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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CLYDE LEE MALLET,

Defendant and Appellant.

G047080

(Super. Ct. No. RIF127195)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, John D. Molloy, Judge. Affirmed with directions.

Dennis L. Cava, 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 Laura A. Glennon, Deputy Attorneys General, for Plaintiff and Respondent.

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## I

### INTRODUCTION AND BACKGROUND

Defendant Clyde Lee Mallett was convicted of possessing cocaine base for sale. (Health & Saf. Code, § 11350, subd. (a).) The trial court sentenced him to prison for 28 years to life, primarily as a result of two “strike” priors for robbery and attempted robbery. (Pen. Code, §§ 664, 211, 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)(A).)<sup>1</sup> Defendant appealed, but we rejected his contention that his sentence was cruel or unusual. (*People v. Mallett* (Dec. 22, 2011, G045094) [nonpub. opn.] (*Mallett I*)). However, we conditionally reversed the judgment. We remanded the matter and directed the trial court to conduct a second in camera *Pitchess* hearing and to create a record of the law enforcement personnel files it reviewed.<sup>2</sup> On remand, the trial court conducted the second hearing, found no discoverable information, and reinstated the judgment.

In this appeal, defendant asked that we independently review the second *Pitchess* hearing. We did so and initially filed an opinion concluding that the trial court properly denied the motion. (*People v. Mallett* (Oct. 1, 2013, G047080) [nonpub. opn.] (*Mallett II*)). Defendant also argued that he was entitled to resentencing under the Three Strikes Reform Act of 2012 (Reform Act) because his conviction was not yet final when the Reform Act became effective and his commitment offense was not a serious or violent felony. We agreed with defendant and remanded the matter for resentencing.

However, the California Supreme Court granted the Attorney General’s petition for review and following its decision in *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*), transferred the case back to this court with directions to vacate our prior opinion and to reconsider the cause in light of *Conley*. Accordingly, we now vacate our opinion in *Mallett II* and reconsider the resentencing issue.

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

<sup>2</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

## II

### DISCUSSION

#### A. *The Pitchess Hearing*

“A trial court’s ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535.)” (*People v. Hughes* (2002) 27 Cal.4th 287, 330.) A sealed transcript of the in camera hearing held below was made part of the appellate record. We have reviewed the transcript and conclude the trial court did not abuse its discretion in refusing to disclose the contents of the officers’ personnel files. (*Ibid.*)

#### B. *Defendant Must Petition for Resentencing*

On November 7, 2012, the Reform Act became effective while this appeal was still pending. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C), 1170.126.) Under the prior “Three Strikes” law, a defendant with two or more strike priors who was convicted of any new felony would receive a sentence of 25 years to life. (Former § 667, subd. (e)(2)(A).) The Reform Act amended the Three Strikes law. Now, a defendant who has two or more strike priors is to be sentenced pursuant to paragraph one of section 667, subdivision (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 667.5, subdivision (c), or section 1192.7, subdivision (c), unless certain disqualifying factors are pleaded and proven. (§ 667, subs. (d)(1), (e)(2)(C).)

The Reform Act also allows a person who is “presently serving” an indeterminate life sentence under the Three Strikes law to petition to have his or her sentence recalled and to be resentenced as a second strike offender, if the current offense

is not a serious or violent felony and the person is not otherwise disqualified.<sup>3</sup> (§ 1170.126.) However, 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, subds. (a)-(g).) Accordingly, under section 1170.126, resentencing is discretionary, while sentencing under section 667, subdivision (e)(2)(C), is mandatory.

Defendant contends that upon remand for resentencing, the trial court must sentence him pursuant to section 667, subdivision (e)(2)(C). He argues that section 667, subdivision (e)(2)(C), is an ameliorative sentencing statute which presumptively applies to all criminal judgments which were not yet 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, subdivision (e)(2)(C), applies prospectively only, i.e., to defendants who are first sentenced on or after November 7, 2012. She argues that it does not apply to defendant because he is “presently serving” a third strike sentence within the meaning of section 1170.126, subdivision (a), and that his only remedy is to petition for relief under that statute.

Again, in our original opinion, we agreed with defendant and directed the trial court to resentence him according to section 667, subdivision (e)(2)(C), on remand. However, in *People v. Conley, supra*, 63 Cal.4th 646, the California Supreme Court held that the Reform Act does not authorize automatic resentencing of eligible defendants whose judgments were not yet final on the effective date of the act. (*Conley*, at pp. 661-662.) Rather, such defendants must petition for resentencing as provided for in section 1170.126, subdivision (b). (*Conley*, at pp. 661-662.)

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<sup>3</sup> Defendant is not otherwise disqualified under the statute. (See *Mallett I, supra*, G045094.)

Here, defendant's appeal was pending on the effective date of the Reform Act. Further, defendant's current offense is not a serious or violent felony and he is not otherwise disqualified. (See *Mallett I, supra*, G045094.) Thus, under *Conley*, defendant may petition for resentencing as provided for in section 1170.126, subdivision (b). Under that section, defendant "may file a petition for a recall of sentence, within two years after the effective date of the act that added this section [November 7, 2012,] or at a later date upon a showing of good cause." (§1170.126, subd. (b).) We find good cause for the late filing of the petition.

### III

#### DISPOSITION

The judgment is affirmed. The superior court is directed to accept for filing a petition submitted by defendant pursuant to section 1170.126 on or before one year after this opinion becomes final.

MOORE, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.