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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TALYON JEROME ORR,

Defendant and Appellant.

H041278

(Santa Clara County

Super. Ct. No. CC643445)

Appellant Talyon Jerome Orr has filed a notice of appeal from an order by the trial court denying his petition filed pursuant to Penal Code section 1170.126<sup>1</sup> for recall of his indeterminate life sentence imposed under the original Three Strikes law (Prop. 184, § 1, as approved by voters, Gen. Elec. (Nov. 8, 1994)).

Section 1170.126, added by Proposition 36 and effective November 7, 2012, permits a person serving an indeterminate term of imprisonment under the Three Strikes law to file a petition for recall of sentence and to request resentencing. The statute limits eligibility to those whose current convictions are for felonies that are not defined as serious or violent felonies under section 667.5, subdivision (c), or 1192.7, subdivision (c). (§ 1170.126, subd. (e)(1).)

*Facts and Proceedings Below*

On December 12, 2007, a jury convicted appellant of first degree burglary (§§ 459, 460, subd. (a), count 1) and receiving stolen property (§ 496, subd. (a), count 4).

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

Appellant admitted that he had suffered three prior strike convictions (§§ 667, subds. (b)-(i), 1170.12), two serious felony convictions (§ 667, subd. (a)) and had served two prior prison terms (§ 667.5, subd. (b)).<sup>2</sup>

Thereafter, on March 28, 2008, the court sentenced appellant to an aggregate term of 60 years to life in prison—two 25-to-life terms to be served consecutively for count 1 and count 4, consecutive to 10 years for the two serious felony priors.<sup>3</sup>

Subsequently, on June 24, 2014, in pro per, appellant petitioned the court for recall of his sentence pursuant to section 1170.126. In his petition, appellant listed his current felony convictions as “First Degree Burglary P.C. 459/460 (A)” and “Buying, Receiving, or Withholding Stolen Property P.C. 496 (A).” Appellant argued that his current felony offense “P.C. 459/460(A) is not defined as a serious or violent felony per Penal Code 1192.7 (c) or 667.5 (c) . . . .”<sup>4</sup> The court denied the petition on July 1, 2014. In a written order, the court found appellant ineligible for resentencing because “Residential burglary is a serious felony as defined in Penal Code § 1192.7(c)(18). Thus because [appellant]’s current indeterminate sentence under § 667(e)(2) and 1170.12(c) was imposed for a serious/violent felony, [appellant] is not among the group of persons subject to the remedial provisions of Penal Code § 1170.126. [¶] Because the petition fails to state a prima facie case for relief, the request for appointment of counsel is DENIED.”

#### *Discussion*

Appellant contends that the “trial court got it ‘half-right’: [he] is plainly ineligible to be resentenced on the first degree burglary charge”; however, he argues that he is “clearly eligible to be resentenced as to the separate offense of receiving stolen property—

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<sup>2</sup> On our own motion, we have taken judicial notice of the record in appellant’s previous appeal *People v. Orr*, (June 25, 2009, H032806) [nonpub. opn.].

<sup>3</sup> Appellant filed a notice of appeal in case No. H032806 raising various issues, which this court rejected.

<sup>4</sup> Appellant is incorrect. His first degree burglary conviction is a serious felony (§1192.7, subd. (c)(18), and depending on the circumstances can be a violent felony (§ 667.5 subd. (c)(21).

a nonserious, nonviolent felony . . . .” In a supplemental opening brief, appellant argues that the order denying resentencing must be reversed because he was deprived of his right to counsel under the state and federal Constitutions. Respectfully, we disagree with appellant on both points and affirm the order denying resentencing.

At the outset, we note that the People raise the issue of forfeiture. That is, appellant’s contention on appeal that the trial court improperly found him ineligible for resentencing on his conviction for receiving stolen property is forfeited because appellant never asked the trial court to resentence him based on that conviction. Citing *People v. Partida* (2005) 37 Cal.4th 428, 435, the People contend that this issue is forfeited under the general rule that “[a party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.”

In *People v. Partida, supra*, 37 Cal.4th 428, the Supreme Court held that constitutional arguments raised for the first time on appeal are not forfeited if they do not invoke reasons different from those the trial court was asked to apply, but merely assert that the trial court’s act or omission, to the extent erroneous *for the reasons actually presented to that court*, “had the additional legal consequence of violating” the Constitution. (*Id.* at p. 435.) The *Partida* rule can apply when the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply. (*People v. Homick* (2012) 55 Cal.4th 816, 856, fn. 25.) Deciding whether appellant, who has two convictions that lead to his indeterminate life term, is eligible to be resentenced requires the application of the same legal principles that the trial court applied. Accordingly, we will address this issue.

Proposition 36, the Three Strikes Reform Act of 2012 (the 2012 Act), amended sections 667 and 1170.12. The 2012 Act mandates that the court impose an indeterminate life term only where the current offense, i.e., the third strike, is a serious and/or violent felony. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167 (*Yearwood*)). If the current offense is not a serious and/or violent felony, the 2012 Act

requires that the trial court sentence the defendant as a second strike offender.<sup>5</sup> (*Id.* at pp. 167-168.) In addition, the 2012 Act added section 1170.126, which provides that a defendant serving an indeterminate life term for an offense that is not a serious and/or violent felony may petition the court for recall of his sentence and for resentencing. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1292, [there are two parts to the 2012 Act: the first part is *prospective* only, reducing the sentence to be imposed in future three strike cases where the third strike is not a serious or violent felony; the second part is *retrospective*, providing *similar, but not identical*, relief for prisoners already serving third strike sentences in cases where the third strike was not a serious or violent felony].)

Subdivision (a) of section 1170.126 provides: “The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act *would not have been an indeterminate life sentence.*” (Italics added.) Subdivision (e)(1) of section 1170.126 provides: “An inmate is eligible for resentencing if . . . [t]he 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.” (Italics added.)

If appellant’s only third-strike commitment offense were first degree burglary, which as noted *ante* is a serious or violent felony under sections 667.5, subdivision (c)(21) and 1192.7, subdivision (c)(18), this case would be straightforward—he would not be eligible for resentencing on that conviction. Similarly, if appellant’s

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<sup>5</sup> There are certain exceptions to this rule that are not relevant here.

*only* third-strike commitment offense were for receiving stolen property, which is neither a serious nor a violent felony under sections 667.5 and 1192.7, again this case would be straightforward—he would be eligible for discretionary resentencing on that conviction. The problem arises where, as here, a defendant is serving consecutive 25-years-to-life terms for two different commitment offenses—one a serious felony, and the other not. Plainly, appellant is not eligible for discretionary resentencing on the first degree burglary conviction. What we must decide here is whether he is eligible for resentencing on the receiving stolen property conviction *only*, given that his other commitment offense is a serious felony.

To resolve this issue we look to the plain language of section 1170.126, subdivision (a), which sets forth the objective of the statute.<sup>6</sup> As noted, subdivision (a) provides, “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 non-violent and non-serious 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.) The use of the terms “exclusively” and “persons” directly supports the 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. This language contradicts the argument that portions of the 2012 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. 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, such as appellant, who is serving

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<sup>6</sup> We recognize that the 2012 Act does not explicitly address this issue.

life terms for one offense not violent or serious and one offense that is serious is not “a person whose sentence under this act would not have been an indeterminate life sentence” under the 2012 Act.

Furthermore, section 1170.126, subdivision (d) requires the petition for recall of sentence to “specify all of the currently charged *felonies*, which resulted in the sentence . . . .” (Italics added.) 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—i.e., 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 uses the term “sentence” to mean the combination of all terms resulting from all of the felonies of which a defendant was convicted in the latest proceedings. Viewed in this light, the use of the word “sentence” in section 1170.126, subdivision (a), plainly indicates that having a serious or violent felony as one of the commitment offenses disqualifies an inmate from being resentenced on any of his or her indeterminate life terms.

Moreover, as noted, subdivision (e) of section 1170.126 provides that “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.” We cannot ignore the voters’ inclusion of the “or felonies” language. This language has no apparent meaning other than to reference an aggregate of multiple Three Strikes life terms for multiple felonies. It is “a rule of statutory construction that significance should be given to every word of a statute, if possible, and an interpretation [that] renders part of the statute surplusage or nugatory should be avoided.” (*People v. Hinks* (1997) 58 Cal.App.4th 1157, 1164.)

Finally, the ballot arguments in favor of Proposition 36, which “have been recognized as a proper extrinsic aid in construing voter initiatives adopted by popular vote” (*Yearwood, supra*, 213 Cal.App.4th at p. 171), 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*, at p. 171, citing the Voter Information Guide, Gen. Elec. (Nov. 6, 2012), pp. 5253.) Plainly, these ballot arguments indicate the voters’ intent 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.<sup>7</sup>

Appellant resorts to the oft-invoked “rule of lenity.” However, “this is a ‘tie-breaking principle’ of *statutory interpretation*” that we apply *only* “where evidence of *legislative intent* is in equipoise” as to which of alternate reasonable interpretations should prevail. (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1339, fn. 6.) We have not found anything equivocal in the intent expressed in the plain statutory language or the arguments made in connection with the initiative. Consequently, the rule of lenity does not have any role here.

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<sup>7</sup> “[O]ur interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. [Citations.] We therefore first look to ‘the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context.’ [Citations.] Once the electorate’s intent has been ascertained, the provisions must be construed to conform to that intent. [Citation.] ‘[W]e may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.’ [Citation.]” (*People v. Park* (2013) 56 Cal.4th 782, 796.)

### *Failure to Appoint Counsel*

Appellant contends that reversal is required, because he was deprived of his right to counsel when the trial court conducted the initial screening of his petition to determine his eligibility for resentencing under section 1170.126. Appellant argues that this is an issue of first impression, which must be resolved in his favor based on parallel case law concerning the right to counsel at sentencing proceedings and at post-conviction hearings where a criminal defendant has established a prima facie case for relief.

Certainly, “[t]he Sixth Amendment right to the assistance of counsel applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake. [Citation.]” (*People v. Crayton* (2002) 28 Cal.4th 346, 362.) Further, a defendant is entitled to the effective assistance of counsel at a sentencing hearing. (See *Gardner v. Florida* (1977) 430 U.S. 349, 358 (*Gardner*)). However, the initial screening of the petition to determine eligibility for resentencing is not a sentencing hearing.

In claiming a constitutional right to counsel, appellant relies upon two United States Supreme Court cases, *Gardner, supra*, 430 U.S. 349 and *Mempa v. Rhay* (1967) 389 U.S. 128 (*Mempa*), and two California Supreme Court cases, *People v. Shipman* (1965) 62 Cal.2d 226 (*Shipman*) and *In re Clark* (1993) 5 Cal.4th 750 (*Clark*).

In *Gardner, supra*, 430 U.S. 349, a plurality of the United States Supreme Court concluded that “petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.” (*Id.* at p. 362.) In reaching that conclusion, the court stated: “[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. [Citations.] The defendant has a legitimate interest in the character of the

procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. [Citation.]” (*Id.* at p. 358, fn. omitted.)

The *Gardner* case is of no help to appellant. First, *Gardner* was a capital case and this case is not. Second, while *Gardner* mentioned that sentencing is a critical stage of a criminal prosecution and applied principles of due process, it did not address the right to counsel at post-conviction proceedings. We recognize that original sentencing or resentencing upon remand following an appeal is a critical stage of a criminal prosecution but the resentencing sought by appellant does not fall into those categories.

In *Mempa*, which involved two consolidated cases applying Washington state law, sentencing had been “deferred subject to probation.” (*Mempa, supra*, 389 U.S. at p. 130.) The petitioners pleaded guilty and were placed on probation without imposition of sentence; later, they were sentenced upon revocation of probation without the benefit of counsel. (*Id.* at pp. 130-133.) The United States Supreme Court stated the basic rule that “appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.” (*Id.* at p. 134.) The high court determined that a lawyer must be afforded to defendants at the deferred sentencing stage of the proceeding. (*Id.* at p. 137.)

Appellant was sentenced in 2008. His 2014 petition for recall under section 1170.126 did not constitute deferred sentencing. Rather, the petition initiated a statutory, post-conviction procedure to seek a reduction of sentence.

*Shipman* held that a petitioner who has made a prima facie case for *coram nobis* relief is entitled to the appointment of counsel. (*Shipman, supra*, 62 Cal.2d at pp. 232-233.) A writ of error *coram nobis* is a narrow remedy to vacate a conviction and has limited application. (*People v. Kim* (2009) 45 Cal.4th 1078, 1092.)<sup>8</sup>.

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<sup>8</sup> “To qualify as the basis for relief on *coram nobis*, newly discovered facts must establish a basic flaw that would have prevented rendition of the judgment. [Citations.]”

In *Shipman*, the California Supreme Court stated that “[i]t is now settled that whenever a state affords a direct or collateral remedy to attack a criminal conviction, it cannot invidiously discriminate between rich and poor. . . .” (*Shipman, supra*, 62 Cal.2d at p. 231.) “Although the United States Supreme Court has not held that due process or equal protection requires appointment of counsel to present collateral attacks on convictions, it has held that counsel must be appointed to represent the defendant on his first appeal as of right. (*Douglas v. California* (1963) 372 U.S. 353.) Since the questions that may be raised on *coram nobis* are as crucial as those that may be raised on direct appeal, the *Douglas* case precludes our holding that appointment of counsel in *coram nobis* proceedings rests solely in the discretion of the court.” (*Ibid.*) “A state may, however, adopt reasonable standards to govern the right to counsel in *coram nobis* proceedings.” (*Id.* at p. 232.) The court established that where “an indigent petitioner has stated facts sufficient to satisfy the court that a hearing is required, his claim can no longer be treated as frivolous and he is entitled to have counsel appointed to represent him” (*ibid.*) and entitled to counsel on appeal but “*in the absence of adequate factual allegations stating a prima facie case, counsel need not be appointed either in the trial court or on appeal from a summary denial of relief in that court.*” (*Ibid.*, italics added.)

In *Clark*, the California Supreme Court concluded that “[i]n limited circumstances, consideration may be given to a claim that prior habeas corpus counsel did not

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(*People v. Kim, supra*, 45 Cal.4th at p. 1103) “New facts that would merely have affected the willingness of a litigant to enter a plea, or would have encouraged or convinced him or her to make different strategic choices or seek a different disposition, are not facts that would have prevented rendition of the judgment.” (*Ibid.*) “Because the writ of error *coram nobis* applies where *a fact* unknown to the parties and the court existed at the time of judgment that, if known, would have prevented rendition of the judgment, [t]he remedy does not lie to enable the court to correct errors of law.” [Citations.] Moreover, the allegedly new fact must have been unknown and must have been in existence at the time of the judgment. [Citation.]” (*Id.* at p. 1093.) “[T]he writ of error *coram nobis* is unavailable when a litigant has some other remedy at law.” (*Ibid.*)

competently represent a petitioner.” (*Clark, supra*, 5 Cal.4th. at p. 779.) The *Clark* court explained: “An imprisoned defendant is entitled by due process to reasonable access to the courts, and to the assistance of counsel if counsel is necessary to ensure that access, but neither the Eighth Amendment nor the due process clause of the United States Constitution gives the prisoner, even in a capital case, the right to counsel to mount a collateral attack on the judgment. [Citation.] This court has held, however, that if a petition attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns. [Citations.] ¶] Regardless of whether a constitutional right to counsel exists, a petitioner who *is* represented by counsel when a petition for writ of habeas corpus is filed has a right to assume that counsel is competent and is presenting all potentially meritorious claims. [Citations.] ¶] If, therefore, counsel failed to afford adequate representation in a prior habeas corpus application, that failure may be offered in explanation and justification of the need to file another petition.” (*Id.* at pp. 779-780.) This holding has no application to this case.

No sound constitutional principle can be derived from the holdings of the foregoing cases to establish a right to counsel under the circumstances of this case. Appellant has not shown that proceedings on a post-conviction petition for recall of sentence pursuant to section 1170.126 are part of a criminal prosecution within the meaning of the Sixth Amendment. Neither has he established that he has a constitutional right to counsel under existing case law based upon principles of due process. A petition pursuant to section 1170.126 is not the first appeal of right. It does not even challenge the validity of the original sentence. Although due process may afford a right to counsel in certain proceedings beyond the coverage of the Sixth Amendment, appellant has not demonstrated that the fundamental fairness demanded by due process required the appointment of counsel to represent him on his petition for recall, which lacked any

arguable merit because he was patently statutorily ineligible for relief under section 1170.126.

In sum, the eligibility inquiry is straightforward; the presence and participation of counsel is constitutionally unnecessary.

*Disposition*

The order denying the petition for recall of sentence is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.