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.	)	No. S219454 Court of Appeal No. B249651 (Los Angeles County Superior Court No. YA038015)

REPLY BRIEF ON THE MERITS

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ARGUMENT

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]) AN OFFENSE CANNOT BE CONSIDERED A SERIOUS OR VIOLENT FELONY IF IT WAS NOT DEFINED AS A SERIOUS OR VIOLENT FELONY ON THE DATE THE OFFENSE WAS COMMITTED EVEN IF IT WAS DEFINED AS A SERIOUS OR VIOLENT FELONY ON THE EFFECTIVE DATE OF THE ACT

A. Introduction

In the Opening Brief on the Merits, appellant explained that, when read in the overall context of the Three Strikes Law as it has been applied and interpreted, Penal Code section 1170.126 requires that the determination of whether a person is eligible for a recall of a third strike sentence be based upon whether his current crime was a "violent" or "serious" felony at the time of its commission. Respondent urges that the determination must be based upon the 2012 definition of violent or serious felony and lays out various reasons for this conclusion. Respondent's reasons reflect three basic themes: 1) section 1170.126 is written in the present tense and so only current definitions can apply; 2) using the current definitions would not offend the *ex post facto* clause of the federal constitution; and 3) the voters wanted to keep truly dangerous felons in prison. These reasons, which were all addressed and refuted in the Opening Brief on the Merits, do not withstand scrutiny.[1]

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[1]/ In a footnote, respondent also questioned whether the order denying a Penal Code section 1170.126 petition is appealable, but assumed that it was, pending this

B. The Use of the Present Tense

Respondent asserts that the use of the present verb tense in section 1170.126 shows that the definitions of violent and serious felonies in effect on November 7, 2012 must be applied in determining an inmate's eligibility for a sentence recall under that statute. (ABOM 6-7) As appellant pointed out in the Opening Brief on the Merits, the present tense signifies no such thing in the context of the Three Strikes Law. (OBOM 16-18)

The choice of verb tense is significant in construing statutes (see *People v. Loeun* (1997) 17 Cal.4th 1, 11), but verb tense "standing alone" is not dispositive. (See *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 776.) The use of present tense in a sentencing statute does not always mean "currently," as opposed to the time of the commission of the offense. (See *People v. Jeffers* (1987) 43 Cal.3d 984, 992.) To decide the meaning in a given statute, the courts look to the statutory scheme of which the section is a part. (*Hughes v. Board of Architectural Examiners*, *supra*, 17 Cal.4th at p. 776; *People v. Briceno* (2004) 34 Cal.4th 451, 459-460; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 903; *People v. Rizo* (2000) 22 Cal. 4th 681, 685.)

When viewed in the context of the Three Strikes Law as a whole, the use of the present tense in section 1170.126 simply cannot carry the weight that respondent assigns

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Court's decision in *Teal v. Superior Court*. (ABOM 2, fn. 2.) Of course, this Court has now decided *Teal* and held that such an order is appealable. Therefore, this appeal lies. (*Teal v. Superior Court* (2014) ___ Cal.4th ____ [2014 Cal. LEXIS 10481].)

to it. The entire Three Strikes sentencing scheme is written in the present tense. Both sections 667 and 1170.12, which lay out the basic scheme and are referenced in section 1170.126, are written in the *present* tense and provide that the scheme "shall apply where a defendant *has* one or more prior serious and/or violent felony convictions. . ." (Pen. Code, §§ 667, subd. (e), 1170.12, subd. (c) [emphasis added].) Under respondent's reasoning, such use of the present tense should require that a defendant whose prior offenses are currently defined as serious or violent be sentenced to a "strike" sentence, irrespective of whether his priors were so defined at the time of the commission of his current offense. Yet, pursuant to Penal Code sections 667.1 and 1170.125 as interpreted by the courts, these provisions are read to require the use of the definitions in effect at the time of the commission of the current offense to determine whether the priors qualify as "strikes." (See *People v. James* (2001) 91 Cal.App.4th 1147, 1151 [permitting a "strike" sentence based upon the definition of violent or serious felonies in effect as of the date of the current offense, irrespective of whether the prior offense was a "strike" when the prior was committed]; *In re Jenson* (2001) 92 Cal.App.4th 262, 266, fn.3 [noting that an offense added to the list of juvenile offenses that could be "strikes" after the commission of the current offense did not affect that case]; see also *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 574-575, 577 [explaining lock-in date for new "strikes" and which definitions apply when].) So, if a defendant is being sentenced for a crime committed before his prior felonies were added to the lists of violent and serious felonies, he cannot get a Three Strikes sentence despite the fact that by the time of his conviction

and sentencing his priors have become "strikes," and he therefore "has" a "strike" prior. (*Ibid.*) The use of the present tense in this context means that the definitions in effect at the time of the commission of the offense should be used. (See *People v. Jeffers*, *supra*, 43 Cal.3d at p. 992; *People v. James*, *supra*, 91 Cal.App.4th at p. 1151; *People v. Superior Court* (*Andrades*) (2003) 113 Cal.App.4th 817, 826-830; *In re Jenson*, *supra*, 92 Cal.App.4th at p. 266, fn. 3; see also *Manduley v. Superior Court*, *supra*, 27 Cal.4th at pp. 574-575, 577.)

Respondent further asserts that section 1170.126, subdivision (e)(2), proves the significance of the use of the present tense. This reliance is also misplaced. As respondent notes, subdivision (e)(2) states that an inmate is eligible for a sentence recall 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)]." Respondent urges that the use of the present participle, "appearing," rather than "then-appearing" or "appearing at the time," demonstrates that current definitions of the offenses are determinative. (ABOM 7) Subdivisions (e)(2)(C)(I)-(iii) and (c)(2)(C)(I)-(iii), however, do not define the terms "violent" or "serious" or refer to the statutes that do. Moreover, these subdivisions did not *previously exist*. They were only added to the code by Prop. 36 to include non-serious, non-violent felonies that are nonetheless eligible for a third

strike sentence. Thus, as there were no prior statutes to which to refer, the use of the present tense in conjunction with them adds nothing to the pertinent analysis.[2]

Next, respondent asserts that section 1170.126, subdivision (a), which limits resentencing to inmates "whose sentence under this act would not have been an indeterminate life sentence," demonstrates that the statute only applies to crimes that were not defined as serious or violent at the time of the enactment of section 1170.126. (ABOM 7) Again, respondent is wrong. As appellant explained in the Opening Brief on the Merits, appellant *is* in fact an inmate who would not have had an indeterminate life sentence under this act. (OBOM 13-15) This is so because, were appellant sentenced under the act today for the violation of Penal Code section 136.1 that he committed in 1998, he *could not be sentenced to a life term.*

Today, as it has since its enactment, the Three Strikes law uses the definition of violent or serious felony that was in effect at the time of the commission of the offense being sentenced. When the Three Strikes law was initially enacted, the definitions of violent and serious felonies were based upon the 1993 definitions, which were in effect at the time. (See § 2, Prop. 184.) Thereafter, in 2000, when the definitions of violent and serious felonies were expanded to include more offenses, sections 667.1 and 1170.12

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[2]/ Furthermore, had those subsections existed previously, the use of the term "appearing" would not have signified an intent to use current definitions. That term could mean either "appearing" when the sentence was imposed or at the present time. Just as the statute does not specify "then-appearing," it does not specify "now-appearing."

were enacted to specify that the new definitions applied only to crimes committed on or after the effective date of the new definitions. Now, those sections have been amended to permit current definitions to apply to crimes committed on or after November 2012. This requirement of prospective application of new definitions has been consistently interpreted to mean that the definition controlling whether a crime is violent or serious for purposes of the Three Strikes Law is that in effect at the time of the commission of the offense being punished. (See *People v. James*, *supra*, 91 Cal.App.4th at p. 1151; *In re Jenson*, *supra*, 92 Cal.App.4th at p. 266, fn.3; see also *Manduley v. Superior Court*, *supra*, 27 Cal.4th at pp. 574-575, 577.) Applying this scheme to appellant's 1998 violation of Penal Code section 136.1, would require the determination of whether his current offense (section 136.1) is a serious or violent felony as defined by the statutes in effect in 1993, before 2000. (Pen. Code, §§ 1170.12, 1170.125.) Under the 1993 definitions it is not. Thus, under the current act, appellant's sentence on his 1998 violation of Penal Code section 136.1 would be a doubled determinate term. (Pen. Code, §§ 1170.12, subd. (c); 1170.125.)

C. Section 1170.125 Clarifies the Requirement that the Courts Use the Definitions of Violent and Serious Felonies in Effect on the Date of the Commission of the Current Offense

Respondent argues that section 1170.125 does not require that appellant's eligibility be determined by use of the definitions of violent and serious felonies in effect at the time of the commission of his current offense. (ABOM 13-18) In making this argument, respondent acknowledges, but does not address, appellant's argument that the Three Strikes Law has always been interpreted to require the definitions of violent and serious felonies in effect at the time of the commission of the current offense to control its applicability. (OBOM 6-15) Rather, respondent, as did the court of appeal, gets waylaid in a discussion of *ex post facto* law, and jumbles together other discussions of how the statute might be read if it were taken out of context or read in isolated segments.

First, respondent asserts that the purpose of section 1170.125 is to avoid *ex post facto* issues and that avoidance of such issues is the reason that pre-Proposition 36 cases have used the "commission date test" to determine whether a prior was a "strike." (ABOM 14) Appellant agrees. Respondent then asserts that the *ex post facto* clause is not implicated by retroactively defining crimes as violent or serious to render a person ineligible for a sentence reduction. Based upon this, respondent concludes that the *same* words used in the *same* statute mean two different *things*. The statute cannot be so interpreted.

Generally, the same words or expressions mean the same thing in the same statute, and any previous construction of the term by the courts is deemed applicable to statutes

later using the same terms. (See *In re Jeanice D.* (1980) 28 Cal.3d 210, 216; see also *Gustafson v. Alloyd Company, Inc.* (1995) 513 U.S. 561, 568; 115 S. Ct. 1061; 131 L. Ed. 2d 1 ["we adopt the premise that the term should be construed, if possible, to give it a consistent meaning throughout the Act. That principle follows from our duty to construe statutes, not isolated provisions."].) Here, respondent seeks to construe the identical language differently with respect to 1170.12 and 1170.126. Yet nothing in the statute suggests that it should be so read.

Assuming that section 1170.12 is a codification of *ex post facto* principles, whether or not the *ex post facto* clause is implicated in the context of a sentence recall, the statutory language must be interpreted consistent with that clause. (Cf. *People v. Estrada* (1995) 11 Cal.4th 568, 575-576 [although in the context of the case no constitutional rights were implicated, because the rule implementing constitutional standards was the basis of statutory language, the language had to be construed pursuant to the constitutional interpretation].) Consistent with the *ex post facto* clause, the definitions of violent and serious felonies must be those in effect on the date of the commission of the offense being punished.

Furthermore, as respondent acknowledges, this is the way that the language has always been interpreted. (ABOM 14) Section 1170.125, and all of the other statutes creating the Three Strikes sentencing scheme do now, and have always, required that the definitions in effect at the time of the commission of the current offense apply. (See Pen. Code, §§ 667.1, 1170.125; *People v. James*, *supra*, 91 Cal.App.4th at p. 1151; *In re*

Jenson, supra, 92 Cal.App.4th at p. 266, fn.3; *People v. Superior Court* (*Andrades*), *supra*, 113 Cal.App.4th at pp. 826-830; see also *Manduley v. Superior Court, supra*, 27 Cal.4th at pp. 574-575, 577.) The language of section 1170.125 has always been clear that new definitions apply to crimes committed "on or after" their effective date. "Where, as here, 'the language of a statute uses terms that have been judicially construed,' "'the presumption is almost irresistible'" that the terms have been used"' in the precise and technical sense which had been placed upon them by the courts.'" [Citations.] This principle [likewise] applies to legislation adopted through the initiative process. [Citation.]'" (*People v. Weidert* (1985) 39 Cal.3d 836, 845-846.)

Respondent then makes the argument that section 1170.125 does not even apply to appellant's case because it initially states that it applies to crimes committed on or after November 12, 2012. (ABOM 16) It is precisely *because*, by its terms, it does not apply to appellant, that it helps his cause. By its terms, section 1170.125's adoption of the definitions of violent and serious felonies in effect as of November 2012 *does not apply to appellant*. Rather, the *old* definitions that were in effect at the time of the commission of appellant's offense are what apply to him. And, under *those*, 1998, definitions, attempting to dissuade a witness in violation of Penal Code section 136.1 is not a disqualifying violent or serious felony.

Respondent later asserts that the next clause of section 1170.125, which expressly relates to section 1170.126, can be read independently of the prior clause to require the new definitions to apply to section 1170.126 petitions. (ABOM 16-17.) The statute

permits no such reading. It states, "for all offenses committed on or after November 7, 2012, all references to existing statutes in section 1170.12 and 1170.126 are to those sections as they existed on November 7, 2012." The second clause is modified by the first; it has no independent meaning. (See *Gustafson v. Alloyd Company, Inc.*, *supra*, 513 U.S. at p. 568 [the court has a "duty to construe statutes, not isolated provisions."].)

Respondent further notes that "on its face" the reference to section 1170.126 in section 1170.125 makes no sense. (ABOM 17, fn. 6) Respondent urges, however, that interpreting section 1170.125 in light of section 1170.126, subdivision (a)'s statement that the recall provisions apply to those "whose sentence under this act would not have been an indeterminate life sentence" demonstrates that the reference requires the use of current definitions to determine recall eligibility. Appellant agrees that this statement assists in the interpretation of section 1170.125, but respondent again has given the statement unsupported significance. Respondent appears to read 1170.126, subdivision (a), to mean that the statute applies to persons whose sentence would not have been a indeterminate life term *if his crime were committed on or after November 7, 2012*. But, the statute says no such thing. It states that it applies to persons whose "sentence under this act would not have been an indeterminate life sentence." As explained above, under the act, which requires with respect to "all" statutory references that new definitions be applied prospectively only, a person serving a sentence for a 1998 violation of Penal Code section 136.1, would not have an indeterminate life sentence. Thus, subdivision (a) supports rather than defeats, appellant's claim.

The better reading of section 1170.25's reference to section 1170.126 is that it is meant to clarify that the same rules apply for section 1170.126 as apply for the rest of the Three Strikes sentencing scheme of which it is a part. That way, for both section 1170.12 and section 1170.126, which applies to those "whose sentence under this act would not have been an indeterminate life sentence," the determination of whether a second strike sentence is applicable depends on the date of the commission of the offense being punished. Moreover, this interpretation should be adopted because, where there are "two reasonable interpretations of the statute [which] stand in relative equipoise . . ." a court is obligated to follow the "rule of lenity" by "giving the defendant the benefit of every reasonable doubt on questions of interpretation." (*In re M.M.* (2012) 54 Cal. 4th 530, 545.)

Respondent's next assertion is that the courts have consistently decided whether a *prior* offense was serious or violent based upon current definitions of serious and violent rather than those in place at the time of the commission of the prior. (ABOM 17) Assuming that "current" definitions are those in place at the time of the *commission* of the current offense (not the time of conviction or sentencing), appellant agrees. In fact, appellant urges that *all* determinations as to whether an offense is violent or serious so as to trigger a third strike sentence must be based upon the definition in effect at the time of the commission of the current offense. Therefore, appellant agrees that the same test applicable to priors is applicable to the current offense. Respondent, however, makes an unsupported leap to the conclusion that the test required by 1170.125 as it has been

interpreted permits use of a different test - the date of current sentencing - to apply to section 1170.126. As explained above, this has no support in the language of the statute.

D. Voters' Intent

Respondent asserts that nothing in the arguments for or against the initiative indicated that the courts would use the definition in effect at the time of the commission of the offense to determine whether a defendant was eligible for a sentence recall. (ABOM 8) This is not so. As pointed out in the Opening Brief on the Merits, 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. *May* authorize re-sentencing if third strike conviction *was* not serious or violent." (Emphasis added.) Later, the "Pro" argument explained that the proposition "restores the *original* intent of the Three Strikes law" (emphasis added) to focus on currently violent criminals. (Official Voter Information Guide, http://voterguide.sos.ca.gov/propositions/36.) Thus, the plan was to correct a perceived mistake in the *initial* drafting of the law to preclude a life sentence from applying to most non-violent, non-serious felonies. Therefore, in addition to changing the law going forward, it included a recall provision to reform the law *ab initio*. This information indicated to the voters that the sentences for past crimes that were not violent or serious when committed may be reduced, irrespective of whether they are considered as serious or violent under current law.

"'Moreover, [respondent's] argument ignores the fact it has long been settled that '[t]he enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted' [Citation], 'and to have enacted or amended a statute in light thereof' [Citation] '*This principle applies to legislation enacted by initiative*. [Citation.]' [Citation]" (*People v. Superior Court (Martinez)* (2014) 225, Cal.App.4th 979, 992 [emphasis added]; see also *People v. Weidert, supra*, 39 Cal.3d at pp. 845-846.) As noted above, the law has always been that the date of the commission of the current offense controls whether the crime is deemed serious or violent under the Three Strikes Law.

Respondent also makes much of the fact that the voters were assured that the new law would not result in the truly dangerous being freed. (ABOM 9-13) As noted in the Opening Brief on the Merits, however, the law did not, and could not, promise that anybody whose crime is currently defined as serious or violent would not be sentenced to a "second strike" term. As discussed above, anybody who committed his or her offense before that offense was listed as a violent or serious felony would not be excluded from a second strike sentence if convicted after the passage of Prop. 36.

As the ballot arguments noted, the statute was "carefully crafted" to both save money and protect the public from the truly dangerous. (See *People v. Yearwood* (2013) 213 Cal.App.4th 161, 171; Official Voter Information Guide, http://voterguide.sos.ca.gov/propositions/36.) That one of the goals was to protect the public does not require that that goal be given undue weight. As this Court noted in *People v. Garcia* (1999) 20

Cal.4th 490, "our decisions make clear that [purpose of providing longer sentences with the Three Strikes Law] is not a mantra that the prosecution can invoke in any Three Strikes case to compel the court to construe the statute so as to impose the longest possible sentence." (*Id.* at p. 501; see also *People v. Woodhead* (1987) 43 Cal.2d 1002, 1011 ["The phrase 'public safety' does not constitute a blank check for interpretation of specific statutory language in any manner that would appear to advance the policy objectives advanced by the Attorney General.") Similarly, the intent to protect the public should not override all other purposes in passing Prop. 36 and mandate that its ameliorative provisions be as narrowly construed as possible.

Section 1170.126 includes provisions seemingly designed to accomplish all the legislative goals, from restoring the original intent of the law to apply only to violent and serious offenses to protecting the public, while also reducing prison overcrowding and saving taxpayer dollars. It therefore permits qualified defendants to seek reduction of their life terms, while maintaining a failsafe mechanism by which a trial court can keep the life term for an unreasonably dangerous person who is otherwise eligible for a sentence reduction. (See Pen. Code, § 1170.126, subd. (f).) This failsafe mechanism protects the public from the release of the truly dangerous felon. At the same time, a liberal construction of recall eligibility, which merely gets the defendant a hearing on whether his sentence should be reduced, best furthers the other purposes of the statute. Thus, the use of the definition in effect at the time of the commission of the offense being punished, in addition to being completely consistent with the language of the statute and

the entire statutory scheme, is most consistent with all the stated goals of the initiative. It does not elevate the public safety goal so as to undermine the other purposes and best gives effect to the "carefully crafted" statute designed to accomplish all of these purposes.

CONCLUSION

For all of the above reasons and those stated in the Opening Brief on the Merits, it is clear that the definitions of serious and violent felonies that were in effect at the time of the commission of appellant's offense must be applied in determining his eligibility for a sentence recall. As the 1998 definitions of serious and violent felonies did not include appellant's crime, he is eligible for a sentence recall pursuant to Penal Code section 1170.126. This Court should therefore reverse the order denying his recall petition.

DATED: November 13, 2014

RESPECTFULLY SUBMITTED

CALIFORNIA APPELLATE PROJECT

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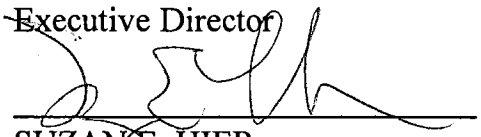

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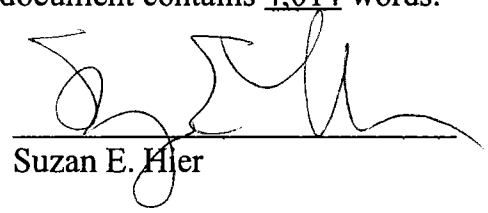

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PROOF OF SERVICE

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BRIEF ON THE MERITS

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