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.

Case No. S219819

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

RESPONDENT'S REPLY BRIEF ON THE MERITS

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THE THREE STRIKES REFORM ACT DOES NOT PROVIDE FOR SEPARATE CONSIDERATION OF A DEFENDANT'S ELIGIBILITY FOR RESENTENCING AS TO EACH COUNT

In his Answer Brief on the Merits (hereafter "AABM"), appellant contends that, pursuant to the Three Strikes Reform Act of 2012 (hereafter the "Act"), he is eligible for recall and resentencing on his conviction for second degree burglary (an offense that is categorized as neither violent nor serious pursuant to Penal Code sections 667.5, subdivision (c), and 1192.7, subdivision (c)),[1] even though he also suffered a current conviction for first degree residential burglary (a serious felony offense pursuant to section 1192.7, subdivision (c)). He asserts that such a conclusion is "the only reasonable interpretation" of section 1170.126 and that the policies behind the statute support his interpretation. (AABM 4-20.) Respondent disagrees. Both the statutory language and the policies behind the statute evince an intent on the part of the electorate to exclude defendants who have suffered a current conviction of a serious and/or violent felony from eligibility to be resentenced on any count.

A. The Statute as a Whole Evinces an Intent to Exclude from Its Benefits Any Persons Whose Current Commitment Offenses Include a Serious or Violent Felony

Section 1170.126, subdivision (a),[2] provides that the resentencing provisions "apply exclusively to persons presently serving an indeterminate term of imprisonment . . . whose sentence under this [A]ct would not have been an indeterminate life sentence." Appellant expends much effort

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[1] Unless stated otherwise, all further statutory references are to the Penal Code.

[2] Unless stated otherwise, all further references to subdivisions are to those in section 1170.126.

arguing that subdivision (a) cannot be dispositive on the issue presented here – whether recall eligibility is determined on a count-by-count basis – because the word "sentence" could refer to a component of an aggregate sentence as well as the aggregate sentence itself. (AABM 8-13.) Appellant, however, ignores other parts of subdivision (a) that strongly suggest the drafters of the initiative intended to exclude from the resentencing provisions a class of inmates, namely, those who had suffered a current conviction of a serious or violent felony. Specifically, the use of the terms "exclusively" and "persons" directly support respondent's position that the overall intent of the statute is to exclude from its benefits any persons whose current commitment offenses include a serious or violent felony. Moreover, the use of these terms contradicts appellant's argument that the Act requires that recall eligibility be determined on a count-by-count basis rather than by focusing on the offender as a whole, specifically an offender whose current commitment offenses include a serious or violent felony.

That the drafters and electorate intended to exclude from the Act's resentencing provisions any inmate who suffered a current conviction of a serious or violent offense is all the more apparent when subdivision (a) is read in conjunction with subdivision (d). Subdivision (d) states that "[t]he petition . . . shall specify all of the currently charged felonies, which resulted in the sentence . . ." presently served. Respondent argued in the opening brief that the purpose of the requirement that an inmate list all of his triggering offenses resulting in his life sentence is to give the trial court the opportunity to identify inmates who are not eligible for recall and resentencing due to their current convictions of serious and/or violent felonies. The requirement could not be related to the determination of dangerousness under subdivision (f), respondent explained, because that determination would not occur until a noticed evidentiary hearing was held.

(ROBM[3] 11, citing § 1170.126, subds. (f) & (g), & *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1297, fn. 20.)

Appellant barely addresses this point in the answer brief, perfunctorily asserting that "[r]espondent's construction is certainly not apparent from the wording of the statute" and that it "is more reasonable" that the requirement relates to the trial court's determination of dangerousness under subdivision (f). (AABM 14, fn. 4.) Appellant's bald assertions on this point are unpersuasive. The Act clearly contemplates a dangerousness hearing at which evidence of the defendant's entire criminal conviction history and character is presented, "including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes," as well as his "disciplinary record and record of rehabilitation while incarcerated." (§ 1170.126, subds. (f), (g); *People v. Superior Court (Kaulick)*, *supra*, 215 Cal.App.4th 1279, 1297; see also *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 6.) Because the Act contemplates presenting this extensive evidence of the defendant's criminal history at the dangerousness hearing, it is not reasonable to conclude that the drafters included the requirement in subdivision (d) to aid in the dangerousness evaluation. A much "more reasonable" interpretation is that the requirement in subdivision (d) was included to enable the trial court to screen out offenders who were ineligible for resentencing as a result of their current convictions for serious or violent felonies.

Subdivision (d) undercuts appellant's argument in another way as well. In the opening brief, respondent pointed out that subdivision (d) clearly employs the word "sentence" to mean the aggregate sentence – the sentence that resulted from the total of all felonies charged and convicted. If "sentence" means aggregate sentence in subdivision (d), it must be

[3] "ROBM" refers to Respondent's Opening Brief on the Merits.

presumed that it has the same meaning in subdivision (a). (See *Delaney v. Baker* (1999) 20 Cal.4th 23, 41 ["It is, of course, 'generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute.'"].) And if "sentence" means aggregate sentence in subdivision (a), appellant is clearly ineligible for resentencing under section 1170.126 because his aggregate sentence under the Act would have included an indeterminate life term. (See ROBM 8-9.)

Appellant attempts to dismiss the importance of the way "sentence" is used in subdivision (d) through reliance on section 7, which states, in pertinent part, that "[w]ords used in . . . the singular number include[] the plural, and the plural the singular." (AABM 13-14.) However, for multiple reasons, section 7 does not dispose of respondent's argument as thoroughly as appellant contends. First, the "singular/plural" language upon which appellant relies carries little weight. This Court has repeatedly declined to rely on that language, describing it as a "slim reed" for resolving issues of statutory interpretation. (See *People v. Eid* (2014) 59 Cal.4th 650, 656-657; *People v. Navarro* (2007) 40 Cal.4th 668, 680.) Moreover, the drafters of the Act were apparently unaware of the "singular/plural" rule set forth in section 7 and certainly did not rely on it drafting the Act. If they had been aware of the rule and were relying on it being operative, they would not have repeatedly referred to "a felony or felonies" in the Act. (See § 1170.126, subds. (b), (e)(1).) The drafters' use of this language rebuts the presumption that they were aware of section 7. (See *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1368 [presumption that Legislature is aware of statutes in existence may be rebutted].)

Respondent submits that another portion of section 7 is more helpful in resolving whether the drafters intended "sentence" in subdivision (a) to mean the aggregate sentence or merely a component of an aggregate

sentence: "Words and phrases must be construed according to the context . . . of the language . . . ." (§ 7, subd. (16).) Here, the relevant "context" must include the way the word was used in other parts of the statute. The fact that "sentence" was used to refer to the aggregate sentence in subdivision (d) indicates it was used in the same way in subdivision (a). (*Delaney v. Baker*, *supra*, 20 Cal.4th at p. 41.)

Appellant relies primarily on subdivision (b), which provides that inmates serving an indeterminate life sentence for an offense that was not serious and/or violent may petition for recall of sentence. (See AABM 6, 8, 14.) However, subdivision (a) should be given primacy because it is a declaration of purpose. Once it is understood that subdivision (a) serves to screen out inmates who are ineligible for resentencing due to their current convictions for violent or serious offenses, there is no conflict with subdivision (b). Read in conjunction with subdivision (a), subdivision (b) merely provides that inmates serving an indeterminate life sentence for an offense that was not serious and/or violent may file a petition for recall of sentence so long as none of their current convictions are for serious and/or violent offenses.

Subdivision (e) likewise supports respondent's position that eligibility for resentencing under the Act is determined by looking at the judgment as a whole, and not on a count-by-count basis. As discussed in the opening brief (ROBM 10), subdivisions (e)(2) and (e)(3) disqualify inmates from resentencing on all counts if those inmates have factors relating to their current offenses, or specific prior offenses, respectively. Because subdivisions (e)(2) and (e)(3) render an inmate ineligible for resentencing as to any count based on a single disqualifying factor or conviction, it

makes little sense to interpret subdivision (e)(1)[4] to permit eligibility despite a disqualifying conviction. Instead, if the three subdivisions are harmonized, a single serious or violent offense would preclude resentencing for any other commitment offenses under subsection (e)(1), much as a single disqualifying offense would preclude resentencing for any other commitment offense under subsections (e)(2) and (e)(3). This "whole judgment" construction best serves to harmonize the statute internally. (See *People v. Arias* (2008) 45 Cal.4th 169, 177 [when construing an ambiguous statute, courts favor a construction which internally consistent].)

Appellant's reliance on subdivision (c) to show the Act requires that the terms of a sentence be considered individually is misplaced. That subdivision provides: "No person who is presently serving a term of imprisonment for a 'second strike' conviction imposed pursuant to [the Three Strikes Law] shall be eligible for resentencing under the provisions of this section." Appellant reasons that if "sentence" in subdivision (a) means the aggregate sentence, then, pursuant to subdivision (c), an inmate serving an indeterminate life term for a felony that is neither serious nor violent would be ineligible for resentencing if he were also serving a determinate second strike sentence. (AABM 16-17.) Appellant is correct that such a hypertechnical construction of subdivisions (a) and (c) would be absurd. However, the solution to the problem appellant poses is not to interpret the word "sentence" to apply to individual counts. Rather, the proper solution is to interpret subdivision (c) in a commonsense manner, i.e., to interpret it as applying only to defendants serving second strike sentences, not defendants serving second strike and third strike sentences.

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[4] Subdivision (e)(1) provides that an inmate is eligible for resentencing if he is serving an indeterminate life term under the Three Strikes Law for a conviction of a felony that is not categorized as serious or violent.

B. The Policies Behind the Statute Evince an Intent to Exclude from Its Benefits Any Persons Whose Current Commitment Offenses Include a Serious or Violent Felony

Appellant further contends that the policies behind the statute support his interpretation of it. Citing *People v. Garcia* (1999) 20 Cal.4th 490, 500, appellant asserts that eligibility for resentencing should be determined on a count-by-count basis because the primary purpose of the initiative was to "mak[e] the punishment fit the crime." He also equates a trial court's eligibility determination under 1170.126 with an initial sentencing under the amended versions of sections 667 and 1170.12. (AABM 17-19.) In so doing, appellant fails to grasp the differences between the prospective and retrospective parts of the Act. Furthermore, he fails to appreciate that excluding defendants who have suffered current convictions of serious or violent felonies from the benefits of the Act promotes public safety, a key purpose of the Act.

People v. Garcia, *supra*, 20 Cal.4th 490, of course, is not directly applicable to the question presented here. In *Garcia*, this Court held that a trial court sentencing a defendant under the Three Strikes Law has discretion under section 1385 to dismiss strike allegations on a count-by-count basis. (*Id.* at pp. 492-493.) This Court explained that in exercising its discretion, the trial court must consider the nature and circumstances of the current felonies, which may differ considerably. Under such circumstances, the court "might . . . be justified in striking prior conviction allegations with respect to a relatively minor current felony, while considering those prior convictions with respect to a serious or violent current felony." (*Id.* at p. 499.)

Thus, *Garcia* is premised on an examination of a trial court's power to exercise its *discretion pursuant to section 1385* on the basis of a defendant's individual characteristics notwithstanding the mandates of the

sentencing scheme otherwise applying to that defendant's convictions. This does not have any bearing on a trial court's exercise of its authority under section 1170.126 to determine whether the commitment convictions are *eligible as a matter of law.* In relying on *Garcia*, appellant attempts to take what was meant to give a sentencing court discretion and turn it into a mandatory provision of the Act.

Along these lines, appellant argues that, because a defendant can have a "mixed sentence of second and third strike terms" under the amended versions of sections 667 and 1170.12, "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).)" (AOB 19.) This argument, however, fails to grasp the differences between the prospective and retrospective parts of the Act:

> [T]here are two parts to the Act: the first part is *prospective* only, reducing the sentence to be imposed in future three strike cases where the third strike is not a serious or violent felony (Pen. Code, §§ 667, 1170.12); the second part is *retrospective*, providing *similar, but not identical*, relief for prisoners already serving third strike sentences in cases where the third strike was not a serious or violent felony (Pen. Code, § 1170.126)."

(*People v. Superior Court (Kaulick)*, *supra*, 215 Cal.App.4th at p. 1292.)

One "difference between the prospective and retrospective parts of the Act is that the retrospective part of the Act contains an 'escape valve' from resentencing prisoners whose release poses a risk of danger." (*People v. Superior Court (Kaulick)*, *supra*, 215 Cal.App.4th at p. 1293, referring to § 1170.126, subd. (f).) For the reasons discussed above, another difference between the two parts of the Act is the drafters' intent to exclude from the retrospective part's benefits any persons whose current commitment

offenses include a serious or violent felony. Thus, contrary to appellant's suggestion, the fact that second and third strike sentences may be required under the prospective part of the Act does not mean the same is true under the retrospective part of the Act. The retroactive portion of section 1170.126 constitutes an "act of lenity" on the part of the electorate. (See *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040.) The electorate chose to extend such lenity only to those defendants whose triggering offenses did not include any serious and/or violent felonies.

Appellant's argument likewise fails to appreciate the extent to which respondent's interpretation would further public safety, one of the key purposes of the Act. (See *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1054.) In approving the Act, the electorate "approved a mandate that the . . . Act be liberally construed to effectuate the protection of the health, *safety*, and welfare of the People of California." (*People v. White* (2014) 223 Cal.App.4th 512, 522, emphasis added.) Indeed, the Voter Information Guide stated that the Act was "carefully crafted" "so that truly dangerous criminals will receive no benefits whatsoever from the reform." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) Official Title and Summary of Prop. 36, p. 52.) According to the guide, "dangerous criminals" would be required to "*serve their full sentences*," but "[p]eople convicted of shoplifting a pair of socks, stealing bread or baby formula don't deserve life sentences." (*Id.* at p. 53.)

There can be no doubt that an inmate legitimately serving a third strike sentence for a serious felony is one of the "truly dangerous criminals" to whom the Voter Information Guide was referring. Such an inmate is clearly not akin to a person "convicted of shoplifting a pair of socks, stealing bread or baby formula." Because requiring that such an inmate serve his full sentence promotes public safety – "a key purpose" of the Act – the policies behind the Act support respondent's position that defendants

who have suffered current convictions of serious or violent felonies are not eligible for resentencing under the Act.

CONCLUSION

In sum, the Act as a whole and the policies behind it evince an intent on the part of the electorate to exclude inmates who have suffered a current conviction of a serious and/or violent felony from taking advantage of the resentencing provisions of section 1170.126. Because appellant suffered a current conviction of a serious felony (as well as a conviction of a nonviolent/nonserious offense), he is ineligible for resentencing under section 1170.126. Accordingly, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal and affirm the trial court's denial of appellant's petition for recall of sentence.

Dated: March 6, 2015

Respectfully submitted,

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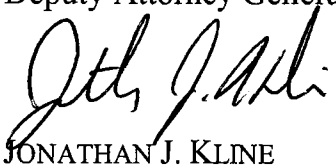

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 2,926 words.

Dated: March 6, 2015

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DECLARATION OF SERVICE

Case Name: **People v. Oscar Machado** **Case** No.: **S219819**

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 **March 6, 2015**, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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To be delivered to:
The Honorable William C. Ryan
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On **March 6, 2015**, I caused original and thirteen copies of the **RESPONDENT'S REPLY 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 Federal Express, **Tracking #** 8055 1140 9713

On **March 6, 2015**, I caused one electronic copy of the **RESPONDENT'S REPLY BRIEF ON THE MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On **March 6, 2015**, I caused one electronic copy of the **RESPONDENT'S REPLY 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 **March 6, 2015**, at Los Angeles, California.

Maria P. Navarro	Navarro
Declarant	Signature

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