IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. OSCAR MACHADO, Defendant and Appellant.	)	No. S219819

Second Appellate District, Division One, Case No. B249557
Los Angeles Superior Court No. YA036692
Honorable William C. Ryan, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	No. S219819
	)	
v.	)	
	)	
OSCAR MACHADO,	)	
	)	
Defendant and Appellant.	)	
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APPELLANT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Is an inmate serving an indeterminate term of life imprisonment under the Three Strikes Law (Pen. Code, §§ 667 (b)-(j), 1170.12), which was imposed for a conviction of an offense that is not a serious or violent felony, eligible for resentencing on that conviction under the Three Strikes Reform Act if the inmate is also serving an indeterminate term of life imprisonment under the Three Strikes Law for a conviction of an offense that is a serious or violent felony?

STATEMENT OF THE CASE[1]

On April 16, 2013, appellant filed in the superior court a Petition for Recall of Sentence Pursuant to Penal Code section 1170.126. (1CT 3, 84.) According to the petition, appellant was convicted in 1998 of two felonies: one count of second degree burglary of an automobile (Count 1) and one of first degree burglary (Count 2). According to the petition, count 2 was actually a second auto burglary, but it occurred in an underground parking structure of an apartment complex. Appellant characterized this burglary as a "technical" first degree burglary. The motion urged that appellant not be considered ineligible for recall of sentence on that basis. (1CT 3-8.) Appellant stated that he was serving two consecutive 25-life sentences, one for the residential burglary and one for the second degree burglary. (1CT 4.)

The superior court denied the petition because appellant's "current conviction for burglary in the first degree is a serious felony pursuant to Penal Code section 1192.7(c)(18) making [him] ineligible for resentencing under Penal Code section 1170.126." (1CT 85-86, 88.)

Appellant filed a timely Notice of Appeal. (1CT 90.) The appeal was authorized by Penal Code section 1237 subdivision (b). (*Teal v. Superior Court* (2014) 60 Cal.4th 595.)

On appeal, appellant contended that he was eligible for resentencing on his second

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[1]/ This is an appeal from the denial of appellant's post-judgment, Proposition 36, petition for recall of his Three Strikes sentence. The only account in the record of the facts of the crimes of which appellant was convicted is provided by appellant in his motion. Those facts are irrelevant to this appeal. Therefore, no Statement of Facts is included in this Brief.

degree burglary conviction, because second degree burglary is not a serious or violent crime. The Court of Appeal agreed, and it reversed the trial court's order in a published opinion. (*People v. Machado* (2014) 226 Cal.App.4th 1044.)

This Court thereafter granted respondent's petition for review.

ARGUMENT

I.

THE TRIAL COURT ERRED IN FINDING THAT APPELLANT WAS INELIGIBLE FOR RELIEF PURSUANT TO PENAL CODE SECTION 1170.126. BECAUSE APPELLANT IS, IN FACT, ELIGIBLE FOR RECALL AND RESENTENCING ON ONE OF THE TWO COUNTS OF WHICH HE STANDS CONVICTED

A. Introduction

Proposition 36, also known as the Three Strikes Reform Act of 2012 (the Act), was approved on November 6, 2012. The Act amended the Three Strikes law so that an indeterminate life sentence may be imposed only where the third strike offense is a serious or violent felony or where the offender is not eligible for a determinate sentence based on other disqualifying factors. (Pen. Code, §§ 667(e)(2)(C), 1170.12 (c)(2)(C).) (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 596-597; see also *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168.)

The Act also added Penal Code section 1170.126 to provide that a person "presently serving an indeterminate term of imprisonment" under the Three Strikes Law "whose sentence under this act would not have been an indeterminate life sentence" (§ 1170.126, subd. (a)) could file a motion to recall that sentence with the court that sentenced him and obtain resentencing. (§ 1170.126, subd. (b).)[2]

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[2]/ Penal Code section 1170.126 provides, in relevant part:
(a) The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment. . . whose sentence under this act would not have been an indeterminate life sentence.

The question here is whether a defendant is entitled to recall and resentencing when he has been given a third "strike" sentence on two counts, one of which is a serious felony and one of which is not. Appellant has two 25-life sentence to be served consecutively. One is for a residential burglary, a serious felony (Pen. Code, § 1192.7 (c)) and he concedes he is ineligible for resentencing on that count. The other, however, is for second degree burglary, an offense which is not a serious felony, and thus could not

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(b) Any person serving an indeterminate term of life imprisonment imposed pursuant to [the Three Strikes law] ... upon conviction, ..., 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 ...
(c) No person who is presently serving a term of imprisonment for a "second strike" conviction ..., shall be eligible for resentencing under the provisions of this section.
(d) The petition for a recall of sentence described in subdivision (b) shall specify all of the currently charged felonies, which resulted in the sentence under paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, or both, and shall also specify all of the prior convictions alleged and proved under subdivision (d) of Section 667 and subdivision (b) of Section 1170.12.
(e) An inmate is eligible for resentencing if: (1) The inmate is serving an indeterminate term of life imprisonment imposed ... for a conviction 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. (2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12. (3) The inmate has no prior convictions for any of the [specified excluding] offenses ...
(f) Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e). If the petitioner satisfies the criteria in subdivision (e), the petitioner shall be resentenced pursuant to paragraph (1) of subdivision (e) of Section 667 and paragraph (1) of subdivision (c) of Section 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.

today be sentenced as an indeterminate life term. Appellant contended below, and the Court of Appeal agreed, that he is not disqualified from being resentenced on that charge simply because he also has a current conviction for a serious felony. Section 1170.126 subdivision (b) specifically states that "any person serving an indeterminate term of life imprisonment imposed . . . upon conviction, . . . , of a felony or felonies that are not defined as serious . . . may file a petition for recall . . . ." (See *Teal v. Superior Court*, *supra*, 60 Cal.4th at 597 [§ 1170.126 establishes "a procedure for an offender serving an indeterminate life sentence for a third strike conviction that is not defined as a serious and/or violent felony to file a petition for recall of sentence. (§ 1170.126, subd. (b)."].) It would be incongruous to allow a defendant to be punished with a strike sentence on a non-strike count, when the purpose of the statute is to limit third strike sentencing to serious current offenses only.

Respondent contends that appellant is ineligible for resentencing, primarily because subdivision (a) of the statute provides that relief is available exclusively to inmates who are serving an indeterminate Third Strike sentence that would not have been an indeterminate Third Strike sentence under the new statutes. Respondent's contention turns largely on the definition of the word "sentence" in subdivision (a). Respondent contends it must be construed only to mean an aggregate sentence, not the sentence imposed for a single count of a multicount sentence. Respondent's position is belied by

the rules of statutory construction, the other subdivisions of the statute and the policy behind the statute.

B. The Rules of Statutory Construction

In construing a statute enacted by voter initiative, this Court applies the same rules of statutory construction that apply to legislative enactments to attempt to determine the intent of the electorate. (*People v. Park* (2013) 56 Cal.4th 782, 796.) In determining that intent, the initial step is to examine the words of the statute, viewing them in their statutory context and giving them their ordinary and usual meaning, because the language of a statute is usually the most reliable indicator of legislative intent. (*People v. Albillar* (2010) 51 Cal.4th 47, 55; *People v. Wright* (2006) 40 Cal.4th 81, 92.) A statute is interpreted with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness. (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043.) Once the electorate's intent has been ascertained, the provisions must be construed to conform to that intent. (*People v. Park*, *supra* at p. 796.)

Where the language of a statute is unambiguous, the plain meaning controls and there is no occasion to resort to principles of statutory construction or extrinsic sources. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 55.) Where the language is ambiguous, the Court examines other indicators of the voters' intent, particularly the analyses and

arguments in the official ballot pamphlet. (*People v. Briceno* (2004) 34 Cal.4th 451, 459.)

C. Appellant Comes Within the Plain Terms of Subdivision (b) Defining Persons Who May Petition for Resentencing; Respondent's Reliance on Subdivision (a) Requires An Aberrent Interpretation of a Commonly Used Word

Appellant argued below that the purpose and intent of the drafters and the language used to effectuate that intent are clear. The statute applies to any person serving an indeterminate term "upon conviction . . . of a felony . . . that [is] not defined as serious . . ." (Pen. Code, 1170.126, subd. (b)). That language includes appellant, who is serving a consecutive indeterminate life sentence imposed for his second degree burglary conviction, a non-serious felony.

Respondent contends that appellant's reading of the statute is untenable. Respondent focuses upon subdivision (a) rather than (b). That subdivision states that "[t]he resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment ... whose sentence under this act would not have been an indeterminate life sentence." Contending that the word "sentence" in subdivision (a) can only refer to a defendant's overall sentence and not to a sentence upon any particular count, respondent maintains that appellant is ineligible for resentencing because his "sentence" under the Act would still be an indeterminate life sentence given his ineligibility for resentencing upon the

residential burglary count. (Respondent's Opening Brief on the Merits [hereafter ROBM] pp. 7-8, citing *People v. Anthony* (2014) 230 Cal.App.4th 1176.) And, assuming arguendo that the word "sentence" could refer to either the overall sentence or to the sentence upon any particular count, respondent points to other sections that, she contends, resolve any ambiguity in favor of ineligibility. (RBOM, pp. 8-10.) Respondent is wrong, as is *People v. Anthony*, *supra.*

1. The Penal Code and Case Law Commonly Use the Terms "Sentence" and "Term" to Refer to the Component Parts of a Sentence as Well as the Aggregate

To accept the idea that the drafters must have used the word "sentence" to refer to an aggregate rather than any of the component parts of a sentence would require one to believe that the drafters were unaware of how the terms are commonly used. For, while it is true that a prisoner serves an overall sentence that encompasses all of the individual sentences for each offense, he is also serving a sentence for each component count. (See *People v. Jones* (2012) 54 Cal.4th 350, 353; *People v. Miller* (1977) 18 Cal.3d 873, 887; *People v. Bailey* (1974) 38 Cal.App.3d 693.) Thus, the word "sentence" can as easily refer to a term imposed for an individual count as to an overall term. Indeed, the terms are used interchangeably in the Penal Code and in the case law. Penal Code section 669 provides, in part, that "Life sentences, ..., may be imposed to run consecutively with one another...", and this Court has also used the word "sentences" to refer to the component

parts of an indeterminate Three Strike sentence. (*People v. Williams* (2004) 34 Cal.4th 397, 402 [Section 1170.1 "does not apply to multiple indeterminate sentences imposed under the Three Strikes Law."]; *People v. Garcia* (1999) 20 Cal.4th 490, 500 ["A requirement [of the Three Strikes Law] that a defendant serve the individual sentences for different current felonies consecutively does not indicate how the trial court should determine the lengths of those individual sentences."] and *Id.*, at p. 503 fn. 3 stating that while a trial court could choose to impose a Three Strike sentence, "it had discretion not to impose it twice.".)

The same is true for the word "term." The Penal Code explicitly provides for three different types of terms: principal, subordinate and aggregate. (Pen. Code, § 1170.1.) General reference to a "term" could mean any one of them.

Given that both the words "sentence" and "term" can mean either the sentence on the individual count or in the aggregate, and that the law is clear that, even in an aggregate sentence, the term imposed on each unstayed count is being served, the only reasonable interpretation of the Act is to consider recall eligibility as to counts individually. In light of the fact that these words often include the component parts of a sentence as well as the aggregate, surely the drafters of the Act would have clarified that eligibility was based only upon the aggregate sentence imposed had that been the intent. The drafters certainly knew how to do that, as they specified a factor that would render a defendant entirely ineligible for a sentence recall in sections 667, subdivision

(e)(2)(C)(iv) and 1170.12, subdivision (c)(2)(C)(iv), which entirely exclude from eligibility prisoners with certain priors.

2. The Drafters Were Presumably Aware That Third Strike Sentences Are Individually Determined

In addition to the general usage, the drafters of the Act presumably were also aware that sentences imposed under the Three Strikes Law have always been determined on a count-by-count basis. The basic Three Strikes Law refers to single crimes in laying out the strike sentencing rules.[3] And, under some circumstances, a court must sentence a defendant who has a current conviction of more than one felony consecutively for "each count." (Pen. Code, § 1170.12 (a) (6) & (7).) Hence, section 1170.126's references to sections 667 and 1170.12, should require the same per count analysis.

But even if the common usage does not compel the conclusion that the word "sentence" in the statute is not restricted to the aggregate, *People v. Williams*, *supra*, 34 Cal.4th 397, ought to. There this Court rejected an argument that the five-year term imposed for a prior serious felony could be imposed only once upon a defendant sentenced to multiple indeterminate terms under the Three Strikes law. Section 667 subdivision (a) provides a five-year enhancement for each prior serious felony brought and tried separately and requires that it be imposed "in addition to *the sentence* imposed

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[3]/ "[I]f a defendant has two or more prior [strikes] . . . the term for the current felony shall be...." (Pen. Code, § 1170.12 (c), (2) (A).)

by the court for the present offense...." (Emphasis added.) This Court held that the five-year prior could be added to each indeterminate third strike sentence in a multicount sentence. Thus, the phrase "the sentence" in 667(a) has been construed in a Three Strike context to mean the separate sentence imposed for each count and not the aggregate for all the counts. When they wrote the word "sentence" in subdivision (a) of section 1170.126, the drafters of the Act were presumably aware that the word "sentence" in section 667 (a) had been so construed. (See *People v. Weidert* (1985) 39 Cal.3d 836, 845-846 [where, as here, an initiative uses a word that has been judicially construed, it is presumed that the drafters intended the same meaning].)

Indeed, that a third strike sentence comprises multiple discrete sentences is the basis for the holding of *People v. Garcia*, *supra*, 20 Cal.4th 490, 500, 503-504. There, this Court held that under section 1385, a sentencing court was authorized to strike the prior "strikes" as to one count while leaving them in effect for another so as to impose a second strike sentence one count and an indeterminate third strike sentence on the other. In *Garcia*, the Attorney General made an argument similar to the one made here, urging "that the Three Strikes law is a single comprehensive and indivisible sentencing scheme that either does or does not apply, but cannot apply in part." (*Id.*, at p. 502) This Court dubbed this contention "a variant of the argument that prior conviction allegations describe a status that a defendant either does or does not have, but cannot have with respect to one count and not another." (*Ibid.*) The Court agreed that "the Three Strikes

law is a single comprehensive and indivisible sentencing scheme that either does or does not apply," but held nonetheless that "the effect under the Three Strikes law of a defendant's prior conviction status may change from one count to another." (*Ibid.*) Again, the drafters of the Act were presumably aware that different counts in a Three Strike sentence may be assessed differently when they wrote the word "sentence" in Section 1170.126 subdivision (a).

3. The Other Subdivisions of § 11701.26 Do Not Compel Respondent's Definition of "Sentence" in Subdivision (a)

Respondent points to various other subdivisions as supporting her contention that subdivision (a)'s reference to "sentence" means the aggregate sentence and not its components. She argues that any ambiguity in the construction of the word "sentence" in subdivision (a) is resolved by subdivision (d), which requires the petitioner to list all the currently charged felonies which resulted in "the sentence," and, thus, must be construed to mean the aggregate sentence. (RBOM, p. 8.)

Respondent's contention fails to take into account Penal Code, section 7, which provides in relevant part: "Words used in this code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; *the singular number includes the plural, and the plural the singular*;...." (Emphasis added.) Once again, the drafters were presumably aware of Penal Code section 7 when they drafted subdivision (d) (not to mention subdivision (a)), so the use of

the singular cannot possibly be dispositive as contended by respondent. (*In re Greg F.* (2012) 55 Cal.4th 393, 407 ["The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute."]; *People v. Rizo* (2000) 22 Cal.4th 681, 685 ["In interpreting a voter initiative ..., we apply the same principles that govern statutory construction."].) If both subdivisions were read to say "the sentence or sentences," as required by section 7, the argument here is settled. Appellant does not put all his eggs in the section 7 basket, as he believes that a common sense reading of the statute leads to the conclusion that he is eligible for resentencing. But if we truly are to read section 1170.126 in accordance with the Code of which it is a part, Respondent's contention is untenable.[4]

Most of respondent's contentions that other subdivisions lead to her conclusion merely beg the question of whether the term "sentence" can mean the components rather than the aggregate. Respondent reads subdivision (b), the subdivision upon which appellant primarily relies, to be restrictive rather than inclusive. She does this by substituting an "only" for the "any" in the subdivision. Thus, respondent reads

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[4]/ Respondent also invokes subdivision (d)'s requirement that the petitioner list *all* the currently charged felonies as compelling a conclusion that one ineligible felony makes a defendant ineligible for resentencing; that subdivision, she argues, is designed to determine eligibility under subdivision (e) rather than dangerousness under subdivision (f). (RBOM p. 10.) Respondent's construction is certainly not apparent from the wording of the statute, and the Court of Appeal's conclusion that the subdivision is designed to facilitate the trial court's exercise of discretion under subdivision (f) is more reasonable. (Opn., at p. 9.)

subdivision (b) to mean "that only those inmates who are serving an indeterminate life sentence for an offense that was not serious and/or violent may petition for recall of sentence" (RBOM, 9), rather than using the actual words of the subdivision, which state that "[a]ny person" who is serving such a sentence is eligible to petition. Appellant is in fact serving such a sentence for one of his two counts, but appellant fails to see how he would be ineligible under subdivision (b), even with the substitution of "only" for "any," unless the word "sentence" has to mean the aggregate rather than the component parts. And that interpretation is the question under review. (*People v. Anthony*, *supra*, 230 Cal.App.4th 1176, did not even consider subdivision (b) in deciding that the Act did not apply to inmates who are serving two terms one for a serious crime and another for a non-serious crime.)

The same problem appears with respondent's reliance upon subdivision (e)(1), which by respondent's lights simply cannot be construed to render appellant eligible for resentencing. That subdivision provides, in relevant part, that "An inmate is eligible for resentencing if: (1) The inmate is serving an indeterminate term of life imprisonment imposed ... for a conviction 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."

Respondent contends that the only two situations in which subdivision (e) applies are (1) if the inmate is serving a third strike sentence for a single felony that is not serious or violent, or (2) the inmate is serving a third strike sentence for two or more felonies that

are not serious or violent. Once again, respondent's contention begs the question. If the phrase "indeterminate term of life imprisonment" is read to include component parts of a third strike sentence, appellant is eligible, as he is "serving an indeterminate term of life imprisonment imposed ... for a conviction of a felony ... that [is] not defined as serious and/or violent...by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7." Only by reading the subdivision to refer solely to an aggregate term does respondent's conclusion that it has to refer to an aggregate term become true.

Thus, respondent's attempts to use subdivisions (b), (d) and (e) to support the construction of subdivision (a) she urges are unavailing. Absent, however, from the array of support respondent has marshaled is any reference to subdivision (c), which seems to contemplate that the component terms of the aggregate sentence be considered individually.

Subdivision (c) provides: "No person who is presently serving a term of imprisonment for a 'second strike' conviction imposed pursuant to paragraph (1) of subdivision (e) of Section 667 or paragraph (1) of subdivision (c) of Section 1170.12, shall be eligible for resentencing under the provisions of this section." Under respondent's construction of subdivision (a), a person "serving an indeterminate term of imprisonment ... whose sentence would not have been an indeterminate life sentence" does not include appellant because his "sentence" must be considered in the aggregate and only in the aggregate. Yet subdivision (c) of the Act seemingly requires that the

terms of a sentence be considered individually. Any other construction would be absurd, as it cannot be, can it, that an inmate who is serving an indeterminate life term for a felony that is not violent or serious is ineligible for resentencing altogether because he is also serving a determinate second strike sentence, and subdivision (c) clearly provides that no person serving such a sentence is eligible for resentencing under the Act? A reading of the statute that construed the words "sentence" and "term" to apply to the sentence or term imposed for an individual count would avoid such an absurd construction. And constructions that lead to absurdities are always to be avoided. (*People v. Walker* (2002) 29 Cal.4th 577, 581.)

D. The Policies Behind the Statute Support Appellant's Interpretation

In *Garcia, supra*, this Court noted that the nature and circumstances of the offense in each count may make a difference as to whether an indeterminate Three Strikes term is appropriate. (20 Cal.4th at p. 499.) Far from backing away from this sentiment, the initiative altered the law to require a second strike sentence for lesser felonies and make the indeterminate life term applicable to only those that are violent or serious. As the drafters listed making the punishment fit the crime as a primary purpose of initiative (see *People v. Yearwood, supra*, 213 Cal.App.4th at p. 171), they appear to have embraced and continued the rule recognized in *Garcia* that the Three Strikes Law "does not require the

court to treat other current convictions with perfect symmetry if symmetrical treatment would result in an unjust sentence." (*People v. Garcia*, *supra*, 20 Cal.4th at p. 500.)

Imposition of this a more fitting punishment was the means by which the public's safety was meant to be protected under the Act, as it would permit prison overcrowding to be reduced by giving shorter sentences to those who committed less violent crimes, thereby making room for those who had committed more serious offenses. (*People v. Yearwood*, *supra*, 213 Cal.App.4th at p. 171.) While this reasoning applies to the dichotomy between those whose current offenses are violent or serious and those whose current offenses are not, it applies equally to distinguish between those serving sentences on multiple counts all of which are violent or serious and those serving sentences on multiple counts only some of which are violent or serious. The purposes of the Act are better served by having those with at least some non-violent, non-serious felonies released sooner than those with only violent or serious felonies. Thus, to the extent that a determinate term combined with an indeterminate term might lead to earlier release of such a defendant, it would be completely consistent with the purposes of the Act.

Nothing in the Act's modification of Penal Code sections 667 or 1170.12 changes the Three Strikes Law to require perfect symmetry as to sentence on all counts. The amendments to those sections seemingly state that the determination of which "strike" sentence will apply is determined count by count. Section 667 and 1170.12 refer to "the

current offense" that is not violent or serious as requiring a determinate, second strike, term.

Indeed, the summary of Proposition 36 in the Official Voter Guide stated that the proposition, "Revises law to impose life sentence only when new felony conviction is serious or violent." (Official Voter Information Guide, http://voterguide.sos.ca.gov/propositions/36.) The status of the *new felony*, not the status of the defendant, is what controls the determination of whether the sentence on it will be a determinate second strike term, or an indeterminate third strike sentence.

Thus, under the current versions of sections 667 and 1170.12, as under the previous versions, a defendant can have a mixed sentence of second and third strike terms. And, when the court refuses to strike a strike for a defendant who has some counts of violent or serious crimes and others that are neither violent nor serious, such a mixed sentence is mandatory. Thus, a defendant already serving a third strike sentence for such mixed counts *is* a person serving an indeterminate sentence "whose sentence under this act would not have been an indeterminate life sentence" as to those counts that are for offenses that are neither violent or serious, and the recall provisions of section 1170.126, apply to him as to such counts. (Pen. Code, § 1170.126, subd. (a).)

CONCLUSION

Subdivision (b) of section 1170.126 provides that appellant, who is serving an indeterminate Third Strike sentence for a felony that is no longer deemed worthy of one, may petition for recall of that sentence. Nothing in the other parts of the statute compels the conclusion that appellant must continue to serve that sentence regardless of whether the trial court wants to lower it, and the policies behind the Act ameliorating the Three Strikes Law support his eligibility. This Court should uphold the Court of Appeal's decision reversing the trial court's denial of the petition on eligibility grounds.

Dated: February 2, 2015

Respectfully submitted,

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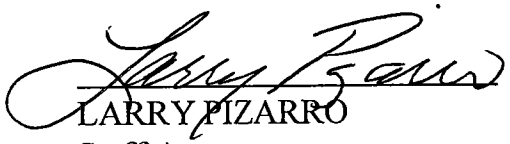

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WORD COUNT CERTIFICATION
People v. Oscar Machado

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 4,810 words.

LARRY PIZARRO

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 520 S. Grand Avenue, 4th Floor, Los Angeles, California 90071. I am employed by a member of the bar of this court.

On, February 2, 2015, I served the within

APPELLANT'S ANSWER BRIEF ON THE MERITS

in said action, by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.

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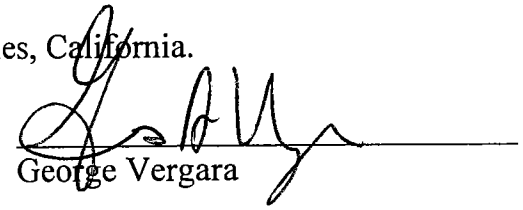
I declare under penalty of perjury that the foregoing is true and correct.

Executed February 2, 2015 at Los Angeles, California.



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