IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No. S219454
Plaintiff and Respondent,	)	
	)	
v.	)	Court of Appeal No. B249651
	)	
TIMOTHY WAYNE JOHNSON,	)	(Los Angeles County Superior
	)	Court No. YA038015)
Defendant and Appellant.	)	
	)	

APPELLANT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

1. For the purpose of determining eligibility for resentencing under the Three Strikes Reform Act of 2012 (Prop. 36, Gen. Elec. (Nov. 6, 2012) [Pen. Code, § 1170.126]), is an offense considered a serious or violent felony if it was not defined as a serious or violent felony on the date the offense was committed but was defined as a serious or violent felony on the effective date of the Act?

STATEMENT OF THE CASE

On December 21, 1998, appellant was sentenced to a "Three Strikes" life term based upon his conviction of two counts of dissuading a witness in violation of Penal Code section 136.1, subdivision (a)(1).[1] (CT 24) Appellant's prior serious felony convictions were for robbery, residential burglary, and assault with a deadly weapon. (CT 13, 21)

On May 10, 2013, a formal Petition for Recall of Sentence was filed in appellant's behalf by the Post Conviction Assistance Center (PCAC). (CT 11-38)[2]

On June 12, 2013, the court ruled on the May 10, 2013 petition, denying it with prejudice. (CT 109) The ruling was based upon the finding that appellant's current conviction, which is now defined as a serious felony, rendered him ineligible for relief under Penal Code section 1170.126. (CT 109-114)

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[1]/ Appellant's total sentence was 28 years to life. It comprised concurrent 25 years to life terms for the dissuasion counts, plus 3 years for three Penal Code section 667.5, subdivision (b) enhancements. (CT 24)

[2]/ On November 8, 2012, appellant had written to the superior court, requesting information on having his indeterminate "strike" sentence reduced pursuant to Proposition 36. (CT 67) On February 19, 2013, the trial court characterized that request as a petition to recall his sentence pursuant to Penal Code section 1170.126 and denied it with prejudice. (CT 3-10) On June 10, 2013, at the request of PCAC, and with the District Attorney's express lack of objection, the court vacated the February 19 order denying appellant's "petition." (CT 40-100, 101, 103-104)

Appellant appealed. (CT 116) On May 23, 2014, the Court of Appeal issued its opinion affirming the trial court's order denying the petition. (See Court of Appeal, Second Appellate District, Docket in case B249651)

On June 24, 2014, petitioner's Petition for Review was filed. Thereafter, on July 30, 2014, this Court granted review. (See California Supreme Court Docket in case S219454)

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

Proposition 36 (Prop. 36) amended the Three Strikes law to dilute it such that life sentences are reserved for "cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender." (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168.) Penal Code section 1170.126 was also enacted to create the mechanism by which a defendant serving a third strike sentence that would not have been a life sentence under the diluted new law can obtain a recall of his sentence and be resentenced as a second strike offender. (*Ibid.*)

The Three Strikes Law is constructed of a series of statutes. Some of these, basically parallel each other as the law was developed simultaneously by the Legislature and by the electorate using the initiative process. Thus, Penal Code sections 667 and 1170.12 both lay out the Three Strikes Law, each explaining how the alternative sentencing scheme works and when it applies. Both sections refer to Penal Code sections 667.5 and 1192.7 for definitions of "violent" and "serious" felonies within the meaning of

the Three Strikes Law. Penal Code sections 667.1 and 1170.125 were added later to modify each respective statute (sections 667 and 1170.12) so as to update these definitions-by-reference when the referenced statutes (sections 667.5 and 1192.7) were themselves modified. (See *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 574-575, 577.) Thus, the law comprises several statutes that must be read together to complete it.

Prop. 36, in addition to amending the existing statutes, added another statute to the mix, Penal Code section 1170.126. Section 1170.126, which embodies the recall provisions to enable already imposed third strikes sentences to be modified consistent with the new criteria, also cross-references the basic sections 667 and 1170.12. And, it is included in section 1170.125. Therefore, section 1170.126 must be read in conjunction with the rest of the statutory scheme and interpreted consistently with it. (See *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.)

The issue presented here relates to the interplay between sections 667.1 and 1170.125 and the basic Three Strikes Law as embodied in section 667 and 1170.12, respectively. Since 2000, the sections 667.1 and 1170.125 have been interpreted to require that the determination of whether a *prior* conviction constitutes a "strike" within the meaning of sections 667 and 1170.12 be based upon the definitions of violent or serious felonies in effect on the date of the *commission* of the current offense being punished. (See *People v. James* (2001) 91 Cal.App.4th 1147, 1151; *People v. Superior*

Court (*Andrades*) (2003) 113 Cal.App.4th 817, 826-830; *In re Jenson* (2001) 92 Cal.App.4th 262, 266, fn.3.) Until the passage of Prop. 36, the status of the current offense being punished as either violent or serious was irrelevant to what "strikes" sentence would be imposed. Now, that status matters. Now, sections 667.1 and 1170.125 must be applied to the determination of the status of the *current* offense as well. And, the status of the current offense is a key component to a defendant's eligibility for a recall of his sentence under section 1170.126.

The Court of Appeal concluded that, irrespective of section 1170.125, which expressly includes section 1170.126 in its purview, and the cases that have interpreted section 1170.125 to require that the determination of whether a crime could be considered violent or serious for purposes of the Three Strikes Law be based upon the definition of those offenses at the time of the commission of the offense being punished, a defendant's eligibility for a sentence recall must be based upon the current definitions of violent and serious felonies. As appellant's crime is currently defined as serious, the Court of Appeal found appellant ineligible for a recall. The Court of Appeal was wrong.

Reading section 1170.126 in the overall context of the Three Strikes Law as it has been applied and interpreted demonstrates that the determination of whether a person is eligible for a recall of a third strike sentence must be based upon whether his crime was a "violent" or "serious" felony at the time of its commission. This conclusion is consistent with the statutory language and the purposes of the electorate in enacting Prop. 36.

B. The Statutory Language

When interpreting a statute, the courts "look first to the words themselves. [Citations] When the language is clear and unambiguous, there is no need for construction. [Citations] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008.)

When the Three Strikes Law was enacted in 1994, it provided, as it does today, that all violent and serious felonies as defined in Penal Code sections 667.5 and 1192.7 were "strikes." (Pen. Code, §§ 667, subd. (d) (1), 1170.12, subd. (b) (1).) Section 2 of Proposition 184, enacting the "Three Strikes Law," provided that "[a]ll references to existing statutes are to statutes as they existed on June 30, 1993." Penal Code section 667, the Legislature-enacted parallel provision creating Three Strikes sentencing, also initially indicated that the controlling definitions were those in effect on June 30, 1993. (Former Pen. Code, § 667, subd. (h).)

In 2000, when Proposition 21 increased the number of offenses that qualified as serious felonies, Penal Code section 1170.125 was added to ensure that the newly added "strikes" were applied only prospectively. That section provided that the definitions of violent and serious felonies as referred to in the "strikes" law were as they existed on the

effective date of the Proposition 21, including the amendments made by the proposition, but clarified that these definitions were for crimes committed *on or after* the effective date of Proposition 21. Penal Code section 667.1 was enacted at the same time to make the same provisions for the "strikes" law as it appeared in Penal Code section 667. In 2006, when additional changes were made to the lists of offenses that were "violent" and "serious," section 1170.125 was amended to provide that, for crimes committed *on or after* the effective date of the amendments, and section 667.1 was similarly updated. Now, after the passage of Prop. 36, Penal Code section 1170.125 has been amended again to provide that "for all offenses committed *on or after* the effective date of this act," all references to existing statutes in section 1170.12 *and* the new 1170.126 are to those statutes as they exist at the time of the effective date of Proposition 36. (Emphasis added.)[3]

Thus, from its inception, the determination of whether a crime was a violent or serious felony for purposes of the Three Strikes Law has been based upon the definition of violent or serious felony in effect at the time of the commission of the crime being punished. (See Pen. Code, §§ 667.1, 1170.125; *People v. James* (2001) 91 Cal.App.4th 1147, 1151; *People v. Superior Court* (*Andrades*) (2003) 113 Cal.App.4th 817, 826-830;

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[3]/ Penal Code section 1170.125 now reads: "Notwithstanding Section 2 of Proposition 184, as adopted at the November 8, 1994, General Election, for all offenses committed on or after November 7, 2012, all references to existing statutes in Sections 1170.12 and 1170.126 are to those sections as they existed on November 7, 2012."

In re Jenson (2001) 92 Cal.App.4th 262, 266, fn.3; see also *People v. Ringo* (2005) 134 Cal.App.4th 870, 884.) And, the clear language of Penal Code section 1170.125 has required that new designations of serious and violent felonies are to be applied going forward, to offenses committed "on or after" the effective date of the amendments to the lists of serious or violent felonies. Thus, "strike" sentences are available for any case in which the law in effect at the time of the commission of the current offense defined the charged prior "strike" conviction as a serious or violent felony, but are not available if, at the time of the commission of the current offense, the prior "strike" was not yet listed as a violent or serious felony. (See *People v. James*, *supra*, 91 Cal.App.4th at p. 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]; see also *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 574-575, 577 [explaining lock-in date for new "strikes"]; *In re Jenson*, *supra*, 92 Cal.App.4th at p. 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].)

Until now, the status of the current offense as serious or violent was irrelevant to whether the defendant could receive a "third strike" sentence. In the past, all defendants with multiple "strike" priors were given an indeterminate life sentence irrespective of the status of the current offense. With the passage of Prop. 36, however, whether a

defendant with multiple prior serious or violent felonies will receive a second strike, determinate, sentence or a third strike, indeterminate, sentence now turns on the status of a *current* felony. (Pen. Code, §§ 667, subd. (e)(2), 1170.12, subd. (c)(2).)

Additionally, with the passage of Proposition 36, Penal Code sections 667.1 and 1170.125 once again were amended to state that, for purposes of the Three Strikes Law, changes made to the lists of violent or serious felonies apply *prospectively* to crimes that are committed on or after November 7, 2012. And, section 1170.125 expressly refers to Penal Code section 1170.126 in making this statement. That is, once again, the date of the *current* felony controls which definition of violent or serious felony will be used to determine what, if any, "strike" sentence will be imposed, and Penal Code section 1170.125's reference to Penal Code section 1170.126 makes it clear that the same rule applies in cases of petitions for recall of a third strike sentence that was previously imposed. Because the plain language of the statutes states that new additions to the list of serious or violent felonies can be used in the determination of whether a crime was a violent or serious felony for purposes of the Three Strikes Law only for crimes committed on or after the effective date of the statutory change making the additions, whether appellant's *current* conviction is a violent or serious felony turns on the definition of violent or serious felony in effect at the time of its commission. (See *People v. Ringo*, *supra*, 134 Cal.App.4th at p. 883 [in interpreting an initiative look first to the language of the statute].)

"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.)

The "on or after" language of section 1170.125 has always been construed to mean that for purposes of the Three Strikes Law the definition of a violent or serious felony is controlled by the definition of those terms in effect on the date of the commission of the offense being sentenced. The use of the same language in the latest amendment to the statute gives rise to the "almost irresistible presumption" that the same construction should apply to the amended statute. The inclusion of new section 1170.126 in section 1170.125 further demonstrates that the same definitions and rules should apply throughout the Three Strikes sentencing scheme.

Moreover, "[t]he statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme." (*People v. Rizo* (2000) 22 Cal. 4th 681, 685; *People v. Briceno* (2004) 34 Cal.4th 451, 459.) "We do not interpret statutory language in isolation but interpret it "'in the context of the entire statute of which it is a part, in order to achieve harmony among the parts.'"" (*Id.* at p. 460; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 903.)

There is no indication that the definitions of violent and serious felonies are intended to apply differently with respect to the commitment offense and the prior, "strike," offenses. As a general rule, 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 ["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."].) Thus, the use of the same prospective language in section 1170.125, with its reference to section 1170.126, along with judicial construction of the application of amendments to the definitions of serious and violent felonies as being dependent on the date of the current offense, demonstrate that the date of the current offense should control the determination of its status as a serious felony for purposes of Penal Code section 1170.126.

Subdivision (a) of section 1170.126 states that it applies to those "whose sentence under this act would not have been an indeterminate life sentence." Under the current act, a defendant who had committed his offense before March, 2000, but not been tried or sentenced on it until after November 7, 2012, would be sentenced according to the definition of serious or violent felonies that were in effect before March, 2000. This is because he would be sentenced under Penal Code sections 667 and 1170.12.

Penal Code, sections 667, subdivision (e)(2)(C), and 1170.12, subdivision (c)(2)(C), provide that a defendant who "has two or more prior serious and/or violent felony convictions" as defined by sections 667.5 and 1192.7, and "the current offense" is not a serious or violent felony as defined by sections 667.5 and 1192.7, "shall be sentenced" to a doubled, determinate second strike term, unless other specified disqualifications apply. Furthermore, sections 667.1 and 1170.125 explain that "all references" to existing statutes in sections 667 and 1170.12 are controlled by the definitions in effect as of the time of the commission of the offense being sentenced. (See Pen. Code, §§ 667.1, 1170.125; *Manduley v. Superior Court, supra,* 27 Cal.4th at pp. 574-575, 577; *People v. James, supra,* 91 Cal.App.4th at p. 1151; see also *People v. Ringo* (2005) 134 Cal.App.4th 870, 884 [for purposes of 667, subdivision (a), in post-Prop. 21 cases, "the crucial date for determining if a prior conviction qualifies as a serious felony is the *date of the charged offense*" (emphasis added].)

Sections 667.1 and 1170.125 use the phrase "all references" to existing statutes in sections 667 and 1170.12. The present versions of Penal Code sections 667, subdivision (e)(2)(C), and 1170.12, subdivision (b)(2)(C), provide that a "current" offense that is not a felony defined as violent or serious within the meanings of section 667.5 and 1192.7 is not subject to a third strike sentence. The reference in these subdivisions to sections 667.5 and 1192.7 is a part of "*all references*" to existing statutes those sections. Thus, pursuant to Penal Code section 667.1 and 1170.125, and the cases interpreting them, the

determination of whether a second strike sentence must be imposed instead of a third strike sentence is now made based upon whether the *current* felony was defined at the time of its *commission* as a violent or serious felony.

Therefore, if a defendant were tried today under the act, and his crime was committed before March, 2000, the determination of whether his current offense qualifies for a third strike sentence would be controlled by the definitions in effect as of June 1993. If it were committed after March, 2000, but before 2006, it presumably would be controlled by the definition in effect in March, 2000. If it was committed after 2006, it would be controlled by the definition in effect in September, 2006. *Only* if it were committed after November 7, 2012, would it be controlled by the current definition.

Penal Code sections 667.1 and 1170.125 have consistently stated that new definitions apply only to crimes committed on or after their effective dates and have consistently been interpreted to require that the date of the current offense being sentenced controls the definitions to be applied. (See *People v. James*, *supra*, 91 Cal.App.4th at p. 1151; *People v. Superior Court* (*Andrades*), *supra*, 113 Cal.App.4th at pp. 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.) Thus, pursuant to Penal Code section 1170.125 and the case law interpreting it, a person whose current offense was not a violent or serious felony when committed, is a person "whose sentence under this act would not have been an indeterminate life sentence" within the meaning of Penal Code

section 1170.126. By extension then, the determination of whether a third strike sentence should be recalled under Penal Code section 1170.126 must be based upon whether the offense being punished was a serious or violent felony at the time of its commission.

Penal Code section 1170.126 does not provide that a recall is available to persons whose sentence under this act would not have been an indeterminate life sentence "*if their crimes had been committed after the effective date of this act.*" Reading the language of subdivision (a) of section 1170.126 with an assumption that the current definition of "serious felony" was intended to apply, would effectively add such a provision to subdivision (a). But, subdivision (a) does not purport to limit its application to those qualifying under today's definitions of the specific crime. Rather, its intended application is conditioned on the "sentence" that would result under the Act, which in turn depends on the definitions of the relevant crimes in effect at the time of their commission.

The fact that section 1170.126 applies to those "whose sentence under this act would not have been an indeterminate life sentence" clarifies why section 1170.125 includes 1170.126 along with 1170.12. For both, the determination of whether a second strike sentence is applicable depends on the date of the commission of the offense being punished.[4]

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[4]/ To interpret the statute otherwise would be to read the reference to section 1170.126 in 1170.125 out of that statute. A court should not presume drafting error and write out portions of a statute "when the statute is reasonably susceptible to an

In rejecting this interpretation of the act, the Court of Appeal relied on the fact that section 1170.126, subdivisions (b) and (e), are written in the present tense and state that a person is eligible for resentence if he is serving a sentence for crimes that "are" not defined as serious or violent. While it is true that this statement of eligibility in the present tense suggests that eligibility under the statute was meant to be based upon current definitions of violent or serious felonies and that the choice of verb tense is significant in construing statutes (see *People v. Loeun* (1997) 17 Cal.4th 1, 11), the use of present tense 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.)

Relying on the use of the present tense to confirm that the current definitions of violent or serious felonies control whether a person is eligible for a sentence recall pursuant to Penal Code section 1170.126 is inappropriate here because both sections 667 and 1170.12 have always explained the circumstances permitting "strike" sentences in the *present* tense. Thus, Penal Code section 667, subdivision (e), and Penal Code section 1170.12, subdivision (c), both state that the three strikes sentencing scheme "shall apply where a defendant *has* one or more prior serious and/or violent felony convictions. . ." (Emphasis added.) These statutes do not say that they are applicable where the defendant "had or has" prior violent or serious felonies. Yet, pursuant to Penal Code sections 667.1

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interpretation that harmonizes all its parts without disregarding or altering any of them." (*People v. Garcia* (1999) 21 Cal.4th 1, 5-6.)

and 1170.125 as interpreted by the courts, if a defendant is being sentenced for a crime committed before his prior felonies were added to the list of violent or serious felonies, he could not get a three strikes sentence despite the fact that by the time of his conviction and sentence his priors had become "strikes." That is, even if by the time of conviction and sentence such defendant "has" a "strike" prior, he cannot get a "strike" sentence. Only if his offense was committed on or after the date that his priors became serious or violent felonies could he get the three strikes sentence; the date of current offense being sentenced controls the definition of violent or serious felonies. (See *People v. James*, *supra*, 91 Cal.App.4th at p. 1151.) Because a change in the law after the defendant committed his current offense cannot bring him into the purview of the Three Strikes Law despite the fact that he *has* a serious or violent felony prior at the time that he is convicted or sentenced, the use of the present tense in this context does not indicate an intention on the part of the drafters of the law that only the current definition of violent and serious felonies applies. Rather, in context, it means the definition 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*), *supra*, 113 Cal.App.4th at pp. 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.)

Sections 667.1 and 1170.125 make clear that the use of the present tense does not mean that the current definitions apply. Those sections that, as noted above, provide that

new definitions apply to crimes committed "on or after" the date the new definitions became law, codify the requirements of the *ex post facto* clause of the federal Constitution. Under the *ex post facto* clause, changes in the definitions of serious or violent felonies in a manner that would make a "strikes" sentence applicable to an offense for which no "strikes" sentence could have been imposed at the time of its commission would unconstitutionally increase the penalty after the crime. (See *Lynce v. Mathis* (1997) 519 U.S. 433, 441 [117 S.Ct.891; 137 L.Ed.2d 63]; *Peugh v. United States* (2013) ___ U.S. ___ [133 S.Ct. 2072, 2086; 186 L.Ed.2d 84, 101-102].)

The Court of Appeal in this case determined that *ex post facto* principles were irrelevant in the context of a recall of sentence under Penal Code section 1170.126. As a result, the court interpreted section 1170.125 differently with respect to section 1170.126 than with respect to section 1170.12, requiring a prospective application of definitions in the context of the latter, but not in the context of the former. This decision, however, is inappropriate.

Nothing in the language of the statutes supports a different application in the two contexts. Moreover, *ex post facto* principles may require the prospective application of the new definitions with respect to Penal Code section 1170.126, because to retrospectively define a defendant's crime as serious would alter the definition of his crime in a way that could disadvantage him with respect to punishment. (See *Lynce v. Mathis, supra*, 519 U.S. at p. 441 [117 S.Ct.891; 137 L.Ed.2d 63]; *Peugh v. United*

States, *supra*, ___ U.S. ___ [133 S.Ct. 2072, 2086; 186 L.Ed.2d 84, 101-102] [merely retrospectively depriving the defendant of the opportunity for a lower sentence is prohibited].) Courts are obligated to construe any ambiguity in a penal statute in a manner which avoids constitutional problems. (*People v. Leila* (2013) 56 Cal.4th 498, 506-507; *People v. Douglas M.* (2013) 220 Cal.App.4th 1068, 1076-1077.) Thus, this Court should construe the statute to avoid violation of the *ex post facto* clause.

Ultimately, however, irrespective of whether *ex post facto* principles would be implicated by not requiring use of the old definitions in the context of section 1170.126, it is clear that section 1170.125, and all of the other statutes creating the Three Strikes sentencing scheme do now, and have always, expressly stated that the definitions of violent or serious felonies for purposes of the Three Strikes statutes are the definitions in effect at the time of the current offense and any changes to the definition are applied *prospectively* to *new offenses committed after the change* **and** changes to the statute *after the commission of the offense being punished* do not apply. Thus, this interpretation must be applied in the context of section 1170.126. (Cf. *People v. Estrada* (1995) 11 Cal.4th 568, 575-576 [because rule implementing constitutional standards was the basis of statutory language, the language had to be construed pursuant to the constitutional interpretation].)

Additionally, in resolving statutory ambiguity in a criminal statute, courts generally adopt the interpretation that favors the defendant. 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.) The interpretation of Penal Code section 1170.125 that requires the application of the definitions of violent or serious felonies in effect at the time of the commission of the offense in the determination of eligibility for a sentence recall under Penal Code section 1170.126 is at least in "relative equipoise" with the interpretation that merely reads the reference to section 1170.126 out of section 1170.125 altogether. Therefore, the rule of lenity favors having the date of the commission of the current offense control the definitions of violent or serious felonies under the statute.

C. Voters' Intent

The intent of the electorate in passing Proposition 36 was undoubtedly complex. The overall purpose and effect of the proposition was to "dilute" the Three Strikes Law so that it would apply to fewer cases. (See *People v. Yearwood*, *supra*, 213 Cal.App.4th at pp. 167-168.) The stated goals in the voter pamphlet were save the state money and protect the public. The means of accomplishing both of these goals was to reduce prison overcrowding that was threatening to result in there being insufficient space to house the truly dangerous criminals and was very costly to the taxpayers. Such overcrowding would in turn be reduced by making "the punishment fit the crime" and reserving life sentences for defendants whose current offenses are violent or serious, thereby making

room for those who had committed more violent crimes. This would be accomplished going forward by imposing second strike sentences for non-violent, non-serious felonies, and by permitting persons already serving a third strike sentence for something that would be punished as only a second strike sentence under the new scheme to petition to have their sentences recalled and reduced. (See *Id.* at p. 171; Official Voter Information Guide, http://voterguide.sos.ca.gov/propositions/36 [the guide listed Prop. 36's basic purposes as being to make the punishment fit the crime, save California over $100 million every year, and make room in prison for dangerous felons].)

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 felonies that were not serious or violent. Therefore, in addition to changing the law, it included a recall provision to reform the law from the get-go.

The promoters of the initiative also sought to assure the voters that the new law would not result in the truly dangerous being freed. The new law, however, 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 declared to be violent or serious would not be excluded from a second strike sentence if convicted after the passage of Prop. 36. And, the voter pamphlet itself warned that it "[m]ay authorize *re*-sentencing if third strike conviction *was* not serious or violent." (Emphasis added.) Thus, the drafters of the initiative must have anticipated that some people petitioning for recall of the sentence would be persons whose current convictions *were* not violent or serious when committed, but are now, and so alerted the voters to that fact.

Section 1170.126 includes provisions seemingly designed to accomplish all the legislative goals - reducing overcrowding, saving taxpayer dollars, and protecting the public. It 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).) The best way to accomplish all the goals of the statute is to have a large pool of eligible defendants, who if they are not unreasonably dangerous can have shorter, less costly terms of imprisonment.

Determining eligibility for a sentence recall based upon the definition of violent or serious in effect at the time of the commission a defendant's offense would seemingly render more defendants eligible for a recall of sentence. Such recalls in turn would better

achieve the goal of reducing prison population. At the same time, the ability to deny a recall upon a finding of unreasonable dangerousness would still remain to achieve the goal of keeping truly dangerous criminals behind bars as well. (See Pen. Code, § 1170.126, subd. (f).) A liberal construction of recall eligibility, which merely gets the defendant a hearing on whether his sentence should be reduced, best furthers all the 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.

The statutory language and the stated goals of the voters in passing Proposition 36 together demonstrate that section 1170.126 was designed to permit, with few inapplicable exceptions, all defendants who are serving an indeterminate term for a crime that was not serious or violent when committed and who are not unreasonably dangerous to the public to have their sentences recalled and determinate "second strike" sentences imposed. Therefore, that is how the statute must be interpreted and applied. (See *People v. Ringo*, *supra*, 134 Cal.App.4th at p. 883 [statutory language is construed in the context of the language of the statute and the other indicia of voters' intent such as the arguments in the official ballot pamphlet].)

Additionally, this Court should not rely on the stated purpose of protecting the public as a basis for interpreting the statute in a manner to achieve the greatest number of

third strike sentences. In this regard, this Court's opinion in *People v. Garcia* (1999) 20 Cal.4th 490 is instructive. After noting that the overall purpose of the Three Strikes Law was to provide longer sentences for persons who had prior convictions for "strike" offenses, this Court stated, "But our decisions make clear that this purpose 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.

D. Application to the Current Case

In August, 1998, appellant attempted to dissuade two witnesses in violation of Penal Code section 136.1, subdivision (a) (2). (CT 20-21, 23). In August, 1998, attempting to dissuade a witness was not a serious felony. It became a serious felony a year and a half later when Proposition 21 added Penal Code section 136.1 to the list of serious felonies in Penal Code section 1197.7, subdivision (c). (See *Manduley v. Superior Court*, *supra*, 27 Cal.4th 537, 577; *People v. Neely* (2004) 124 Cal.App.4th 1258, 1262.)

If Penal Code sections 1170.125 and 1170.126 are read consistently with past interpretations of section 1170.125 in the context of the Three Strikes Law, appellant's eligibility must be determined based upon the definition of serious and violent felonies in 1998. As appellant's crimes were not serious felonies at that time, he is eligible for a sentence recall and resentencing to two determinate terms. Therefore, the order finding him ineligible and dismissing his petition for a sentence recall must be reversed.

CONCLUSION

The Three Strikes Law is constructed of a series of interrelated statutes. Primarily, it requires harsher sentences for defendants who have committed multiple violent or serious felonies. The definitions of violent or serious felonies have expanded over time, but with each expansion of the list of crimes that would render a defendant eligible for a life sentence under the Law, the changes have been applied prospectively such that the definition in effect at the time of the commission of the crime being punished dictates whether and how the Three Strikes Law will operate on the sentence.

When Prop. 36 was enacted to reform the Three Strikes Law so as to make its life term inapplicable to most non-violent, non-serious felonies, it also added section 1170.126 to the group of statutes comprising the Law. In adding section 1170.126, the legislation included it in the statute that requires prospective application of new definitions (Pen. Code, § 1170.125), and stated that it was meant to apply to persons whose sentence under the new provisions would have been a determinate term.

As the new provisions require consideration of the definition of serious or violent felonies in effect at the time of the commission of the offense, and section 1170.125 also requires prospective application of changes in the law, 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.

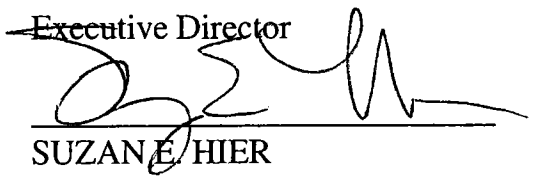
And, as his crimes were not serious felonies at the time the he committed them, he is eligible for a sentence recall pursuant to Penal Code section 1170.126.

DATED: September 19, 2014

RESPECTFULLY SUBMITTED

CALIFORNIA APPELLATE PROJECT

JONATHAN B. STEINER
Executive Director



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WORD COUNT CERTIFICATION
People v. Timothy Wayne Johnson

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 6,482 words.

Suzan E. Hier

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 September 18, 2014, I served the within

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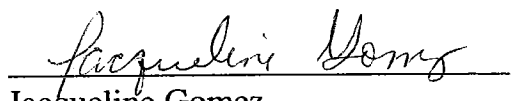
I declare under penalty of perjury that the foregoing is true and correct.

Executed September 18, 2014 at Los Angeles, California.



Jacqueline Gomez