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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.

TROY KENNETH NESTE,

Defendant and Appellant.

E058237

(Super.Ct.No. FMB03378)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Denise M. Rudasill, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Troy Kenneth Neste of attempting to dissuade a 12-year-old witness from testifying, in violation of Penal Code¹ section 136.1, subdivision (a)(2), and of making a terrorist threat against the same 12-year-old witness, in violation of section 140, subdivision (a).² Defendant waived a jury trial on prior conviction allegations, and the trial court found true that defendant suffered two serious felony convictions for burglary and robbery, within the meaning of the “Three Strikes” law. The court also found true the allegation that defendant suffered two prison priors. (*People v. Neste, supra*, E026494.) The trial court sentenced defendant under the three strikes law to an indeterminate sentence of 25 years to life for each of defendant’s convictions, to be served consecutively, and sentenced defendant to a one-year enhancement for each prison prior (§ 667.5, subd. (b)), for a total term of 52 years to life in state prison.

In this appeal, defendant challenges the denial of his petition for recall and resentencing under Proposition 36, known as the Three Strikes Reform Act of 2012 (hereafter the Act or Reform Act), contending the trial court erred when it concluded he was ineligible for resentencing based on a current serious felony conviction. According

¹ Unless otherwise indicated, all additional undesignated statutory references are to the Penal Code.

² We derive some of the underlying procedural history from this court’s unpublished opinion in defendant’s prior appeal (*People v. Neste* (Dec. 6, 2000, E026494) [nonpub. opn.]), of which we take judicial notice. (Evid. Code, §§ 452, subd. (d), 459, subd. (b).) To the extent our unpublished decision affirming the judgment is hearsay, we may consider reliable hearsay in the context of a petition for resentencing under the Reform Act. (*People v. Guilford* (2014) 228 Cal.App.4th 651, 659-661.)

to defendant, because dissuading a witness was not designated as a serious felony when he committed his offense, the trial court could not rely on that conviction to find him ineligible for resentencing. Even if the trial court properly considered his conviction for dissuading a witness as a disqualifying serious felony, defendant contends he was nonetheless eligible for resentencing on the consecutive indeterminate life term for his nonserious and nonviolent felony conviction for making a terrorist threat. The People contend (1) denial of defendant's petition is not appealable in the first place; (2) the trial court correctly found defendant ineligible for resentencing because the Act looks to whether a defendant's convictions are currently considered serious or violent felonies; and (3) a prisoner who is serving an indeterminate term of life for a current serious felony conviction is completely ineligible for resentencing under the Act, even for indeterminate life sentences imposed for nonserious and nonviolent felony convictions.

The order denying defendant's petition is an appealable postjudgment order, so we deny the People's motion to dismiss the appeal. On the merits, we conclude that, when determining whether a prisoner is eligible for resentencing under the Act, the court must determine if the prisoner is serving an indeterminate term of life for a conviction that was a serious or violent felony at the time of the passage of the Act. We also conclude that a prisoner serving an indeterminate term of life in prison for a serious felony conviction is ineligible for resentencing on three strikes sentences for nonserious and nonviolent felony convictions. Because the trial court did not err, we affirm the order denying defendant's petition.

I.

PROCEDURAL HISTORY³

In his petition for recall and resentencing, defendant argued he was eligible for resentencing under section 1170.126 because he was sentenced to an indeterminate term of life “for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by Section 667.5(c) or Section 1192.7(c).” Other factors that defendant articulated in favor of his resentencing were his regular attendance of Alcoholics Anonymous meetings, his lack of serious prison rule violations, his completion of a general equivalency diploma, and his completion of bible studies. Defendant waived his personal presence for a hearing on the petition. (§ 1170.126, subd. (i).)

At the hearing conducted on defendant’s petition, the People argued defendant was ineligible for resentencing under the Reform Act because “the current conviction that [defendant] was sent away for is actually a strike. [Section] 136.1 is still a strike, and therefore he is ineligible.” The court agreed. “One of the current convictions is for a violation of [section] 136.1, which is a serious felony, and that would make [defendant] ineligible for consideration for resentencing under [section] 1170.126.” Therefore, the court denied defendant’s petition.

Defendant timely filed a notice of appeal.

³ The underlying facts of defendant’s convictions are not relevant to our analysis, so we will not discuss them.

II.

DISCUSSION

A.

APPEALABILITY

The People contend a prisoner may not appeal the denial of a petition for recall of sentence and resentencing under section 1170.126, and they request that we dismiss defendant's appeal. According to the People, a prisoner who is ineligible for resentencing under the Act has no right to file a petition for recall of sentence under the Act in the first place, and a trial court lacks authority to consider such a prisoner for resentencing. Therefore, the People contend the denial of an improperly filed petition does not affect the prisoner's substantial rights and is not an appealable postjudgment order under section 1237, subdivision (b).

In *Teal v. Superior Court* (Nov. 6, 2014, S211708) ___ Cal.4th ___ [2014 Cal. Lexis 10481] (*Teal*), the California Supreme Court rejected the People's argument that the eligibility requirements for recall and resentencing set forth in section 1170.126, subdivisions (a) and (b) "establish a threshold eligibility requirement that determines an inmate's standing to file a petition as well as the trial court's jurisdiction." (*Teal*, at p. ___ [2014 Cal. Lexis at p. *6].)

First, the Supreme Court concluded that the inmate in that case "had standing to file the petition and to have the trial court consider his eligibility claim on the merits." (*Teal, supra*, ___ Cal.4th at p. ___ [2014 Cal. Lexis at p. *6].) "Petitioner meets [the] standing requirements. He filed a timely petition alleging a justiciable controversy

affecting concrete interests. He claims he is eligible for resentencing under section 1170.126, because he was serving a Three Strikes life sentence and his current conviction for making a criminal threat was not a serious or violent felony at the time of his conviction.” (*Id.* at p. ____ [2014 Cal. Lexis at p. *7].)

Second, the court concluded that “the trial court’s authority or discretion to determine the merits of petitioner’s claim was not predicated on his eligibility to file a petition in the first instance. After the filing of the petition, the trial court was required to determine petitioner’s eligibility for resentencing as provided in subdivisions (e) and (f) of section 1170.126. Subdivision (f) states that ‘[u]pon *receiving* a petition for recall of sentence under this section, the court *shall determine* whether the petitioner satisfies the criteria in subdivision (e).’ (§ 1170.126, subd. (f), italics added.)” (*Teal, supra*, ____ Cal.4th at p. ____ [2014 Cal. Lexis at pp. *7-8].) “The court’s finding of ineligibility here provided a basis to deny the petition. It did not affect petitioner’s standing to file the petition in the first instance.” (*Id.* at p. ____ [2014 Cal. Lexis at p. *8].)

Last, the court rejected the People’s focus “on the correctness of the trial court’s ineligibility finding” as the very basis for concluding that the inmate could not appeal that finding. (*Teal, supra*, ____ Cal.4th at p. ____ [2014 Cal. Lexis at p. *9].) “[A] postjudgment order ‘affecting the substantial rights of the party’ (§ 1237, subd. (b)) does not turn on whether that party’s claim is meritorious, but instead on the nature of the claim and the court’s ruling thereto. [Citations.]” (*Id.* at p. ____ [2014 Cal. Lexis at p. *9], fn. omitted.) “[T]he Attorney General confuses the issues on the merits with the procedural question of appealability. The test of appealability under section 1237,

subdivision (b), does not depend on the resolution of ‘an issue to be determined on the merits.’ [Citation.]” (*Id.* at p. ____ [2014 Cal. Lexis at p. *12].)

Therefore, the order denying defendant’s petition is appealable as a postjudgment order affecting defendant’s substantial rights. (§ 1237, subd. (b).) We must deny the People’s motion to dismiss.

B

DEFENDANT IS INELIGIBLE FOR RECALL AND RESENTENCING DUE TO HIS CONVICTION FOR DISSUADING A WITNESS, WHICH WAS A SERIOUS FELONY WHEN THE ACT WENT INTO EFFECT

Defendant contends he is eligible for recall and resentencing under the Reform Act because his offense of dissuading a witness from testifying, in violation of section 136.1, subdivision (a)(2), was not a serious felony at the time he committed it. Because that offense would not result in an indeterminate term of life under the reformed three strikes law, he contends he is an eligible prisoner described in section 1170.126, subdivision (a). According to defendant, the fact that his offense was later designated a serious felony is irrelevant because the Act looks to whether the prisoner’s current offenses were serious or violent when they were committed. We disagree.

“On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012 (Reform Act), which amended Penal Code sections 667 and 1170.12 and added section 1170.126. [Citation.] Under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12) as it existed prior to Proposition 36, a defendant convicted of two prior serious or violent felonies was subject as a third strike offender to a sentence of 25 years

to life upon conviction of *any* third felony. [Citation.] Now, under the *prospective* provisions of the Reform Act (set forth in §§ 667, 1170.12), a defendant convicted of two prior serious or violent felonies is subject to the 25-year-to-life sentence only if the current third felony is a *serious or violent* felony. [Citation.] Thus, if the third felony is not a serious or violent felony and none of four enumerated disqualifying exceptions or exclusions applies, the defendant will be sentenced as a second strike offender. [Citation.]” (*People v. White* (2014) 223 Cal.App.4th 512, 517, fn. omitted (*White*)).

“Of particular importance here, the *retrospective* part of the Reform Act provides a means whereby, under three specified eligibility criteria and subject to certain disqualifying exceptions or exclusions, a prisoner currently serving a sentence of 25 years to life under the pre-Proposition 36 version of the Three Strikes law for a third felony conviction that was not a serious or violent felony may be eligible for resentencing as if he or she only had one prior serious or violent felony conviction. [Citations.]” (*White, supra*, 223 Cal.App.4th at p. 517.)

The resentencing provisions of the Act are intended to apply “exclusively” to prisoners currently serving indeterminate terms of life under the former three strikes law “whose sentence under this act would not have been an indeterminate life sentence.” (§ 1170.126, subd. (a).) Any prisoner serving an indeterminate life sentence under the former three strikes law, that was imposed “for a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7,” may, within two years of the effective date of the Act or on another date upon a showing of good cause, petition the superior court for recall of his or her sentence

and for resentencing as a second strike offender. (§ 1170.126, subd. (b); see *id.*, subd. (c) [prisoners serving a term of imprisonment for a second strike are ineligible].)

The petition must specify all of the current felonies for which the prisoner is serving an indeterminate life sentence under the three strikes law, and must specify all prior convictions that were pleaded and proven under section 667, subdivision (b) and section 1170.12, subdivision (b). (§ 1170.126, subd. (d).)

“An inmate is eligible for resentencing if: [¶] (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7. [¶] (2) The inmate’s current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12. [¶] [And] (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.” (§ 1170.126, subd. (e).) Even if the inmate is otherwise eligible for resentencing, the court may, in its discretion, deny the petition if it concludes resentencing “would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subds. (f), (g).)

In defendant's trial, the People alleged, and the jury found true beyond a reasonable doubt, that on June 23, 1999, defendant committed the offense of dissuading a witness or victim from testifying by threat of force or violence, in violation of section 136.1, subdivision (c)(1). A felony violation of section 136.1 was not added to the list of serious felonies under section 1192.7, subdivision (c), until the following year, by passage of Proposition 21. (*People v. Neely* (2004) 124 Cal.App.4th 1258, 1262 (*Neely*)). As of March 8, 2000, "intimidation of victims or witnesses, in violation of Section 136.1," is a serious felony conviction for purposes of the three strikes law. (§ 1192.7, subd. (c)(37); see *Neely*, at p. 1262.) In other words, when the Reform Act went into effect on November 7, 2012 (see *People v. Yearwood* (2013) 213 Cal.App.4th 161, 169 (*Yearwood*)), intimidation of a crime victim or witness was deemed to be a serious felony.

To determine whether the Reform Act looks to the commission date of the current offense for which the prisoner is serving an indeterminate term of life, or to the effective date of the Act, for purposes of eligibility for resentencing under section 1170.126, subdivisions (b) and (e)(1),⁴ we apply standard tools of statutory interpretation. "In interpreting a voter initiative like [the Act], we apply the same principles that govern statutory construction.'" (*People v. Osuna* (2014) 225 Cal.App.4th 1020.) "In construing statutes, "our fundamental task is 'to ascertain the intent of the lawmakers so

⁴ This question is currently pending before the California Supreme Court. (*Braziel v. Superior Court*, review granted July 30, 2014, S218503; *People v. Johnson*, review granted July 30, 2014, S219454.)

as to effectuate the purpose of the statute.’ [Citations.] We begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. [Citation.] We give the language its usual and ordinary meaning, and ‘[i]f there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs.’””” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1369.) If the language of a voter initiative is unclear or ambiguous on its face, “we may resort to extrinsic sources, including the analyses and arguments contained in the official ballot pamphlet, and the ostensible objects to be achieved. [Citations.]” (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006.) Resort to external sources of legislative or voter intent is also permissible to confirm an interpretation of the plain language of a statute. (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279.)

On its face, section 1170.126 provides that a prisoner is eligible for recall and resentencing if his indeterminate life term was imposed for a conviction “of a felony or felonies that *are* not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.” (§ 1170.126, subds. (b), (e)(1), italics added.) Use of the present tense “are,” for purposes of the relevant definitions of serious or violent felony convictions, is determinative here. “[The legislative] use of a verb tense is significant in construing statutes.’ [Citations.]” (*People v. Loewn* (1997) 17 Cal.4th 1, 11; accord, *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 776 [“In construing statutes, the use of verb tense . . . is considered significant”].) Had the proponents of Proposition 36 intended that the definitions of serious and/or violent felonies would be tied to the date of commission, they would have used the past

tense or otherwise made that intent clear. Instead, the plain language of the statute dictates that the court reviewing a petition for recall and resentencing must determine if the prisoner's commitment offenses "are not" defined as serious or violent felonies, meaning they are not among the crimes listed in section 667.5, subdivision (c) or section 1192.7, subdivision (c), as of the date the Act went into effect. This interpretation is consistent with section 1170.126, subdivision (a), which provides that resentencing is only available to prisoners who would not have been sentenced to an indeterminate life term had they been sentenced under the Reform Act that expressly incorporates the definitions of serious and/or violent felonies as they existed on November 7, 2012. (§§ 667, subd. (d)(1), 667.1, 1170.12, subd. (b)(1), 1170.125.)

This conclusion is reinforced by the fact that the proponents of Proposition 36 used similar present tense language in section 1170.126, subdivision (e)(2) and (e)(3). It provides that a prisoner is eligible for resentencing if his indeterminate life term "was not imposed for any of the offenses *appearing* in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12," and he "has no prior convictions for any of the offenses *appearing* in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e)(2), (e)(3), italics added.) Use of the present participle *appearing* is significant because it "connotes present, continuing action. [Citations.]" (*United States v. Hull* (3d Cir. 2006) 456 F.3d 133, 145 (conc. & dis. opn. of Ackerman, J.).)

Defendant contends that section 1170.125 mandates the use of the definitions of serious or violent felonies in place at the time of the commission of the offense, and not the definitions in place when the Act went into effect. We disagree. As amended by Proposition 36, section 1170.125 provides: “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.” (Italics added.) As two respected commentators have recognized, the reference to section 1170.126 in amended section 1170.125 would appear to “make[] no sense” because the former only applies to crimes committed *before* November 7, 2012. (Couzens & Bigelow, *The Amendment of the Three Strikes Sentencing Law* (Nov. 2013) pp. 25, 32.)⁵

Nonetheless, Couzens and Bigelow conclude the likely intent behind amended section 1170.125, “when viewed against the opening paragraph to section 1170.126(a), is to limit the ability to request resentencing to those persons who would be eligible for a lower sentence *had the crime been committed on or after November 7, 2012.*” (Couzens & Bigelow, *The Amendment of the Three Strikes Sentencing Law*, *supra*, at pp. 25, 32.) With respect to the fact that the list of serious and/or violent felony convictions has been augmented from time to time, the commentators conclude, “It is of no benefit to a defendant sentenced to a 25-life term for a violation of section 422 prior to 2000 that the

⁵ Available at <<http://www.courts.ca.gov/documents/Three-Strikes-Amendment-Couzens-Bigelow.pdf>> (as of Nov. 14, 2014).

crime was not then listed as a serious felony. Based on the objective intent of the amendment to section 1170.125 and the opening paragraph of section 1170.126(a), eligibility for resentencing must be based on the interpretation of statutes as they exist on or after November 7, 2012. In the case of a person convicted of a violation of section 422 prior to March 7, 2000, he or she would not be eligible for resentencing because section 1192.7(c)(38), as it read on November 7, 2012, lists section 422 as a serious felony.” (*Id.* at pp. 25-26, 32.)

We agree with Couzens and Bigelow, and conclude section 1170.125 does not mandate the use of the definitions of serious and/or violent felonies in effect at the time of the commission of the prisoner’s crime or those in effect at any other time before the Reform Act went into effect on November 7, 2012. Moreover, we find nothing in the ballot materials from Proposition 36 that contradicts our reading of the plain language of section 1170.126. The Legislative Analyst’s analysis printed in the official ballot pamphlet explained that Proposition 36 would “allow[] resentencing of certain third strikers who are currently serving life sentences for specified nonserious, non-violent felonies,” and that it would “limit[] eligibility for resentencing to third strikers whose current offense *is* nonserious, non-violent and who have not committed specified current and prior offenses, such as certain drug-, sex-, and gun-related felonies.” (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) analysis of Prop. 36 by the Legis. Analyst,

pp. 49-50, italics added.)⁶ The analysis did not address which definitions of serious or violent felonies would be applicable under section 1170.126, subdivisions (b) and (e)(1), but use of the present tense “is” by the Legislative Analyst supports our conclusion. Finally, nothing in the arguments in support of and in opposition to Proposition 36 reflects voter intent to limit the definitions of serious or violent felonies to those in existence at the time of the commission of the offense. (See Voter Information Guide, *supra*, arguments and rebuttals of Prop. 36, pp. 52-53.)⁷

In sum, we conclude that eligibility for recall and resentencing under section 1170.126, subdivisions (b) and (e)(1), requires a finding that the prisoner has no prior convictions that were deemed serious or violent felonies as of November 7, 2012. As of that date, defendant’s conviction for intimidating a witness in violation of section 136.1 was deemed a serious felony conviction (§ 1192.7, subd. (c)(37); *Neely, supra*, 124 Cal.App.4th at p. 1262), so the trial court correctly ruled defendant was ineligible for resentencing under the Act.

⁶ Available at <<http://voterguide.sos.ca.gov/past/2012/general/propositions/36/analysis.htm>> (as of Nov. 14, 2014).

⁷ Available at <<http://voterguide.sos.ca.gov/past/2012/general/propositions/36/arguments-rebuttals.htm>> (as of Nov. 14, 2014).

C.

DEFENDANT IS NOT ELIGIBLE FOR RESENTENCING ON HIS NONSERIOUS
AND NONVIOLENT OFFENSE OF MAKING A TERRORIST THREAT IN
VIOLATION OF SECTION 140

Defendant contends that, even if he is not eligible for recall and resentencing on his conviction for the serious felony offense of dissuading a witness in violation of section 136.1, he is nonetheless eligible for resentencing on his nonserious and nonviolent felony conviction for making a terrorist threat in violation of section 140, subdivision (a).⁸ We disagree.

We recently addressed the same issue in *People v. Anthony* (Oct. 24, 2014, E058264) ___ Cal.App.4th ___ [2014 Cal.App. Lexis 966] [Fourth Dist., Div. Two], opn. mod. Oct. 30, 2014 [2014 Cal.App. Lexis 1000], Nov. 12, 2014 [2014 Cal.App. Lexis 1020] (*Anthony*.) In *Anthony*, the trial court sentenced the defendant to consecutive indeterminate terms of 25 years to life, under the three strikes law, for his convictions for first degree burglary and second degree burglary. (*Id.* at p. ___ [2014 Cal.App. Lexis 966 at pp. *1-2].) The trial court denied the defendant's petition under the Reform Act, concluding the defendant was ineligible for recall and resentencing under section 1170.126, subdivision (e)(1), because one of his indeterminate terms of life

⁸ This question is also currently before the California Supreme Court. (*Braziel v. Superior Court, supra*, S218503; *People v. Machado*, review granted July 30, 2014, S219819.)

was for a serious and/or violent felony conviction. (*Id.* at p. ____ [2014 Cal.App. Lexis 966 at p. *2].)

On appeal, the “[d]efendant argu[ed] that he [was] eligible [for recall and resentencing] under section 1170.126, subdivision (e)(1), because he [was] serving an indeterminate term of life imprisonment imposed under the Three Strikes law for a felony that was and is not defined as serious or violent, namely, second degree burglary.

Defendant assert[ed] that ‘Nowhere does subdivision (e)(1) suggest that an accompanying serious or violent felony (for which the inmate will be ineligible to seek resentencing) renders the inmate also ineligible to seek resentencing on the *non*-serious Three Strike felony.’ [¶] Defendant compar[ed] this with the language of section 1170.126, subdivision (e)(2), which makes it very clear that an inmate is made ineligible for resentencing on an otherwise eligible offense if his *aggregate* sentence also includes the specified disqualifying offenses.” (*Anthony, supra*, ____ Cal.App.4th at p. ____ [2014 Cal.App. Lexis 966 at pp. *5-6], bold omitted.)

In addressing the defendant’s argument, we first looked to the objective of the Reform Act. “‘The resentencing provisions under this section and related statutes are intended to apply *exclusively* to *persons* presently serving an indeterminate term of imprisonment [for a nonviolent and nonserious felony], whose sentence under this act would *not* have been an indeterminate life sentence’ under the Three Strikes law as amended by the 2012 act. (Italics added.)” (*Anthony, supra*, ____ Cal.App.4th at p. ____ [2014 Cal.App. Lexis 966 at pp. *6-7], quoting § 1170.126, subd. (a).) We noted that “[t]he use of the terms ‘exclusively’ and ‘persons’ directly support[ed] the People’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,” and “contradict[ed] appellant’s argument that portions of the act, specifically section 1170.126, subdivision (e)(1), focus only on the offense for which an inmate seeks resentencing, rather than on the offender as a whole, specifically an offender whose current commitment offenses include a serious or violent felony.” (*Id.* at p. ____ [2014 Cal.App. Lexis 966 at p. *7].) We therefore concluded that “[a] person ‘whose sentence under this act would not have been an indeterminate life sentence’ cannot, by definition, include an inmate, one of whose commitment offenses is a serious or violent felony. In other words, an inmate, like defendant, who is serving life terms for one offense not violent or serious and one offense that is violent or serious is not ‘a person whose sentence under this act would not have been an indeterminate life sentence’ under the amended Act.” (*Id.* at p. ____ [2014 Cal.App. Lexis 966 at pp. *7-8].)

Next, we looked to section 1170.126, subdivision (d), which requires a prisoner to list all currently charged felonies that resulted in the indeterminate life sentence which the prisoner wishes to be recalled. “This requirement that an inmate list all of his commitment felonies indicates that each of the currently charged felonies affects the inmate’s eligibility for resentencing, that the sentencing court must consider all of the inmate’s current felonies in making its eligibility determination, not just the felony for which the inmate requests resentencing. In addition, this subdivision clearly uses the term ‘sentence’ to mean the combination of all terms resulting from all of the felonies of which defendant was convicted in the latest proceedings. Viewed in this light, the use of

the word ‘sentence’ in section 1170.126, subdivision (a), even more clearly indicates that having a serious or violent felony as one of his or her commitment offenses disqualifies an inmate from being resentenced on any of his or her indeterminate life sentences.”

(*Anthony, supra*, ___ Cal.App.4th at p. ___ [2014 Cal.App. Lexis 966 at p. *8].)

Last, we looked to the ballot arguments in favor of Proposition 36 as additional support for our interpretation of section 1170.126. (*Anthony, supra*, ___ Cal.App.4th at p. ___ [2014 Cal.App. Lexis 966 at pp. *8-9].) Those ballot arguments “repeatedly and plainly stressed that truly dangerous criminals, namely those convicted of a serious or violent felony, would not receive *any* benefit *whatsoever* from the proposed amendments to the Three Strikes law. Examples of such language in the ballot arguments are:

‘ . . . “Prop. 36 prevents dangerous criminals from being released early”’; ““Prop. 36 will keep dangerous criminals off the streets””; and ““truly dangerous criminals will receive no benefits whatsoever from the reform.”” (*Yearwood, [supra]*, 213 Cal.App.4th at p. 171, quoting Voter Information Guide, Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36, pp. 52–53.) These arguments indicate an intent by the voters that an inmate convicted of a serious or violent felony in the latest proceedings will not benefit, at all, from the reduced sentencing of the 2012 act.” (*Anthony, supra*, ___ Cal.App.4th at p. ___ [2014 Cal.App. Lexis 966 at p. *9].)

Because “we conclud[ed] that both the language of section 1170.126 and the evidence of voter intent support the conclusion that an inmate is not eligible for resentencing under the Three Strikes Reform Act of 2012 when *any* of the offenses for which he or she is serving a Three Strikes sentence is a serious or violent felony,” we

affirmed the order denying the defendant's petition. (*Anthony, supra*, ___ Cal.App.4th at p. ___ [2014 Cal.App. Lexis 966 at pp. *9-10].)

Anthony is on point with this case. Having concluded, *ante*, that defendant's conviction for dissuading a witness from testifying in violation of section 136.1, subdivision (c)(1), is a disqualifying serious felony under section 1170.126, subdivisions (b) and (e)(1), we must conclude that defendant is ineligible for recall and resentencing on his conviction for making a terrorist threat in violation of section 140. Consequently, we conclude the trial court correctly denied defendant's petition.

III.

DISPOSITION

The postjudgment order denying defendant's petition for recall and resentencing under section 1170.126 is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.