No. S265172

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

LEVEL OMEGA HENDERSON,
Defendant and Appellant.

Court of Appeal, Second Appellate District, Case No. B298366
Los Angeles County Superior Court, Case No. BA437882
The Honorable Frederick N. Wapner, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Does the Three Strikes law (Pen. Code, §§ 667, subd. (c)(6) & (7), 1170.12, subd. (a)(6) & (7)) require consecutive terms on multiple current violent or serious felony convictions, regardless of whether the offenses occurred on the same occasion or arose from the same set of operative facts?

INTRODUCTION

The Three Strikes Reform Act of 2012 (Proposition 36) addressed how the Three Strikes law affects defendants whose current offenses do not include any serious or violent felonies. But Proposition 36 also included an amendment affecting a different class of defendants, namely those whose current offenses include multiple serious or violent felonies. The courts of appeal have unanimously agreed that, despite the ameliorative purpose of the initiative as a whole, this particular amendment had the opposite effect, making consecutive sentences mandatory in certain circumstances where they had previously been discretionary. Specifically, the courts agree that some sentences must now be consecutive regardless of whether the current serious or violent felonies were committed on the same occasion or arose from the same set of operative facts.

The Courts of Appeal are divided, however, over which particular sentences must now be consecutive. The majority view, urged by Henderson, is generally that sentences for serious or violent felonies must always be consecutive to a sentence for a nonserious and nonviolent offense. The minority view, taken by commentators, the Court of Appeal in this case, and dissenting

justices in other cases, is generally that sentences for serious or violent felonies must be consecutive *to each other* as well as to a sentence for a nonserious and nonviolent offense.

This is a close question because there is significant support for the majority view in the history of the Three Strikes law, particularly in this Court's description of how the law operated prior to Proposition 36. As explained below, however, the minority view is more faithful to the plain meaning of the current text, as amended by the voters in Proposition 36, and is more practical in its application. This Court should therefore adopt that understanding of the Three Strikes law.

LEGAL BACKGROUND

A. The Original Three Strikes Law and *People v. Hendrix*

"'Enacted 'to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses' [citation], the Three Strikes law 'consists of two, nearly identical statutory schemes.'" (*People v. Frierson* (2017) 4 Cal.5th 225, 230.) "'The first of these schemes [Penal Code section 667][1] was enacted by the legislature in March 1994.'" (*Ibid.*) "'The second [section 1170.12] was enacted by ballot initiative in November of the same year.'" (*Ibid.*) Both versions were revised by Proposition 36, approved by the voters in November 2012. (*People v. Valencia* (2017) 3 Cal.5th 347, 350.)

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

As relevant here, the original version of section 1170.12, subdivision (a) mandated consecutive sentences as follows:

> (a) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior serious or violent felony convictions, as defined in subdivision (b), 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 pursuant to this section.
>
> (7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, 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, former subd. (a), added by Prop. 184, as approved by voters, Gen. Elec. (Nov. 8, 1994).)

In 1997, this Court examined the original Three Strikes law and held that trial courts had discretion to impose concurrent sentences under section 667, subdivision (c)(7), when the defendant is convicted of multiple serious or violent felonies committed on the same occasion or arising from the same set of operative facts. (*People v. Hendrix* (1997) 16 Cal.4th 508, 511-513; accord *People v. Lawrence* (2000) 24 Cal.4th 219; *People v. Deloza* (1998) 18 Cal.4th 585.)

Analyzing the language of subdivision (c)(6),[2] *Hendrix* explained that "[b]y its terms, this subdivision applies to *any* current felony conviction." (*Hendrix, supra*, 16 Cal.4th at p. 512, original italics.) This Court reasoned, "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.'" (*Id.* at pp. 512-513.)

Hendrix then considered subdivision (c)(7) and held that "'paragraph (6)' in subdivision (c)(7) . . . refers to subdivision (c)(6). So construed, 'more than one serious or violent felony as described in paragraph (6)' refers 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.) Thus,

> [W]hen 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

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[2] Although *Hendrix* addressed section 667, subdivisions (c)(6) and (7), its analysis undisputedly applied to the identical language in section 1170.12, subdivision (a)(6) and former subdivision (a)(7).

> 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."

(*Ibid.*)

This Court concluded that subdivisions (c)(6) and (c)(7) were not duplicative under this approach. Consecutive sentencing is not mandated under subdivision (c)(6) if the felony convictions are committed on the same occasion or arise from the same set of operative facts. But, under subdivision (c)(7), "if any two current felony convictions are serious or violent, and were not committed on the same occasion, and do not arise from the same set of operative facts, the trial court must impose the sentences for these offenses consecutive to each other and 'consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.'" (*Hendrix, supra*, 16 Cal.4th at pp. 513-514.)

In a concurring opinion, Justice Mosk explained:

> The reference in section 667(c)(7) to 'paragraph 6' is to section 667(c)(6). The reference here to the 'description' there is to the phrase, 'not committed on the same occasion, and not arising from the same set of operative facts'. The provision states that '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 . . . .' The reference here to 'each conviction' is to each of the 'more than one serious or violent felon[ies]', 'not committed on the same occasion, and not arising from the same set of operative facts.' [¶] As a consequence, section 667(c)(6) and (7) show themselves to state two rules—a general

> one, for all felonies 'not committed on the same occasion, and not arising from the same set of operative facts' [citation]; and a special one, for only 'serious or violent felon[ies]' of that description.

(*Hendrix*, *supra*, 16 Cal.4th at p. 518 (conc. opn. of Mosk, J.) citations omitted, original italics.)

B. Proposition 36

The original Three Strikes Law as described above was revised by the passage of Proposition 36 in November 2012. (*Valencia*, *supra*, 3 Cal.5th at p. 350.)

As relevant here, Proposition 36 amended section 1170.12, subdivision (a)(7) so that it now states:

> 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 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), italics added.)

Thus, section 1170.12, subdivision (a)(7) no longer refers to subdivision (a)(6) or to offenses committed on the same occasion or arising from the same set of operative facts. Rather, it refers only to subdivision (b), which lists the felonies that are considered to be serious or violent under the Three Strikes law. The reference to offenses committed on the same occasion or arising from the same set of operative facts now exists only in subdivision (a)(6), which was not modified by Proposition 36 and remains part of section 1170.12. Proposition 36 did not amend the virtually identical language in section 667, subdivision (c).

C. The division of authority in the Courts of Appeal

For several years after the passage of Proposition 36 there was no published authority construing amended section 1170.12, subdivision (a)(7). During this period of time, sentencing experts concluded that Proposition 36 had abrogated *Hendrix*. (See Couzens & Bigelow, Cal. Three Strikes Sentencing (The Rutter Group 2018) § 8:1.) In 2018, the court in *People v. Torres* (2018) 23 Cal.App.5th 185 was the first to proffer what is now the majority view—that Proposition 36 did not abrogate a trial court's discretion to impose concurrent terms for multiple serious or violent felonies sentenced under the Three Strikes law. (*Torres*, *supra*, at pp. 200-201; accord *People v. Buchanan* (2019) 39 Cal.App.5th 385, 386-390; *People v. Gangl* (2019) 42 Cal.App.5th 58, 64-71; *People v. Marcus* (2020) 45 Cal.App.5th 201, 205-206.)

Torres concluded that "the change to section 1170.12, subdivision (a)(7) made by Proposition 36 impacts only the additional requirement for consecutive sentencing of 'other' current offenses (namely, nonserious and/or violent felonies and misdemeanor offenses)." (*Torres*, *supra*, 23 Cal.App.5th at p. 201.) Both *Gangl* and *Torres* observed that Proposition 36 changed only the "triggering language" of subdivision (a)(7), not the "directive" portion of that subdivision, and that the measure did not change the language of subdivision (a)(6) at all. (*Gangl, supra*, 42 Cal.App.5th at p. 69; *Torres, supra*, at p. 200.) Attempting to reconcile the two subdivisions, both courts concluded that sentences for multiple current serious or violent felony convictions (whether or not committed on the same

occasion or arising from the same set of operative facts) may be imposed either consecutively or concurrently to each other under subdivision (a)(6)), but must run consecutive to the sentence for any other offense, whether felony or misdemeanor, for which a consecutive sentence may be imposed as required by subdivision (a)(7). (*Torres, supra,* at pp. 200-202; *Gangl, supra*, at pp. 69-71; accord *Marcus*, *supra*, 45 Cal.App.5th at pp. 205-206; *Buchanan, supra,* 39 Cal.App.5th at pp. 386-390.)

In reaching that conclusion, *Gangl* determined that Proposition 36 rendered section 1170.12, subdivision (a)(7) ambiguous, explaining that it is "unclear whether the electorate intended to reject the reasoning of *Hendrix*" and require consecutive sentencing for all multiple current serious or violent felony convictions. (*Gangl, supra*, 42 Cal.App.5th at pp. 67-68.) *Gangl* concluded that such a reading of the statute would result in a disparity in sentencing between newly convicted offenders and petitioners seeking retroactive resentencing under section 1170.126. It would also eliminate discretion to ensure that the punishment fits the crime and would require life imprisonment of offenders who are no longer a threat to society—consequences not intended by the voters according to *Gangl*. (*Id*. at pp. 70-71.)

Marcus held that *Hendrix* remained valid in the face of Proposition 36 and that it "did not function to strip the trial courts of their long-held discretion to fashion an appropriate sentence in cases such as this one." (*Marcus*, *supra*, 45 Cal.App.5th at pp. 205-206.) *Marcus* explained that subdivision (a)(7) "only adds that other crimes must be sentenced

consecutively to the serious and/or violent felonies sentenced either consecutively or concurrently under subdivision (a)(6). Subdivision (a)(7) does not, by its plain language, require the serious/violent felonies to be sentenced consecutively to *one another* . . . . Subdivision (a)(7) requires the sentences for multiple serious and violent felonies to run consecutive to the sentences for other convictions that may be imposed consecutively. This requirement does not, however, supplant the discretion to sentence serious and violent felonies concurrently that is bestowed by subdivision (a)(6)." (*Id.* at pp. 212-213, original italics, footnote omitted.) *Marcus* concluded that removing the reference to subdivision (a)(6) from subdivision (a)(7) did not remove the possibility of concurrent sentencing for multiple serious and/or violent felonies. (*Id.* at p. 213.)

There were dissenting opinions in *Buchanan*, *Gangl*, and *Marcus*. In *Buchanan*, the dissent explained that the amended version of section 1170.12, subdivision (a)(7) is not ambiguous and that it eliminated "any distinction between more than one serious or violent felonies that were committed on the same occasion or which arose from the same set of operative facts and those which did not fall into those categories. . . . Now, 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 felonies whenever consecutive sentences would be authorized, not merely on those 'not committed on the same occasion, and not arising from the

same set of operative facts.'" (*Buchanan*, *supra*, 39 Cal.App.5th at p. 397 (con. & dis. opn. of Needham, J.).)

In *Gangl*, the dissent explained that "each conviction" in subdivision (a)(7) "refers not to serious or violent felony convictions sentenced under paragraph (6), but to the convictions described in the conditional antecedent clause, i.e., each 'current conviction for . . . [a] serious or violent felony.'" (*Gangl*, *supra*, 42 Cal.App.5th at p. 78 (con. & dis. opn. Krause, J.).) The dissent concluded that if a defendant is convicted of more than one felony, but not more than one serious or violent felony, subdivision (a)(6) permits concurrent sentencing, but if a defendant is convicted of more than one current serious or violent felony, subdivision (a)(7) "applies and 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 in the manner prescribed by law,' including any other serious or violent felony." (*Id.* at p. 79.) The dissent in *Marcus* relied on the reasons articulated in the dissent in *Gangl* without further elaboration. (*Marcus*, *supra*, 45 Cal.App.5th at p. 215.)

As discussed below, the Court of Appeal in this case followed this minority view, holding that section 1170.12, subdivision (a)(7), as amended by Proposition 36, mandates consecutive sentencing on multiple current serious or violent felony convictions. (*People v. Henderson* (2020) 54 Cal.App.5th 612, 621.)

STATEMENT OF THE CASE

A. Appellant committed multiple felonies, two of which were violent, on a single occasion

Following a fist fight, appellant Level Henderson struck Daniel Tillett in the face with a semiautomatic handgun, punched him in the jaw, and then pointed the gun at bystander William Aguilar. Aguilar ran away and flagged down a police car. When the police officers arrived, they saw appellant standing over Tillett and hitting him repeatedly. (Opinion 2-3.)

A jury found appellant guilty of one count of assault with a semiautomatic firearm on Tillett (§ 245, subd. (b)); count 1), 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 upon Tillett (§ 245, subd. (a)(4); count 4). (Opn. 4.)[3]

In a bifurcated proceeding, the court found that appellant had been previously convicted of four serious or violent felonies within the meaning of the Three Strikes law. The court also found that appellant had been previously convicted of two serious felonies brought and tried separately (§ 667, subd. (a)(1)) and that he had served four prior prison terms (§ 667.5, subd. (b)). (Opn. 4-5.)

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[3] Appellant was also charged with one count of possession of a firearm with a prior violent conviction (§ 29900, subd. (a)(1); count 2). That count was dismissed on the People's motion. (Opn. 4.)

B. The trial court sentenced appellant to consecutive determinate terms for the violent felonies and stayed the terms for the remaining offenses

After dismissing three of appellant's four prior strike convictions in furtherance of justice, the trial court sentenced appellant to a total prison term of 27 years, comprised of the upper term of nine years for the armed assault in count 1, doubled to 18 years pursuant to the Three Strikes law, a consecutive subordinate term of two years for the armed assault in count 5, doubled to four years pursuant to the Three Strikes law, plus a five-year prior-serious-felony enhancement (§ 667, subd. (a)(1)). (Opn. 5-6.)[4] The court stated at sentencing that "as to count 5," the "three strikes law requires that on serious or violent felonies, two or more, that they be sentenced consecutively." (Opn. 10.)

C. The Court of Appeal affirmed, holding that Proposition 36 requires consecutive sentences for all current serious or violent felonies

On appeal, appellant argued that the trial court erred in failing to recognize it had the discretion to impose concurrent sentences on counts 1 and 5. The Court of Appeal rejected appellant's claim, agreed with the dissenting justices in *Marcus*, *Gangl*, and *Buchanan*, and held that Proposition 36 mandates consecutive sentences on multiple current serious or violent

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[4] The trial court also dismissed the prior prison term enhancements (§ 667.5, subd. (b)) and one of the prior-serious-felony-conviction enhancements (§ 667, subd. (a)(1)), and stayed the sentences on counts 3 and 4 under section 654. (Opn. 5-6.)

felony convictions even if they were committed on the same occasions or arose from the same set of operative facts. (*Henderson*, *supra*, 54 Cal.App.5th at p. 621.)

The court criticized the majority view held by *Torres* and the majority opinions of *Buchanan*, *Gangl*, and *Marcus* stating those courts interpretations are "not what section 1170.12 says." (*Henderson*, *supra*, at pp. 624-625.) The court also remarked that *Torres* incorrectly assumed that the voters intended for courts to retain the discretion impose concurrent sentences because they did not amend subdivision (a)(6) and that the assumption "ignores the actual language of subdivision (a)(6) and (a)(7) and the relationship between the two provisions." (*Henderson*, *supra*, at p. 626.)

The court concluded that the "plain language of section 1170.12, subdivision (a)(7)," as amended by Proposition 36, "requires a court to impose consecutive sentences on convictions for multiple serious or violent felonies," whether or not the felonies were committed on the same occasion or arose from the same set of operative facts. (*Henderson*, *supra*, at p. 623.)

The Court of Appeal reasoned that before the voters passed Proposition 36, section 1170.12, subdivision (a)(7) applied to multiple serious or 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." But because Proposition 36 "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." (*Henderson*, *supra*, at pp. 624-625.)

ARGUMENT

AFTER PROPOSITION 36, CONSECUTIVE TERMS MUST BE IMPOSED ON MULTIPLE CURRENT SERIOUS OR VIOLENT FELONY CONVICTIONS

Proposition 36 amended the Three Strikes law, in particular section 1170.12, subdivision (a)(7). As explained above, there is a division of authority regarding the effect of this amendment on a trial court's discretion to impose concurrent sentences for multiple serious or violent felonies committed on the same occasion or arising from the same set of operative facts. Under the majority view, the amendment preserved that discretion, in keeping with the overall intent of the voters to reduce sentences for some offenders. While the State appreciates that advantage of the majority view, the current statutory text is not compatible with that interpretation. Rather, the plain language of section 1170.12 compels the minority view—that consecutive sentences are now mandatory for multiple current serious or violent felonies regardless of whether they were committed on the same occasion or arose from the same set of operative facts. In addition, this view is supported by evidence of the voters' intent to distinguish serious or violent felons—for whom harsher penalties remain warranted—from non-serious offenders who merit greater leniency. The contrary interpretation is not compelled by the ameliorative purpose of Proposition 36.

A. Standard of review and relevant principles of statutory interpretation

The interpretation of a ballot initiative is governed by the same rules that apply in interpreting a statute enacted by the Legislature. (*People v. Johnson* (2015) 61 Cal.4th 674, 682; *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.) "'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'" (*Johnson*, *supra*, 61 Cal.4th at p. 682; *In re Derrick B.* (2006) 39 Cal.4th 535, 539 [It is well-established that the "objective of statutory construction is to ascertain and effectuate legislative intent."].) "Where a law is adopted by the voters, 'their intent governs.'" (*People v. Buycks* (2018) 5 Cal.5th 857, 879.) To determine this intent, a reviewing court looks first to the words of the statute, giving them their usual, ordinary meaning and construing them in the context of the statute as a whole and the overall statutory scheme. (*Id.* at pp. 879-880.) If the language is unambiguous, its plain meaning controls. (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1106.) It is presumed that when the voters adopted the initiative, they "did so being 'aware of existing laws at the time the initiative was enacted.'" (*Id.* at p. 880.)

If the language is ambiguous and supports more than one reasonable construction, a reviewing court may look to a variety of extrinsic aids, including the objects to be achieved, the evils to be remedied, the legislative history, and questions of public policy. (*Ruiz*, *supra*, 4 Cal.5th at p. 1106; *Derrick B.*, *supra*, 39 Cal.4th at p. 539.)

B. The plain text of section 1170.12, subdivision (a)(7) mandates consecutive sentences on multiple serious or violent felonies

As explained, after the passage of Proposition 36, section 1170.12, subdivision (a)(7) no longer contains the language considered by this Court in *Hendrix*. Section 1170.12, subdivision (a)(7) no longer refers to serious or violent felony convictions as "described in paragraph (a)(6)" but rather refers to serious or violent felonies as "described in subdivision (b)." This Court's construction in *Hendrix* permitting concurrent sentencing for convictions committed on the same occasion or arising from the same set of operative facts relied on "paragraph (6)" being part of section 667, subdivision (c)(7). (See *Hendrix*, *supra*, 16 Cal.4th at p. 513.) Without it, there is no longer a reference to that class of felonies and no longer an implication that the voters intended to permit concurrent sentences for the commission of multiple serious or violent felonies. Thus, because of the amendment made by Proposition 36, this Court's construction in *Hendrix* is no longer controlling.

The majority view and minority view agree that subdivision (a)(7) is now triggered whenever a defendant is convicted of multiple serious or violent felonies. Because the conditional clause in subdivision (a)(7) now refers to serious or violent felonies as "described in subdivision (b)," it "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; *Marcus*, *supra*, 45

Cal.App.5th at p. 212 ["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 "applies in all cases where the current multiple felonies are serious and/or violent—even when those felonies were committed at the same time and involve the same facts."].) But, as discussed below, the majority view and minority view disagree on the effect that the subdivision has on consecutive sentencing once the conditional clause is satisfied.

The plain text of the statute provides the resolution. The directive clause of subdivision (a)(7) requires that a court "impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced . . . ." The initial reference to "each conviction" logically includes each individual conviction that satisfies the conditional clause. In other words, it includes each conviction for a "serious or violent felony as described in subdivision (b)." The subsequent reference to "any other conviction" means any conviction other than the one at issue. Indeed, under the last antecedent rule of statutory construction, "'qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.'" (*People v. Lewis* (2008) 43 Cal.4th 415, 492.) Thus, if the defendant's current offenses include multiple serious or violent felonies, then the plain meaning of the directive clause requires the sentence for each of those felonies to be consecutive to the

sentence for any other offense, including the other serious or violent felonies. (*Henderson*, *supra*, 54 Cal.App.5th at p. 624, italics added ["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."].)

This interpretation, which was adopted by the unanimous court below, is in accord with the dissenting opinions in *Buchanan* and *Gangl*. Justice Needham opined in *Buchanan* that "[t]he plain meaning of section 1170.12, subdivision (a)(7), as amended, is that when a defendant stands currently convicted of more than one serious or violent felonies, the sentence for those felonies must be imposed consecutive to any term for which consecutive sentences are lawful, whether or not they were committed on the same occasion or involved the same set of operative facts. *This includes the sentences on the current serious or violent felonies themselves*." (*Buchanan*, *supra*, 39 Cal.App.5th at p. 394 (con. & dis. opn. of Needham, J.), italics added.) Justice Krause agreed in *Gangl* that "each conviction" in subdivision (a)(7) referred to the "convictions described in the conditional antecedent clause, i.e., each 'current conviction for . . . [a] serious or violent felony'" and if a defendant is convicted of more than one, subdivision (a)(7) applies and mandates that each conviction be sentenced consecutive to any other sentence, "*including any other serious or violent felony*. Because paragraph (7) now mandates consecutive sentencing for each individual serious or violent felony conviction, I interpret the statute to mean that those convictions must be sentenced consecutive to one another."

(*Gangl, supra*, 42 Cal.App.5th at pp. 78-79 (con. & dis. opn. Krause, J.), italics added.)

Indeed, this is how a leading treatise on California sentencing understood the law in the wake of Proposition 36. "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 & Bigelow, Cal. Three Strikes Sentencing (The Rutter Group 2018) § 8:1.)

This interpretation is consistent with the operation of the statutory scheme as a whole. Prior to Proposition 36, section 1170.12, subdivision (a)(6) and former subdivision (a)(7) could be seen as operating sequentially. Indeed, Justice Mosk described the formerly parallel provisions in section 667 as stating "two rules—a general one, for all felonies not committed on the same occasion, and not arising from the same set of operative facts; and a special one for only serious or violent felon[ies] *of that description*." (See *Hendrix, supra*, 16 Cal.4th at p. 518, conc. opn. of Mosk, J., italics added.)[5] But Proposition 36 removed the link

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[5] As noted above, section 667, subdivision (c) was not amended by Proposition 36. This failure to amend should be deemed a drafting error. "There appears no clear legislative direction for dealing with the direct conflict between sections 667, subdivision (c) and 1170.12, subdivision (a). There is no discernible reason for amending one statute but not the other. The problem likely stems for a simple drafting error . . . ."

(continued…)

between section 1170.12, subdivision (a)(7) and subdivision (a)(6) by deleting the reference to the latter. As amended, the application of subdivision (a)(7) no longer depends on the application of subdivision (a)(6). Rather, the two subdivisions state two distinct and independent rules—one for felonies not committed on the same occasion and not arising from the same set of operative facts; and one for felonies that are serious or violent. As a result, construing subdivision (a)(7) as requiring that the sentences for multiple serious or violent felonies be consecutive to each other is consistent with the scheme as a whole.

It is also consistent with other indicia of electoral intent. According to the Legislative Analyst in the Official Information Guide, the purpose of Proposition 36 was to reduce "prison sentences served under the three strikes law by certain third strikers whose current offenses are nonserious, non-violent felonies. The measure also allows resentencing of certain third strikers who are currently serving life sentences for specified nonserious, non-violent felonies." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) analysis of Prop. 36 by the Legislative Analyst, p. 49.) Thus, the intent of Proposition 36 was to reduce

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(…continued)

(Couzens & Bigelow, Cal. Three Strikes Sentencing (The Rutter Group 2020) § 8:1.) Indeed, the majority view agrees that "the only reasonable explanation for the failure to amend the identical language of section 667, subdivision (c)(7) was oversight." (*Torres*, *supra*, 23 Cal.App.5th at p. 202.)

prison terms for nonviolent, nonserious offenders and to ensure lengthy terms for dangerous and violent offenders. Interpreting section 1170.12, subdivision (a)(7) to require consecutive sentencing on serious and violent felonies would not frustrate that intent. (See *Johnson*, *supra*, 61 Cal.4th at p. 686.)

In sum, by deleting the reference to felony convictions "as described by paragraph (6)," i.e., multiple serious and violent felony convictions not committed on the same occasion and not arising from the same set of facts, and adding the reference to subdivision (b), i.e., all serious and violent felonies, the electorate withdrew the discretion to impose concurrent sentences. Instead, consecutive sentencing is now mandatory where the defendant has multiple current serious or violent felony convictions, regardless of whether the serious or violent felonies were committed on the same occasion or arose under the same set of operative facts. (*People v. Mendoza* (2000) 23 Cal.4th 896, 916 ["As a general rule, in construing statutes, '[w]e presume the Legislature [or 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 [citation].'"].)

C. The contrary decisions of the Courts of Appeal misinterpreted the plain language of the statute

G*angl*, *Torres*, and *Marcus* concluded that courts retain the discretion to impose concurrent sentences on serious and violent felonies committed on the same occasion or arising from the same set of operative facts because subdivision (a)(6) was not amended by Proposition 36 and thus continues to apply to all current

felony convictions, including serious and violent ones. (*Gangl, supra*, 42 Cal.App.5th at p. 69; *Torres, supra*, 23 Cal.App.5th at p. 200; *Marcus*, *supra*, 45 Cal.App.5th at pp. 213-214; see also OBM 14 [arguing that because subdivision (a)(6) was not modified by Proposition 36 after serving as the basis for *Hendrix*, the voters never intended to overrule *Hendrix*].) Respondent agrees that section 1170.12, subdivision (a)(6) still applies to any current felony convictions not committed on the same occasion and not arising from the same set of operative facts. It does not follow, however, that trial courts have discretion to sentence a defendant convicted of multiple *serious* or *violent* felonies that were committed on the same occasion or arose from the same set of operative facts concurrently.

As discussed, and as the majority view agrees, multiple current serious or violent felony convictions trigger the application of section 1170.12, subdivision (a)(7), *not* subdivision (a)(6). (See *Torres*, *supra*, 23 Cal.App.5th at p. 201; *Gangl*, *supra*, 42 Cal.App.5th at p. 69; *Marcus*, *supra*, 45 Cal.App.5th at p. 212.) "When the electorate passed Proposition 36, which deleted the reference to 'paragraph 6' in section 1170.12, subdivision (a)(7), it signaled its intention that defendants convicted of more than one serious or violent felonies would no longer be subject to the rule of subdivision (a)(6)." (*Buchanan*, *supra*, 39 Cal.App.5th at p. 397 (con. & dis. opn. of Needham. J.) "When a defendant is convicted of more than one felony, but not more than one serious or violent felony, paragraph (6) affords discretion to sentence the defendant concurrently for any current felony conviction (including a single

serious or violent felony) that was committed on the same occasion or arose from the same set of operative facts. But, when a defendant is convicted of more than one current serious or violent felony, paragraph (7) also applies and 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 in the manner prescribed by law,' including any other serious or violent felony." (*Gangl*, *supra*, 42 Cal.App.5th at p. 79, citations omitted.) Hence, whether or not subdivision (a)(6) was amended and whether or not consecutive sentences are mandatory under that subdivision is irrelevant to whether they are mandatory under subdivision (a)(7). It was not necessary for the electorate to amend the general rule in subdivision (a)(6) to expand the specific rule in subdivision (a)(7).

Gangl and appellant assert that the minority view is not what the electorate intended when it passed Proposition 36. (See *Gangl*, *supra*, 42 Cal.App.5th at pp. 70-71; OBM at 14.) The written materials provided to the voters did not contain any direct statements or discussion addressing the amendment to subdivision (a)(7). (See Voter Information Guide, Gen. Elec. (Nov. 6, 2012).) Thus, what the electorate intended can be determined only by the general intent behind Proposition 36. As discussed above, the purpose of Proposition 36 was to reduce prison terms for nonviolent, nonserious offenders while conversely ensuring that serious and violent repeat offenders remain off the streets and behind bars. The minority view supports this intent.

Additionally, not only is the majority position at odds with the current statutory text, it would create substantial practical problems. Under the majority's interpretation, the amendments enacted by Proposition 36 require only that the sentences for serious and violent felonies—imposed either consecutively or concurrently as permitted by subdivision (a)(6)—be run consecutively to the sentence for any other offense, whether felony or misdemeanor, for which a consecutive sentence may be imposed. But this interpretation would mean "that nonserious, nonviolent felonies are treated more harshly than serious or violent felonies for purposes of imposing consecutive sentences[,]" (*Buchanan*, *supra*, 39 Cal.App.5th at p. 398 (con. & dis. opn. of Needham, J.), an anomaly surely not intended by the voters.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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September 13, 2021

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains 5,967words.

ROB BONTA
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Attorneys for Plaintiff and Respondent

September 13, 2021

LA2020604136

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Henderson** Case No.: **S265172**

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 **September 13, 2021,** I served the attached:

RESPONDENT'S 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:

The Honorable Frederick N. Wapner
Los Angeles County Superior Court
Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street
Department 114
Los Angeles, CA 90012-3210
Send via U.S. Mail

Supreme Court California S.F.
350 McAllister Street
San Francisco, CA 94102-4797

On **September 13, 2021,** I caused one electronic copy of the **RESPONDENT'S 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.:

Rudolph J. Alejo
Served *via* TrueFiling
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California Appellate Project (LA)
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California Court of Appeals
Served *via* TrueFiling

CAP - LA
California Appellate Project (LA)
Served *via* TrueFiling

On **September 13, 2021**, I caused 1 copy of the **RESPONDENT'S 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 U.S. Mail.

On **September 13, 2021**, I caused one electronic copy of the **RESPONDENT'S 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 **September 13, 2021**, at Los Angeles, California.

S. Hubbard	***/s/ S. Hubbard***
Declarant	Signature

LA2020604136
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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

Case Name: **PEOPLE v. HENDERSON**
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9/13/2021
Date

/s/Shoshana Hubbard
Signature

Inberg, Kristen (311744)
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CA Attorney General's Office - Los Angeles
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