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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTT ANDREW HOVE, SR.,

Defendant and Appellant.

E054346

(Super.Ct.No. SWF029575)

OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge.

Affirmed and remanded for resentencing.

Michael S. Romano for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Christine Levingston Bergman, Melissa Mandel, and Warren Williams, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal by defendant and appellant Scott Andrew Hove, Sr. (defendant), challenging his sentence of 29 years to life in state prison, which the trial court imposed under the three strikes law after a jury found defendant guilty of petty theft with a prior theft conviction in violation of Penal Code section 666,¹ based on evidence that defendant stole gloves and a roll of wire, worth \$20.94, from Home Depot. Defendant contends the trial court abused its discretion by denying his request to strike two of his three first degree burglary convictions, all prior serious and/or violent felony convictions within the meaning of the three strikes law. Defendant also claims that his sentence violates the state and federal constitutional prohibitions against cruel and/or unusual punishment. Finally, defendant challenges the jury's guilty verdict on the ground that the presumption of prejudice arising from the misconduct of a juror was not rebutted in this case.

After the parties filed their respective briefs in this appeal, the electorate amended the three strikes law by passing Proposition 36, the Three Strikes Reform Act of 2012, effective November 7, 2012. At our request, the parties submitted additional briefing regarding the applicability of the amendments to this appeal. Defendant contends that the amendment to sections 667 and 1170.12, which would reduce his sentence from 25 years to life to a far lesser determinate term, applies to him under the doctrine of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), i.e., that an amendatory statute which reduces punishment applies in all cases not yet final on appeal, unless there is a clear indication

¹ All statutory references are to the Penal Code unless otherwise indicated.

that the enacting body did not so intend. As we discuss below, we agree and, therefore, we will not address defendant's two other challenges to his sentence or the three strikes law. We do not agree with defendant's jury misconduct claim and, therefore, will affirm the jury's determination of guilt but will remand for resentencing.²

FACTS

The facts are undisputed. On November 15, 2009, at 12:55 p.m., defendant went to a Home Depot store in Lake Elsinore. He took a pair of work or construction gloves off a rack, put them in the waistband of his pants and covered them with his sweatshirt. Defendant then took a spool of welding wire and also concealed that under his sweatshirt, in the waistband of his pants. Defendant was stopped by two asset protection specialists as he left the store. They recovered the gloves and the wire from the waistband of defendant's pants. The combined value of the two items was \$20.94.

Defendant signed a voluntary statement acknowledging that he took the items from Home Depot without intending to pay for them. When questioned by a deputy sheriff prior to his arrest, defendant said that he had come to Home Depot to get some items he needed to finish a welding job. He had not expected the items to cost as much they did. Defendant took the gloves first, removed the tag, and hid them under his shirt. After putting the wire under his shirt, defendant shopped around for a few minutes and

² Because we are not addressing defendant's other challenges to his three strikes sentence, his request for judicial notice, filed January 2, 2012, of documents pertinent to those claims is moot. Therefore, defendant's request for judicial notice is denied.

then left the store. Defendant admitted to the Home Depot employees who stopped him that he should have paid for the merchandise.

Defendant testified at trial that he needed the gloves and wire to finish a welding job. After he realized the items cost more than \$20, which is all the money he had with him, he decided to steal them. Defendant denied removing the price tag from the gloves, although the asset protection specialists claimed they found the price tag on the floor in the merchandise aisle. Defendant also denied leaving the store with the merchandise; he claimed that he never actually left the store because he had second thoughts and was turning around when he was apprehended.³

DISCUSSION

We first address defendant's juror misconduct issue because if meritorious it is dispositive.

1.

JUROR MISCONDUCT ISSUE

During trial, Juror No. 8 reported to the trial judge, with both attorneys present, that during a recess, Juror No. 7 told Juror No. 8 that he had read an article about the case in the local newspaper. When Juror No. 8 said she did not want to know anything about the article, Juror No. 7 blurted out that he knew that if the jury found defendant guilty in

³ According to defendant, it is undisputed that he did not leave the store with the merchandise. To support that claim, defendant cites testimony of one of the two asset protection specialists who stopped defendant. The asset protection specialist said after defendant took each item, they did not "contact" defendant because defendant had not yet left the store with the items.

this case, it would be defendant's third strike and defendant would go to jail for life.

Juror No. 8 told the judge that she had not told anyone else what Juror No. 7 had said, and she did not think that the two other jurors who had been sitting near them heard what Juror No. 7 said because they were involved in their own conversation.

In response to questioning by defense counsel, Juror No. 8 said she could be fair and impartial, despite what Juror No. 7 had told her, and that she would base her verdict in the case on the evidence presented at trial.

The trial court then called Juror No. 7 into chambers, and with both counsel present, asked whether Juror No. 7 had read an article in the newspaper about this case and discussed it with another juror. Juror No. 7 confirmed that he had read the article but had only mentioned it to Juror No. 8, and he did not think anyone else had overheard. Both attorneys stipulated to excuse Juror No. 7 from further service, and the trial court excused the juror in accordance with that stipulation.

After all the jurors except Juror No. 7 returned to the courtroom, the trial court reminded them not to read any newspaper articles about the trial, or any other trials. The court then asked whether anyone had read or seen an article about this case in the newspaper. No one responded. The court next asked whether anyone had read the local paper within the last week or two. The jurors responded collectively, "No." The court also asked whether any of the jurors had heard anyone, including another juror, talk about reading an article about this trial or any other trials in Riverside County. In response to what we must assume was silence on the part of the jurors, the court confirmed, "None? No? No. Okay. We're okay. Nobody? Okay."

Defendant contends the trial court's inquiry was inadequate and did not preserve his right to a fair trial because the judge did not individually question each juror and, therefore, did not rebut the presumption of prejudice. We disagree.

“A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. [Citations.]” (*People v. Nesler* (1997) 16 Cal.4th 561, 578; see U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.) Juror misconduct, such as reading a newspaper article or going to the crime scene, gives rise to a presumption that the misconduct affected the verdict and, therefore, was prejudicial. That presumption must be rebutted. (*Nesler*, at p. 578.) “Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.]” (*In re Hamilton* (1999) 20 Cal.4th 273, 296.)

In this case, the presumption of prejudice was rebutted. The trial court immediately investigated as soon as it learned that Juror No. 7 had read a newspaper article about the case. The trial court then dismissed Juror No. 7, who admitted bias, albeit in favor of defendant rather than against him. The trial court then asked whether any other juror had heard or read a newspaper article about the case. With the exception of Juror No. 8, who stated she could be impartial and base her verdict on the evidence presented in court, the other jurors all denied hearing about or reading any newspaper article about the case or any other Riverside County case. Defendant contends the trial

court should have questioned the jurors individually in chambers. However, he does not suggest how that questioning would have differed from the collective questioning the court conducted in this case. Instead, defendant speculates that the jurors might have been forthcoming if questioned individually in chambers. Because the trial court was not required to conduct an in chambers inquiry, defendant's speculation requires no discussion or response.

Based on our review of the record, we conclude that the trial court's inquiry was adequate and rebutted the presumption of prejudice.

2.

SENTENCING ISSUES

After defendant raised the issue at oral argument, we directed the parties to submit supplemental briefing on whether the voters' approval on November 7, 2012, of Proposition 36, the Three Strikes Reform Act of 2012, which amended sections 667 and 1170.12, applies to defendant. We conclude it does, for reasons we now explain. That conclusion renders moot defendant's two other sentencing issues.

Application of Three Strikes Reform Act

(1.) Proposition 36

As noted previously, while this appeal was pending, the voters passed Proposition 36, the Three Strikes Reform Act of 2012 (hereafter the Reform Act or the act). The

Reform Act became effective on November 7, 2012. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C), 1170.126.)⁴

Under the three strikes law as it existed before the passage of the Reform Act, a defendant with two or more strike priors who is convicted of any new felony would receive a sentence of 25 years to life. (Former § 667(e)(2)(A).) As amended by the act, section 667 provides that a defendant who has two or more strike priors is to be sentenced pursuant to paragraph 1 of section 667(e)—i.e., as though the defendant had only one strike prior—if the current offense is not a serious or violent felony as defined in section

⁴ For convenience, we will dispense with the use of “subdivision” in referring to statutes. We will also refer solely to section 667(e) in discussing the Reform Act, omitting reference to the substantially identical section 1170.12(c). However, the analysis applies to both section 667 and section 1170.12.

667.5(c) or section 1192.7(c), unless certain disqualifying factors are pleaded and proven.⁵ (§§ 667(d)(1), (e)(2)(C).)

⁵ Section 667(e)(2)(C) provides that second strike sentencing does not apply if the prosecution pleads and proves any of the following:

“(i) The current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true.

“(ii) The current offense is a felony sex offense, defined in subdivision (d) of Section 261.5 or Section 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290 except for violations of Sections 266 and 285, paragraph (1) of subdivision (b) and subdivision (e) of Section 286, paragraph (1) of subdivision (b) and subdivision (e) of Section 288a, Section 311.11, and Section 314.

“(iii) During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.

“(iv) The defendant suffered a prior serious and/or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies:

“(I) A ‘sexually violent offense’ as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.

“(II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289.

“(III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.

“(IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.

“(V) Solicitation to commit murder as defined in Section 653f.

“(VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.

“(VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.

“(VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death.”

The Reform Act also provides a procedure that allows a person who is “presently serving” an indeterminate life sentence imposed pursuant to the three strikes law to petition to have his or her sentence recalled and to be sentenced as a second strike offender, if the current offense is not a serious or violent felony and the person is not otherwise disqualified. The trial court may deny the petition even if those criteria are met, if the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126(a)-(g).) Accordingly, under section 1170.126, resentencing is discretionary even if the defendant meets the objective criteria (§ 1170.126(f), (g)), while sentencing under section 667(e)(2)(C) is mandatory, if the defendant meets the objective criteria.

The parties do not dispute that neither defendant’s current offense—petty theft with a prior theft conviction—nor his three burglary strike priors, disqualify him for resentencing pursuant to section 667(e)(2)(C). Defendant contends that section 667(e)(2)(C) is an ameliorative sentencing statute that presumptively applies to all criminal judgments that were not final as of its effective date, and that there is nothing in the language of the Reform Act which overcomes the presumption. The Attorney General contends that section 667(e)(2)(C) applies, prospectively only, to defendants who are first sentenced on or after November 7, 2012. She contends that it does not apply to defendant because he is “presently serving a third strike sentence” within the meaning of section 1170.126(a) and, therefore, defendant’s only remedy is to petition for relief under that statute.

(2.) Section 667(e)(2)(C) Applies to Defendants Whose Judgments Were Not Yet Final on the Effective Date of the Reform Act

There is a general rule of statutory construction, embodied in section 3 of the Penal Code, that ““when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively.’ [Citation.]” (*People v. Floyd* (2003) 31 Cal.4th 179, 184 (*Floyd*)). In *Estrada, supra*, 63 Cal.2d 740, the California Supreme Court created a limited exception to that presumption. The court held that where a statute has been amended to lessen the punishment for an offense and there is no clear indication of an intent to apply the amendment prospectively only, it must be presumed that the Legislature intended the mitigated punishment to apply to all judgments not yet final as of the effective date of the amended statute. (*Id.* at pp. 744-747.) The court held, ““A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.”” (*Id.* at 745.) From this, “[i]t is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply,” including those which are not yet final. (*Ibid.*)

The Legislature has never abrogated the *Estrada* rule. (See *People v. Nasalga* (1996) 12 Cal.4th 784, 792, fn. 7 (*Nasalga*)). The California Supreme Court most recently discussed the rule and its continued vitality in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*)). In *Brown*, the court reiterated that *Estrada* “is today properly understood,

not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule’s application in a specific context by *articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments.*” (*Id.* at p. 324, italics added.)

Despite the *Estrada* presumption, a court interpreting a statute that ameliorates punishment must nevertheless determine the intent of the Legislature or of the electorate in enacting the statute. (*Floyd, supra*, 31 Cal.4th at p. 184.) To determine intent, courts look first to the language of the provision, giving its words their ordinary meaning. If that language is clear in relation to the problem at hand, there is no need to go further. (*Ibid.*) If the language is not clear, the tools of statutory construction must be applied, including but not limited to the *Estrada* rule. If necessary, the court must also look to other extrinsic indicators of intention. (*Nasalga, supra*, 12 Cal.4th at p. 794.)

There is no question that section 667(e)(2)(C) ameliorates punishment under the three strikes law for those defendants who meet its criteria. However, the Reform Act does not contain any explicit provision for retroactive or prospective application, and it does not explicitly state what remedy—i.e., section 667(e)(2)(C) or section 1170.126—applies to a person in defendant’s position. Consequently, we must “look for any other indications” to determine and give effect to the intent of the electorate. (*Nasalga, supra*, 12 Cal.4th at p. 794.)

In enacting new laws, both the Legislature and the electorate are “presumed to be aware of existing laws and judicial construction thereof.” (*In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11.) Accordingly, we presume that in enacting the Reform Act, the electorate was aware of the *Estrada* presumption that a law ameliorating punishment applies to all judgments not yet final on appeal on the effective date of the new statute. We also presume that the electorate was aware that a saving clause may be employed to make it explicit that an amendment that reduces punishment is to apply prospectively only, and that in the absence of a saving clause or another clear signal of intent to apply the amendment prospectively, the statute is presumed to apply to all nonfinal judgments. (*Nasalga, supra*, 12 Cal.4th at p. 793; *Estrada, supra*, 63 Cal.2d at p. 747.)

Previous ballot initiatives have employed explicit language making an ameliorative statute prospective. For example, the California Supreme Court held that the previous Proposition 36, approved by voters on November 7, 2000, applied prospectively only, despite its ameliorative effect, because it expressly stated, ““Except as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively.”” (*Floyd, supra*, 31 Cal.4th at pp. 183-185.) The court in *Floyd* held that the plain language of this saving clause trumped any other possible interpretation of the proposition. (*Id.* at pp. 185-187.) The absence of such language in the Reform Act is persuasive evidence that the electorate did intend to apply section 667(e)(2)(C) to nonfinal judgments.

This construction, moreover, is fully consistent with the expressed purposes of the Reform Act. In *Floyd*, the court found further support in the ballot arguments in support of the proposition, which stated that “[i]f Proposition 36 passes, nonviolent drug offenders *convicted for the first or second time after 7/1/2000*, will get mandatory, court-supervised treatment instead of jail.” (Ballot Pamp., Gen. Elec. (Nov. 7, 2000) argument in favor of Prop. 36, p. 26, cited in *Floyd, supra*, 31 Cal.4th at pp. 187-188, italics added.) The ballot arguments in support of the Reform Act stated that its purpose was to ensure that “[p]recious financial and law enforcement resources” were not diverted to impose life sentences for some nonviolent offenses, while assuring that violent repeat offenders are effectively punished and not released early. The proponents stated that the act would “help stop clogging overcrowded prisons with non-violent offenders, so we have room to keep violent felons off the streets” and “help[] ensure that prisons can keep dangerous criminals behind bars for life.” An additional purpose was to save taxpayers “\$100 million every year” by ending wasteful spending on housing and health care costs for “non-violent Three Strikes inmates.” Moreover, the act would ensure adequate punishment of nonviolent repeat offenders by doubling their state prison sentences. The proponents pointed out that dangerous criminals were being released early because “jails are overcrowded with nonviolent offenders who pose no risk to the public.” And, the proponents stated that by passing Proposition 36, “California will retain the toughest recidivist Three Strikes law in the country but will be fairer by emphasizing proportionality in sentencing and will provide for more evenhanded application of this important law.” The proponents pointed out that “[p]eople convicted of shoplifting a pair

of socks, stealing bread or baby formula [*sic*] don't deserve life sentences.” (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36 and rebuttal to argument against Prop. 36, <<http://voterguide.sos.ca.gov/propositions/36/arguments-rebuttals.htm>>.)

Applying section 667(e)(2)(C) to nonfinal judgments is wholly consistent with these objectives. Doing so would enhance the monetary savings projected by the proponents and would further serve the purposes of reducing the number of nonviolent offenders in prison and of reserving the harshest punishment for recidivists with current convictions for serious or violent felonies, while still assuring public safety by imposing doubled prison terms on less serious repeat offenders.

For both of these reasons—the absence of any expressed intent to apply the act prospectively only and the stated intent underlying the proposition—we conclude that section 667(e)(2)(C) applies to judgments that were not final as of the statute's effective date.

The sole published appellate decision to date that addresses this issue is *People v. Yearwood* (2013) 213 Cal.App.4th 161.⁶ In *Yearwood*, as in this case, the defendant would have been entitled to second strike sentencing under the Reform Act if he had first been sentenced in the trial court after the effective date of the Reform Act. However, Yearwood, like defendant, had already been sentenced and his appeal was pending on the date the act became effective. The court held that even though the judgment was not yet

⁶ As of this date, a petition for review is pending. (*Yearwood, supra*, 213 Cal.App.4th 161 (petn. for review filed Mar. 6, 2013, S209069).)

final, Yearwood’s only remedy was to petition for recall of his sentence and for resentencing pursuant to section 1170.126. (*Id.* at pp. 167-169.)

The court held, as we have, that the Reform Act does not contain a saving clause or refer to retroactive or prospective application or refer explicitly to persons in Yearwood’s position. Nevertheless, the *Yearwood* court concluded that section 1170.126 unambiguously applies to prisoners whose judgments were not final on the Reform Act’s effective date, because those prisoners were “presently serving” an indeterminate life term under the three strikes law. (See § 1170.126(a).) Therefore, the court held, section 1170.126 effectively operates as the functional equivalent of a saving clause and, if section 667(e)(2)(C) is read not in isolation but in the context of the entire statutory scheme, it is clear that the mandatory sentencing provision of section 667(e)(2)(C) is intended to operate prospectively only. (*Yearwood, supra*, 213 Cal.App.4th at p. 175.)

As we discussed above, and as *Yearwood* correctly notes, even in the absence of an express saving clause there may be other reasons to determine that the enacting body intended the statute to apply prospectively only. For example, in *Brown, supra*, 54 Cal.4th 314, the Supreme Court held that an amendment to section 4019 that increased the rate at which prisoners may earn custody credit for good behavior applied prospectively only, despite the absence of express language to that effect, because the purpose of section 4019 is to provide an incentive for good behavior during incarceration. Accordingly, rather than reflecting a determination that a reduced penalty for *past* criminal conduct satisfies the legitimate ends of criminal law, section 4019 addresses “*future conduct* in a custodial setting by providing increased incentives for good

behavior.” (*Brown*, at p. 325.) Awarding the credit retroactively, for time spent in custody before the effective date of the amendment, would not further that purpose. Consequently, the court held, there is no logical basis for inferring that the Legislature intended the amended statute to apply retroactively, and the *Estrada* rule does not apply. (*Id.* at p. 325 & fn. 15.)

The same is not true of the Reform Act, however. As we discussed above, retroactive application of section 667(e)(2)(C) is consistent with the proponents’ stated objectives of reducing prison overcrowding, reducing the resources expended on third strike offenders whose current and prior offenses are nonviolent and less serious, and enhancing public safety by ensuring that the truly dangerous repeat offenders serve indeterminate life terms. Accordingly, there is a logical basis for inferring that the electorate intended the Reform Act to apply to nonfinal judgments.

Moreover, we do not agree with *Yearwood* that section 1170.126 unambiguously applies to defendants who were serving nonfinal third strike sentences on the effective date of the Reform Act. In light of the *Estrada* presumption and the absence of a saving clause in section 667(e)(2)(C), the provision that section 1170.126(a) applies “exclusively to persons presently serving” a third strike sentence *is* ambiguous—does it refer only to prisoners serving sentences that are final, or does it include those whose judgments are not final? It is certainly not so clear as to qualify as the functional equivalent of a saving clause. In *Nasalga*, *supra*, 12 Cal.4th 784, the California Supreme Court held that the rule of *Estrada* is “not implicated where the Legislature *clearly signals* its intent” to make an amendment prospective, “by the inclusion of either an express saving clause or

its equivalent.” (*Nasalga*, at p. 793, italics added.) The court did not describe what constitutes an “equivalent” to an express saving clause. However, the court stated that in the absence of an express saving clause, the “quest for legislative intent” requires that “the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.” [Citation.]” (*Ibid.*) In our opinion, the statutory language that *Yearwood* relies on is ambiguous and, therefore, does not meet that requirement. We note, too, that *Yearwood* does not cite a single case in which similarly ambiguous language was deemed to be the equivalent of a saving clause.

Yearwood relies in part on the ballot arguments in favor of the Reform Act that identify enhancing public safety as a key purpose of the act. (*Yearwood, supra*, 213 Cal.App.4th at p. 175.) The court states that giving section 667(e)(2)(C) prospective-only application furthers that purpose by reducing the likelihood that prisoners who are currently dangerous will be released from prison under the Reform Act. Unlike section 1170.126, section 667(e)(2)(C) does not provide the court with discretion to impose a third strike sentence if it finds that the defendant poses an “unreasonable risk of danger to public safety.” (§ 1170.126(f).) *Yearwood* points out that several years may elapse between sentencing and finality, and a defendant who might objectively qualify for second strike sentencing under section 667(e)(2)(C) may have shown himself or herself to pose such a risk during postsentencing incarceration. (*Yearwood*, at pp. 175-176.)

This is arguably a valid concern. However, it is not reflected in the ballot arguments in support of the Reform Act. We cannot say that a concern not expressed in a ballot argument is a clear indication of voter intent, no matter how valid the concern may

be. Moreover, a defendant may also be incarcerated for many months, sometimes even years, before being convicted and sentenced for a third strike offense. Such a defendant may also display a propensity for violence while incarcerated that indicates that he or she poses a risk to public safety. Nevertheless, any qualifying defendant convicted and sentenced after the effective date of the Reform Act is entitled to sentencing under section 667(e)(2)(C), and the trial court has no discretion to impose a third strike sentence even if the court has concerns about the defendant's future dangerousness based on the defendant's conduct while in custody. For this reason as well, we do not find *Yearwood's* analysis persuasive.

(3.) Conclusion

We conclude that in passing the Three Strikes Reform Act of 2012, the electorate intended the mandatory sentencing provision of sections 667(e)(2)(C) to apply to qualifying defendants whose judgments were not yet final on the effective date of the act. Consequently, we do not need to address defendant's other claims challenging his three strikes sentence. Instead, we will vacate that sentence and remand the matter to the trial court for resentencing under section 667(e)(2)(C).

DISPOSITION

The determination of guilt is affirmed, but the sentence is vacated and the matter is remanded for resentencing under sections 667(e)(2)(C) and/or 1170.12(c)(2)(C).

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

RICHLI
J.