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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

v.

**JOSEPH HENRY BROCKETT,**

**Defendant and Appellant.**

**A144090**

**(San Mateo County  
Super. Ct. No. SC051995A)**

Joseph Henry Brockett was committed to prison under the Three Strikes Law for convictions of one serious felony and three nonserious and nonviolent felonies. He filed a petition for resentencing under the Three Strikes Reform Act, Penal Code section 1170.126.<sup>1</sup> The trial court found him ineligible for resentencing on his nonserious, nonviolent convictions because of the serious felony conviction.

After the denial of Brockett’s petition, the California Supreme Court held “that an inmate is eligible for resentencing with respect to a current offense that is neither serious nor violent despite the presence of another current offense that is serious or violent.” (*People v. Johnson* (2015) 61 Cal.4th 674, 695 (*Johnson*)). Brockett contends, and the Attorney General concedes, that *Johnson* makes clear he was not statutorily ineligible for resentencing. The parties therefore agree the matter should be remanded for reconsideration of Brockett’s petition for resentencing. Accordingly, we will reverse the

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<sup>1</sup> All statutory references are to the Penal Code.

order from which this appeal is taken and remand the matter for further consideration of his petition.

#### FACTUAL AND PROCEDURAL BACKGROUND

On February 10, 2004, a San Mateo County jury convicted Brockett of residential burglary (§ 460, subd. (a)), a serious felony (§ 1192.7, subd. (c)(18)), and three felonies that were neither serious nor violent—one count of petty theft with a prior (§ 666) and two counts of possession of a dangerous weapon (dirk or dagger) (former § 12020, now renumbered § 21310). The jury also found true five allegations under section 667, subdivision (a) for prior serious felonies, five strike allegations under section 1170.12, subdivision (c)(2), three allegations under section 667.5, subdivision (b) for prior prison terms, and an allegation of probation ineligibility under section 1203, subdivision (e)(4).<sup>2</sup>

On March 11, 2004, pursuant to the Three Strikes law, the trial court sentenced Brockett to a prison term of 60 years to life comprised as follows: a term of 25 years to life for the residential burglary conviction; a consecutive term of 25 years to life for one of the convictions for possession of a dangerous weapon; and 10 years for two of the section 667, subdivision (a) enhancements (finding that the other ones were for offenses which had not been brought and tried separately). The court imposed, but stayed, 25-years-to-life terms for the other conviction of possessing a dangerous weapon and for the petty theft conviction. The court did not impose an additional sentence for the prison priors.

In November 2012, California voters approved Proposition 36, which is known as the Three Strikes Reform Act of 2012 (Reform Act). Pursuant to the Reform Act, a third-strike indeterminate life sentence is generally reserved for felony offenders whose current

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<sup>2</sup> The record does not contain documents pertaining to Brockett's original convictions. Thus, for the crimes of which he was convicted and the sentence imposed, we, like the parties, rely on his petition for resentencing, the district attorney's opposition, and Brockett's reply. The facts relating to the convictions and sentence are not disputed, and we may therefore rely on the parties' briefs. (See *Franklin v. Appel* (1992) 8 Cal.App.4th 875, 893, fn. 11 [court may take parties' briefs as accurate statements of parties' positions on law and facts].)

offense is a “serious” or “violent” felony, as defined in sections 1192.7, subdivision (c) and 667.5, subdivision (c). The term for an offense that is a nonserious, nonviolent felony is only doubled. (§ 1170.12, subd. (c)(2)(C).) Furthermore, an inmate serving an indeterminate life sentence under the Three Strikes law, “whose sentence under [the Reform Act] would not have been an indeterminate life sentence,” may petition the superior court for resentencing. (§ 1170.126, subds. (a), (b).) The court has discretion to refuse to resentence the inmate if resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).)

On October 8, 2014, Brockett filed a pro per petition for resentencing under the Reform Act. On November 14, 2014, the district attorney filed an opposition to the petition contending that because one of Brockett’s convictions was for a serious felony, he was statutorily ineligible for resentencing. On January 7, 2015, Brockett, now represented by counsel, filed a response to the district attorney’s opposition. In his response to the prosecutor’s opposition, Brockett informed the court that a number of cases involving the issue of eligibility for resentencing on nonserious, nonviolent third-strike convictions imposed in conjunction with a serious or violent felony conviction were pending before the California Supreme Court. On January 23, 2015, the trial court denied Brockett’s petition, finding him statutorily ineligible for resentencing because of his conviction of residential burglary—a serious felony. The court noted, however, that the cases pending before the California Supreme Court “may change the posture of this case in the not so distant future[.]”

On January 26, 2015, Brockett filed a timely notice of appeal. On July 2, 2015, the California Supreme Court issued its opinion in *Johnson*. (*Johnson, supra*, 61 Cal.4th 674.)

#### DISCUSSION

Brockett argues *Johnson* establishes that the trial court erred in finding him ineligible for resentencing. As *Johnson* explains, “[t]he [Reform] Act authorizes prisoners serving third-strike sentences whose ‘current’ offense (i.e., the offense for which the third-strike sentence was imposed) is not a serious or violent felony to petition

for recall of the sentence and for resentencing as a second-strike case.” (*Johnson, supra*, 61 Cal.4th at pp. 679-680.) *Johnson* held “that the [Reform] Act requires an inmate’s eligibility for resentencing to be evaluated on a count-by-count basis,” and “an inmate may obtain resentencing with respect to a three strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third-strike sentence of 25 years to life.” (*Id.* at p. 688.)

The Attorney General acknowledges Brockett’s argument is correct under *Johnson*, and the matter should be remanded to the superior court for reconsideration of his resentencing petition. Specifically, the court must evaluate Brockett’s eligibility for resentencing on a count-by-count basis. The court retains discretion to refuse to resentence Brockett if it finds that “resentencing [him] would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f); *Johnson, supra*, 61 Cal.4th at p. 682.) We will order accordingly.

#### DISPOSITION

The order denying Brockett’s petition for resentencing is reversed, and the matter is remanded for further consideration of his petition.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.

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