 2014, at Los Angeles, California.

Marianne A. Siacunco	
Declarant	Signature

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