IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent.

v.

DARREN D. SASSER,

Defendant and Appellant.

Case No. S217128

First Appellate District, Division Five, Case No. A136655
Alameda County Superior Court No. 156534
The Honorable C. Don Clay, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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By appointment of the
California Supreme Court

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent. v. **DARREN D. SASSER,** Defendant and Appellant.	No. S217128 First District Court of Appeal No. A136655 Alameda County Superior Court No. 156534

APPELLANT'S OPENING BRIEF ON THE MERITS

QUESTION PRESENTED FOR REVIEW

Can a five-year enhancement for a prior serious felony conviction (Pen. Code, § 667, subd. (a)) be added to multiple determinate terms imposed as part of a second-strike sentence (Pen. Code, § 667, subd. (e)(1))?

INTRODUCTION

The instant case presents for this court's review whether a 5-year prior serious felony enhancement (§667(a)(1)) can and should be added to multiple determinate terms imposed as part of a second-strike sentence. (§667(e)(1); §1170.12(c)(1)). Darren D. Sasser, appellant and defendant herein, received a 485-year to life sentence and a stayed 229-year to life sentence which included 35 years for a 5-year serious felony enhancement

applied to each of seven determinate terms. Why should we care about 35 years of the stayed portion of nine consecutive life sentences which require 485 years of incarceration before the offender may be considered for parole? The answer lies in the electorate's recent declaration of intent in Proposition 36, the "Three Strikes Reform" initiative. Second-strike offenders make up an unsustainably high percent of the adult institution population,[1] and the admissions rate for second-strike offenders appears to be climbing.[2] The stated intent of the Three Strikes Reform Initiative includes items of fiscal responsibility, noting the cost of care for a population of old-age inmates and the early release of offenders from jails and prisons due to overcrowding. (Prop. 36, approved Nov. 6, 2012, §§ 1 & 7, further discussed *infra*.) The Three Strikes laws should be read with an eye toward public safety (avoiding the early release of inmates likely to re-offend) and fiscal responsibility (weighing in the cost of health care for a geriatric inmate population).

STATEMENT OF THE CASE AND FACTS

This Statement of the Case and Facts is abbreviated in light of the narrow question before this court.

Following his convictions for multiple same-occasion sexual offenses committed against two separate victims (Pen. Code §§288a(c)(2),

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[1]Cal. Dep't of Corr. & Rehab., Second and Third Striker Felons in the Adult Institution Population, Jun 30, 2013, noting 34,353 second-strike adult inmates as of June 30, 2013 [available at www.cdcr.ca.gov].

[2]Cal. Dep't of Corr. & Rehab., Fall 2013 Adult Population Projections, Figure 2, p. 8 [available at www.cdcr.ca.gov].

286(c)(2), 261(a)(2)),[3] including sentencing allegations qualifying the offender for sentencing under the One-Strike law (§667.61)[4] and having suffered a prior conviction for a sexual offense qualifying the offender for sentencing under the Habitual Offender Act (§667.71(c)(4), §288(a)) and as a single "strike" under the Three Strikes law (§667(e)(1)), Darren D. Sasser, "appellant" herein, was sentenced under the Habitual Offender Act and Three Strikes laws (§667.71, §667(e)(1)) to nine consecutive life terms with a minimum term of 495 years state prison before parole eligibility. (CT 28-29, 32-33 [Abstract of Judgment].) An alternative sentence of 229-years to life was imposed, but stayed, under the One-Strike and Three Strikes laws. (§667.61, §667(e)(1)). (CT 31.) It is the alternative, but stayed portion of the sentence which presents the issue on review in the instant case.[5]

The instant case arrives in this court by way of sentencing after remand. A sentence originally imposed under the One-Strike Law (§667.61) was reversed on defendant's first appeal because the trial court had overlooked the then-applicable "spatial proximity" test for consecutive sentencing under the One-Strike Law and for imposition of an unauthorized sentence in the form of minimum-parole-eligibility terms reduced to one-third of the mandatory period on several, but not all, of the consecutively

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[3]Further statutory references are to the Penal Code unless otherwise stated.

[4]As to Doe 1 the offenses were found to have occurred during a burglary, with use of a weapon, and supporting a multiple victim enhancement thus qualifying for 25-life terms under this state's One-Strike law (§667.61(e)(1), (2), & (5)); as to Doe 2 sentencing enhancements included use of a firearm (§12022.53), multiple victim, and kidnapping clauses qualifying the offenses for One-Strike (§667.61(e)(4), (5), (d)(2)).

[5]The calculation of that term is further described in detail, *infra*.

imposed counts.[6]

After the remand of his original sentence the trial court imposed nine consecutive life sentences with a 495-year minimum term under the Habitual Offender Law (§667.71) and a stayed term under the alternative, One Strike law (§667.61(e)). Addressing the One-Strike sentencing error, the trial court converted several indeterminate terms to determinate terms, then added 5-year recidivist enhancements to each of the determinate terms:

> Based upon the fact that the law that was in effect in 2005 when these offenses did occur and the law was different as it relates to a sentencing under the one strike law, the Court corrects and modifies the sentencing under the one strike law as follows:
>
> The acts committed against Victims 1 and 2 after the Court's review of the Court of Appeals District Court Appeals decision fall under the single occasion rule. Although there was movement throughout the household of Victim Number 1 from the living room to the kitchen to the bedroom and the closet by the defendant of the victim, the Supreme Court in Jones articulated a rule that limits this Court's findings as it relates to this offense. In 2005 at the time it was committed, the law was different.
>
> The court will find that the acts committed were committed on a single occasion according to the Jones decision. The Court being well aware of its discretion to impose concurrent or consecutive sentences exercises his

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[6]Subdivision (g) of section 667.61 was revised effective September 20, 2006 and replaced with subdivision (i), which mandated consecutive sentencing in crimes involving separate victims, or the same victim on separate occasions as determined by Section 667.6(d), superseding this court's decision in *People v. Jones* (2001) 25 Cal.4th 98, 107. The amendment occurred after appellant's offenses were committed but before the trial and sentencing in the instant case. The trial court applied the newer subdivision and thus failed to incorporate the *Jones* "spatial proximity" test at the initial sentencing, leading to error calculating mandatory consecutive life sentences under the One-Strike Law.

> discretion and sentences the defendant to consecutive terms on each count as follows under the one-strike law:
>
> ...
>
> (RT 10:9-28.)

As succinctly stated by the Court of Appeal in the opinion subject of the instant review, "the court determined that the offenses against the individual victims were committed on a 'single occasion' under *Jones*, but the court nonetheless exercised its discretion to sentence the charges consecutively." (Slip opn., p. 6.) The court then imposed one life term for each of the two victims, Doe 1 and Doe 2, and proceeded to impose full and consecutive determinate terms for the remaining counts:

> ... That being the case, the Court elects to sentence the defendant under 667.6(c)/667.6(d) in that in lieu of 1170.1 of the Penal Code to impose a full, separate consecutive term of six years state prison on Count 5, that being the midterm and that will be doubled as a result of the strike prior, plus five years for the serious felony conviction for the aggregate term of Count of of 17 years.
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> (RT 11:18-28.)

Similarly calculated 17-year terms were imposed for the remaining counts, Count 6, 7, 8, 13, 15, and 16, plus the consecutive indeterminate term for Doe 1 imposed on Count 10. (RT 12-13.) Thus, the 229-life One-Strike sentence subject of the instant review was calculated as 55 years to life as to each of the two victims,[7] plus seven identical 17-year determinate terms[8] for

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[7]These two life terms, not a subject of the instant review grant, were calculated as 25-life under the One-Strike law (§667.61), with the minimum term doubled under the Three Strikes law (§667(e)(1)), plus five years for the serious felony prior conviction (§667(a)(1)).

[8]The trial court in passing sentence occasionally referred to the 17-year terms as both "an aggregate term of 17 years to life" (RT 12:5, 12:9

each of seven additional sexual offenses. The 17-year determinate terms were calculated as the midterm of six years for each forcible sexual offense (§§ 288a(c)(2), 286(c)(2), 261(a)(2)), doubled pursuant to the Three Strikes law (§667(e)(1)), plus five years for the serious felony prior conviction (§667(a)(1)), and imposed fully and consecutively (§667.6(c) & (d)). (CT 28-31, 35-36 [minutes]; RT 11-13.)

On appeal of his resentencing defendant challenged imposition of the 5-year serious felony enhancement on each of the consecutive determinate terms, citing *People v. Tassel* (1984) 36 Cal.3d 77 ("*Tassel*"), overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401, and the distinction between recidivist and offense-related enhancements.[9] In the opinion subject of the instant review, the Court of Appeal ruled that application of serious felony prior conviction enhancements was appropriate as to each offense, whether determinate or indeterminate, under the reasoning of this court's decision in *People v. Williams* (2004) 34 Cal.4th 397 ("*Williams*").

On March 14, 2014, appellant petitioned this court for review, which review was subsequently granted as to the Question Presented, "Can a five-year enhancement for a prior serious felony conviction (Pen. Code, § 667, subd. (a)) be added to multiple determinate terms imposed as part of a second-strike sentence (Pen. Code, § 667, subd. (e)(1))?"

[Counts 6 & 7] and as a determinate-type sentence, an "aggregate term of Count 5 of 17 years." (RT 11:25-28 [Count 5]; see also RT 12:13 [Count 8], RT 13:7020 [Counts 13 & 15].) There appears to be no issue that the 17-year terms were determinate, there being no lawful term of 17-years to life that could be imposed in the instant case.

[9]Determinate terms were not imposed until after the remand on appellant's first appeal.

I. RELEVANT LAW REGARDING PRIOR SERIOUS FELONY ENHANCEMENTS AS APPLIED TO A SECOND-STRIKE SENTENCE

The instant question presented for review involves sentencing law created by initiative and legislative processes. The 5-year prior serious felony enhancement (§667(a)(1)) as well as the Three Strikes sentencing scheme for second-strike offenders (§667(e)(1)), both founded on initiatives approved by the electorate, must be considered against the backdrop of sentencing law as it existed at the time of their enactment.

A. The Current 5-year Serious Felony Prior Conviction Enhancement and Three Strikes Statutes

In its present form Penal Code section 667(a)(1) requires imposition of a 5-year enhancement upon imposition of a determinate sentence when it is pleaded and proved that a recidivist has committed a new, serious felony. The relevant subdivision provides:

> (a) (1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.
>
> (§667(a)(1).)

The statute requires imposition of the five-year term "in addition to the sentence imposed by the court for the present offense." (*Ibid.*) The "sentence to be imposed" to which the five-year enhancement will be

appended is not defined by subdivision (a) of Section 667. Rather, the sentence to be imposed must be fashioned in the context of sentencing law elsewhere defined.

Similarly, the second-strike aspect of the Three Strikes law has been codified by subdivision (e) of Section 667. Subdivision (e)(1) explains the impact of a single prior serious or violent felony conviction on a determinate or indeterminate term:

> (1) If a defendant has one prior serious and/or violent felony conviction as defined in subdivision (d) that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(§667(e)(1); see also §1170.12(c)(1).)

The statute thus provides that the impact of a prior serious felony conviction on calculation of the term to be imposed on the new offense is that the term must be "twice the term otherwise provided." (*Ibid.*) Unlike an offender with two prior strikes, whose sentence is described as a life term (or more) by the Three Strikes law itself,[10] an offender with one prior strike has his term defined by other sentencing statutes, then doubled.

Thus, application of the Third Strikes Law to a recidivist enhancement applied to a determinate term requires examination of California's determinate sentencing scheme.

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[10]In contrast, the term imposed on a third-strike offender *replaces* the term otherwise provided by statute, requiring imposition of an indeterminate life term with a minimum period of incarceration of "the greater" of 25 years, triple the determinate term, or the term otherwise calculable under applicable statutes. (§667(e)(2); §1170.12(c)(2).)

B. California's Determinate Sentencing Law (1976)

The Determinate Sentencing Law was passed in 1976 and went into effect July 1, 1977.[11] (Uniform Determinate Sentencing Act, ch. 1139, 1976 Cal.Stat. 5062.) Its intended effect was to simplify the Penal Code's sentencing provisions and provide for more uniform sentencing. (See Raymond I. Parnas & Michael B. Salerno, *The Influence behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 U.C. Davis L. Rev. 29, 30 n.2 (1978).) With the passage of the determinate sentencing law the emphasis on rehabilitation was subordinated, "This emphasis on rehabilitation began to change in 1977" with the adoption of the DSL; "During the following decade California's legislature passed more than 1000 laws increasing mandatory prison sentences, culminating in 1994 with the enactment of the Three Strikes law ... ." (*California Corrections: Confronting Institutional Crisis, Lethal Injection, and Sentencing Reform in*

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[11]"Before July 1, 1977, California law provided for indeterminate sentencing. Under that sentencing scheme, penal statutes specified a minimum and a maximum sentence for felonies, often ranging broadly from as little as one year in prison to imprisonment for life. [Citation.] [T]he actual length of a defendant's term, within the statutory maximum and minimum, was determined by the Adult Authority." (People v. Jefferson (1999) 21 Cal.4th 86, 94, 86 Cal.Rptr.2d 893, 980 P.2d 441.) "On July 1, 1977, the Legislature replaced California's indeterminate sentencing scheme with a new law, the Determinate Sentencing Act. Under the new law, most felonies specify three possible terms of imprisonment (the lower, middle, and upper terms); ... the trial court selects one of these terms. ([Pen.Code,] § 1170, subd. (b).)" (Id. at p. 95, 86 Cal. Rptr.2d 893, 980 P.2d 441.) These terms are generally referred to as "determinate sentences." (Pen.Code, § 1170, subd. (a)(1);[1] see People v. Jefferson, supra, 21 Cal.4th at p. 92, 86 Cal.Rptr.2d 893, 980 P.2d 441.) Some crimes, however, remain punishable by imprisonment for either some number of years to life, or simply "life."" (*People v. Felix* (2000) 22 Cal.4th 651, 654, quoting *People v. Jefferson* (1999) 21 Cal.4th 86, 92-93.)

2007, 13 Berkeley J. Crim. L. 117, 139 (2008).) Ambiguities regarding the actual application of those laws often required judicial interpretation.

B. The Prior Serious Felony Enhancement (Proposition 8 (1982)) and Tassel (1984)

The five-year prior serious felony enhancement was added in 1982 as part of Proposition 8. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1146.) Two years later, in 1984, this court interpreted the application of Proposition 8's five-year prior serious felony enhancement to an aggregate determinate sentence calculated under this state's determinate sentencing law. In *People v. Tassel* (1984) 36 Cal.3d 77, 90 ("*Tassel*"), overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401, this court held that prior serious felony conviction was a status-type enhancement and only applied once to an aggregate determinate term imposed under the Determinate Sentencing Law.

David Tassel was sentenced to consecutive determinate terms under subdivision (c) of Section 667.6. "He was sentenced to the upper term of eight years for rape (count II) and — pursuant to the special sentencing provisions of section 667.6, subdivision (c) for forcible sex offenses — to a fully consecutive upper term of eight years for oral copulation (count III). Enhancements for prior convictions were added to the terms of both counts II and III — one year to each for a prior Florida statutory rape conviction (§ 667.5, subd. (b)) and five years to each for a prior California rape conviction (§ 667.6, subd. (a))." (*Id.*, at p. 89.) This court carefully examined the statutes applicable to imposition of the 5-year enhancement on a sex offender and reasoned that there were two types of enhancements, those that went to the nature of the offender, and those which went to the

nature of the offense, and that "using the same prior convictions twice to enhance one aggregate sentence" was not required nor intended by sentencing law in calculating an aggregate term. (*Id.*, 90.) *Tassel* observed that there were two kinds of enhancements: those that related to personal history of the defendant and those that related to the acts constituting the offense. This court described the "two kinds of enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense. Enhancements for prior convictions – authorized by sections 667.5, 667.6 and 12022.1 – are of the first sort. The second kind of enhancements – those which arise from the circumstances of the crime – are typified by sections 12022.5 and 12022 was a firearm used or was great bodily injury inflicted? Enhancements of the second kind enhance the several counts; those of the first kind, by contrast, have nothing to do with particular counts but, since they are related to the offender, are added only once as a step in arriving at the aggregate sentence." (*Tassel*, *supra*, at p. 90.)

In 1994, ten years after *Tassel* had clarified that prior serious felony enhancements were to be applied once to an aggregate term, the electorate passed Proposition 184. The Three Strikes Law, first enacted legislatively and then confirmed by voter initiative (§1170.12, added by Initiative Measure, Proposition 184, approved Nov. 8, 1994), amended by Initiative Measure (Prop. 36, approved Nov. 6, 2012, eff. Nov. 7, 2012)),[12] provided

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[12]The following statement of intent preceded the text of section 1170.12 in Proposition 184: "It is the intent of the People fo the State of California in enacting this measure to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." Sections 2 provided, "Section 2. All references to existing statutes are to statutes as they existed on June 20, 1993." Proposition 36, passed in 2012, replaced

that defendants with one strike would have their minimum term doubled for each new offense.[13] At the time that the electorate voted for the Three Strike initiative, *Tassel* had been on the books for ten years. The distinction between recidivist and offense-related enhancements was well known and understood.

D. This Court's Decisions in Nguyen (1999) and Williams (2004)

In 1999 this court clarified one of the statutory interpretation issues presented by the Three Strikes Law, regarding whether the statutory language requires the sentencing court to double "the term otherwise provided as punishment for the current felony conviction" (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)) incorporated provisions of the determinate sentencing law, particularly the 1/3-the base term reduction for subordinate terms. (*People v. Nguyen* (1999) 21 Cal.4th 197 ("*Nguyen*".) Most notably, this court ruled that the Three Strikes law did not alter existing sentencing provisions unless expressly stated, "The phrase 'otherwise provided' would seem to encompass all sentencing provisions outside the Three Strikes law, except for those provisions that the Three Strikes law expressly abrogates." (*Id.*, at p. 202.)

In *Nguyen* the court was called upon to resolve a potential conflict between the Three Strikes law and Section 1170.1's one-third the midterm calculation for subordinate terms, "The issue is whether the two strike

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"June 30, 1993" with "November 7, 2012." (West's Annotated Calif. Codes, Penal Code §667, Historical and Statutory Notes (2014 cumulative pocket part, p. 41).)

[13]The Three Strikes law does not violate the Eight Amendment prohibition against cruel and unusual punishment. (*Ewing v. California* (2003) 53 U.S. 11, 30.)

sentencing provision incorporates the principal term/subordinate term methodology of section 1170.1, one of the central provisions of the Determinate Sentencing Law." (*Id.*, at p. 200.) The court considered and interpreted the statutory language of the Three Strikes law as incorporating the relevant portions of the Determinate Sentencing Law applicable to that case:

> Here, the statutory language requires the sentencing court to double 'the term otherwise provided as punishment for hte current felony conviction.' (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) The phrase 'otherwise provided' would seem to encompass all sentencing provisions outside the Three Strikes law, except for those provisions that the Three Strikes law expressly abrogates. Section 1170.1, which specifies the usual principal term/subordinate term methodology for calculating consecutive determinate terms for felonies, is one such sentencing provision. Therefore, unless the Three Strikes law expressly abrogates the relevant provisions of section 1170.1, the most natural reading of the provision at issue is that the setnencing court must designate principal and subordinate terms as required by section 1170.1, calculating the subordinate terms as one-third of the middle term (except when full-term consecutive sentences are otherwise permitted or required), and then double each of the resulting terms. This is what the sentencing court did here.
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> (*Id.*, at pp. 202-203.)

The court ruled that the phrase "otherwise provided" did incorporate "all sentencing provisions outside the Three Strikes law" unless expressly abrogated. (*Id.*, at p. 202.) The decision ruled that the Three Strikes law's second-strike provision thus incorporated the 1/3-the-midterm provision of Section 1170.1, which this court termed "one such sentencing provision." (*Ibid.*) Based upon this reasoning by *Nguyen* other statutory provisions of the Determinate Sentencing law not specifically abrogated by the Three Strikes law remain in effect.

Nonetheless, in a caveat that would later become important, *Nguyen* made clear its decision addressed only determinate sentencing. *Nguyen*'s interpretation of Section 1170.1 regarding the 1/3-the-midterm rule did not apply to life sentences, "The consecutive sentencing provisions of section 1170.1 simply have no relevance in this context." (*Nguyen, supra*, 21 Cal.4th, at p. 206.)

Indeed, in 2004 this court decided *Williams*, distinguishing *Tassel* insofar as application of five-year serious felony enhancements to indeterminate terms. (*Williams, supra*, 34 Cal.4th 397.) *Williams* distinguished *Tassel's* general rule that status-type enhancements are added only once to a defendant's aggregate determinate sentence, noting that in Three-Strikes cases the statute mandates full and consecutive application of the 5-year enhancement to life terms. As foretold by *Nguyen*, *Williams* limited *Tassel* to determinate sentences: "Section 1170.1, however, applies only to *determinate* sentences. It does not apply to multiple indeterminate sentences imposed under the Three Strikes law." (*Williams, supra,* 34 Cal.4th at p. 402 (italics in original); see also *People v. Byrd* (2001) 89 Cal.App.4th 1373 [A third strike indeterminate term is "calculated separately for each new offense, without regard to the other new offenses," citing *People v. Nguyen, supra*, 21 Cal.4th 197, 205].) Even still, *Williams* was careful to phrase its rule as applicable to third-strike sentences: "Accordingly, we conclude that, under the Three Strikes law, section 667(a) enhancements are to be applied individually to each count of a third strike sentence." (*Id.*, at p. 405; see also *People v. Misa* (2006) 140 Cal.App.4th 805, *People v. Garcia* (2001) 167 Cal.App.4th 1550, 1562.)[14]

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[14]After the decision in *Williams,* the Fourth District Court of Appeal, Division One, ruled that a second-strike sentence under the Three Strikes

E. The 2012 Three Strikes Reform Act Clarifies the Electorate's Intent

In 2012 the people passed the Three Strikes Reform Act. (Proposition 36, approved Nov. 6, 2012, eff. Nov. 7, 2012.) The reform was approved after the date of the offenses in the instant case, but nonetheless provides clarification of the people's intent regarding the Three Strikes Law. The act includes in its stated purpose both saving "hundreds of millions of taxpayer dollars every year" in long-term health care for aging inmates and pruning back unintended application of the Three Strikes law to non-violent offenders so as to reduce overcrowding and avoid the "early release of dangerous criminals who are currently being released early because jails and prisons are overcrowded." (Proposition 36, approved Nov. 6, 2012, eff. Nov. 7, 2012, §1(4) & (5).) The findings and declarations attached to Proposition 36, approved Nov. 6, 2012, eff. Nov. 7, 2012, showed concern for economics and proper allocation of prison space to ensure against early release from jails and prisons due to overcrowding. (Prop. 36, §1(4) & (5); see *People v. Yearwood* (2013) 213 Cal.App.4th 161, 171.) Initiative Measure (Prop. 36) Sections 1 and 7 provided:

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law required a 5-year term for a prior serious felony conviction be imposed on both an indeterminate life term imposed for torture and an accompanying determinate term imposed for an assault. (*People v. Misa* (2006) 140 Cal.App.4th 805.) The Fourth District acknowledged that its analysis was not compelled by the ruling in *Williams*, but stated that *Williams'* reasoning allowed for such a result, "Because he was not subjected to multiple indeterminate sentences pursuant to the Three Strikes law as was the defendant in *Williams,* the California Supreme Court's analysis in that case is not directly dispositive of the issue before us. However, we conclude that a similar analysis is applicable here." (*Id.*, at pp. 811-812; see also *People v. Garcia* (2001) 167 Cal.App.4th 1550, 1562 [a third-strike case applying *Misa* analysis to §667.5(b) one-year prior prison term enhancements].)

SECTION 1. Findings and Declarations:

The People enact the Three Strikes Reform act of 2012 to restore the original intent of California's Three Strikes law – imposing life sentences for dangerous criminals like rapists, murders, and child molesters.
This act will:

(1) Require that murders, rapists, and child molesters serve their full sentences–they will receive life sentences, even if they are convicted of a new minor third strike crime.

(2) Restore the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime.

(3) Maintain that repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession will receive twice the normal sentence instead of a life sentence.

(4) Save hundreds of millions of taxpayer dollars every year for at least 10 years. The state will no longer pay for housing or long-term health care for elderly, low-risk, non-violent inmates serving life sentences for minor crimes.

(5) Prevent the early release of dangerous criminals who are currently being released early because jails and prisons are overcrowded with low-risk, non-violent inmates serving life sentences for petty crimes."

Section 7. Liberal Construction:

This act is an exercise of the public power of the people of the State of California for the protection of the health, safety, and welfare of the people fo the State of California, and shall be liberally construed to effectuate those purposes.

(West's Annotated Calif. Codes, Pen. Code §667, Historical and Statutory Notes, 2012 Legislation, Prop. 36, §§ 1 & 7, (2014 cumulative pocket part, pp. 40-41).)

An interpretation of the electorate's intent regarding the Three Strikes law should take into consideration the electorate's recent clarification.

II. APPLICATION OF SECTION 667(A)(1) AND 667(E)(1) TO THE DETERMINATE TERMS IMPOSED IN THE INSTANT CASE

As noted in the Statement of the Case and Facts, above, the instant sentence concerns application of 5-year serious felony prior convictions (§667(a)(1) to consecutive determinate terms following imposition of a term under the One Strike law (§667.61(e)) amplified under the Three Strikes law as a second-strike (§667(e)(1)). The 229-life One-Strike sentence subject of the instant review was calculated as 55 years to life as to each of the two victims (§667.61, §667(e)(1), §667(a)(1), §667.6(d)), plus seven 17-year determinate terms for each of seven additional sexual offenses calculated as the midterm of six years for each forcible sexual offense (§§ 288a(c)(2), 286(c)(2), 261(a)(2)), doubled pursuant to the Three Strikes law (§667(e)(1)), plus five years for the serious felony prior conviction (§667(a)(1)), and imposed fully and consecutively (§667.6(c)).[15] (CT 28-31, 35-36 [minutes]; RT 11-13.) Thus, the trial court in the instant case imposed full and consecutive determinate terms for the forcible sexual offenses under subdivision (c) of section 667.6 as opposed to the determinate term calculation provided by the 1/3-the-midterm rule of section 1170.1 Yet, sentencing pursuant to Section 667.6 does not distinguish the determinate portion of the instant sentence from this court's precedents.

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[15]After applying one life term as to each of the separate victims (§667.6(d)), the trial court appears to have exercised its discretion to find the offenses were same-victim-same-occasion offenses (§667.6(c)) in imposing the determinate terms.

A. Full and Consecutive Sentencing under Section 667.6(c)

Two statutory issues that may at first blush appear peculiar to the instant type of section 667.6(c) sexual offense sentencing were already resolved by *Tassel*: the proper interpretation of subdivision (h) of Section 1170.1, and application of the 5-year serious felony enhancement to consecutive terms imposed under Section 667.6. At issue in the instant case are same-victim-same-occasion forcible sexual offenses qualifying for punishment under subdivision (c) of section 667.6. Subdivision (c) of section 667.6 authorizes a court to impose full and consecutive terms for qualifying sexual offenses:

> (c) In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e). If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.
>
> (§667.6(c).)

Tassel, discussed *supra*, faced full and consecutive terms imposed pursuant to section 667.6. Thus, *Tassel* has already confronted the application of section 667(a)(1)'s 5-year serious felony prior conviction enhancements to full and consecutive terms imposed under Section 667.6(c).

Similarly, this court in *People v. Jones* (1993) 5 Cal.4th 1142 was confronted with consecutive determinate sentences imposed pursuant to Section 667.6 and ruled that a 5-year serious felony prior conviction enhancement (§667(a)) and, two of three, 1-year prior prison term enhancements (§667.5(b)) were to be appended once to the cumulated determinate terms for the forcible sexual offenses. Monroe Jones was convicted of 3 counts of forcible sodomy (§286(c)), plus a count of digital penetration (§289(a)) and was sentenced to full and consecutive terms under Section 667.6(c) & (d) to which were added a 5-year enhancement for a serious felony prior conviction and three 1-year enhancements for three prior prison terms for a total term of 32 years in state prison. (*Id.*, at p. 1145.) This court reduced the total term to 31 years, declaring the rule that a prior conviction may only be used once when choosing between the 5-year and 1-year enhancements provided by sections 667 and 667.5. (*Id.*, at 1152-1153.) The recidivist-type enhancements, both the 5-year prior serious felony and the 1-year prior prison term enhancements, were applied only once to the cumulated determinate term imposed pursuant to subdivision (c) and (d) of section 667.6. This court interpreted this result as consistent with the intent of the electorate in passing Proposition 8. (*Id.*, at pp. 1149-1152.)

B. Subdivision (h) of Section 1170.1

Additionally, determinate terms imposed under both Section 1170 and 667.6 are discussed by subdivision (h) of section1170.1. Subdivision (h) discusses imposition of enhancements on terms imposed under 667.6:

> (h) For any violation of an offense specified in Section 667.6, the number of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are

> pursuant to this section, Section 667.6, or some other provision of law. Each of the enhancements shall be a full and separately served term.
>
> (§1170.1(h).)

Subdivision (h) clarifies that Section 1170.1 does not impose a limit on the number of enhancements that may otherwise be lawfully imposed. On the other hand, subdivision (h) does not require that same-victim-same-occasion sexual offenses (§667.6(c)) be consecutively imposed.

In fact, the Section 1170(h) argument (formerly subdivision (i), which has again been changed back to subdivision (h)) was presented and squarely rejected by *Tassel*.[16] This court faced the same issue in *Tassel*, construing then subdivision (i) of section 1170.1, and ruled that subdivision was not intended to direct imposition of recidivist enhancements:

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[16]*Tassel* explained the application of subdivision (h) to its case: "The trial court justified its double use of the same prior convictions for enhancement by relying on section 1170.1, subdivision (i) (formerly subd. (h)).[] Subdivision (i), which applies only to forcible sex offenses, provides: "For any violation of subdivision (2) or (3) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, or sodomy or oral copulation by force, violence, duress, menace or threat of great bodily harm as provided in Section 286 or 288a, the number of enhancements which may be imposed shall not be limited, regardless of whether such enhancements are pursuant to this or some other section of law. Each of such enhancements shall be a full and separately served enhancement and shall not be merged with any term or with any other enhancement." (Italics added.)

"Petitioner contends the trial court read subdivision (i) of section 1170.1 too broadly in finding that it ordained using the same prior convictions twice to enhance one aggregate sentence. We agree. The obvious purpose of subdivision (i) is to nullify certain limitations set forth in other parts of section 1170.1 regarding the number and length of enhancements that may be added to particular counts. It is not intended to affect the method by which enhancements for prior convictions are imposed." (*Tassel, supra*, p. 90 [footnote omitted].)

> The obvious purpose of subdivision (i) is to nullify certain limitations set forth in other parts of section 1170.1 regarding the number and length of enhancements that may be added to particular counts. It is not intended to affect the method by which enhancements for prior convictions are imposed.
>
> (*Tassel, supra*, at p. 90.)

Subdivision (i) of Section 1170.1 does not muddy the recidivist enhancement issue. The relevant statute, subdivision (i) of section 1170.1, was read and interpreted in 1984 as not compelling application of 5-year serious felony prior conviction enhancements to consecutively imposed determinate terms.

C. Determinate and Indeterminate Terms Distinguished

The Three-Strikes Law describes the punishments to be imposed for so-called second- and third-strike convictions. Notably, persons convicted of second- and third- strikes are subjected to distinct, and different, sentencing schemes. A person suffering a conviction with a single, qualifying serious or violent felony offense has the term lawfully imposed by other sentencing provisions doubled. A person suffering a conviction with two qualifying serious or violent felony offenses is subjected to an alternative sentencing scheme: life with a minimum mandatory term otherwise calculated under the Three-Strikes law itself. Subdivision (e)(1) of Section 667 describes the punishment to be imposed where one strike has been pleaded and proved:

> (1) If a defendant has one prior serious and/or violent felony conviction as defined in subdivision (d) that has been pled and proved, the determinate term or minimum term for an

> indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.
>
> (§667(e)(1), and see §1170.12(c)(1), *supra.*)

Subdivision (e)(1) doubles a term ***imposed by another statute.*** It doubles a determinate term imposed by another sentencing scheme, "the determinate term ... shall be twice the term otherwise provided ... ." (§667(e)(1); 1170.12(c)(1); and see *People v. Nguyen, supra.*) In contrast, subdivision (e)(2) provides an alternative sentencing scheme where a defendant has suffered at least two prior strikes:

> (2) (A) Except as provided in subparagraph (C), if a defendant has two or more prior serious and/or violent felony convictions, as defined in subdivision (d), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of ... .
>
> (§667(e)(2); and see §1170.12(c)(2).)

Under subdivision (e)(2), a life term is imposed ***instead*** of a determinate term. (§667(e)(2); §1170.12(c)(2); and see *People v. Williams, supra.*) A third strike does not include the calculation of a determinate term and thus does not unsettle precedent regarding attachment of recidivist enhancements to an aggregate term.

In order to apply 5-year serious felony prior conviction enhancements to multiple determinate counts, this court must overrule both *Tassel* and *Nguyen.*

III. TYPICALLY DEFERENCE IS GRANTED TO PRECEDENTS ON POINTS OF STATUTORY CONSTRUCTION

Tassel was the law of the land and set forth the manner of calculating determinate terms at the time when the Three Strikes law and Proposition 184 passed. The original Three Strikes and You're Out initiative was drafted and passed at a time when settled precedent established a distinction between offense- and offender-related enhancements. *Tassel* provided the method of calculating aggregate determinate sentences prior to passage of the Three Strikes Law. *Tassel*'s interpretation of the Three Strikes law should not be set aside lightly. The rule of law commands respect only through the orderly adjudication of controversies, and individuals, institutions and society in general are entitled to expect that the law will be as predictable as possible. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 921, citing *Payne v. Tennessee* (1991) 501 U.S. 808 [115 L.Ed.2d 720, 736-737, 111 S.Ct. 2597]; see *Akron v. Akron Center for Reproductive Health* (1983) 462 U.S. 416, 419-420 [76 L.Ed.2d 687, 696-697, 103 S.Ct. 2481].)

Overruling precedence is even more disruptive when interpreting statutes. As stated by Justice Scalia in a federal context, "the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." (*Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 172-173; *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 921.)

Also as previously recognized by this court, the longevity of a judicial interpretation of a statute without legislative action to overrule that interpretation is not necessarily conclusive, but tends to indicate legislative acquiescence in the judicial interpretation. (*People v. Williams* (2002) 26 Cal.4th 779, 789-790 [*Lebarron Keith Williams*; confirming assault is a general intent crime].) Legislative inaction following interpretation of a statute tends to "indicate that the Legislature has acquiesced in our conclusion that assault does not require a specific intent." (*Williams, supra* 26 Cal.4th, at pp. 789-790, citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 178, 83 Cal.Rptr.2d 548, 973 P.2d 527 [declining to overrule a judicial interpretation after decades of legislative inaction and the unanimity of our decisions restating that interpretation].)

IV. FURTHER INCREASING SENTENCES FOR SECOND-STRIKE OFFENDERS BEYOND CURRENT LEVELS WAS NEITHER CONTEMPLATED NOR INTENDED BY THE ELECTORATE

The expressed intent of the Three Strikes law was to increase punishment. Yet, an intent to increase punishment does not necessarily encompass extension of criminal sentences so as to promote prison overcrowding resulting in the early release of inmates and the retention of inmates requiring geriatric care, at little benefit to crime-prevention but great cost to the taxpayer. The electorate clarified as much in its passage of the 2012 "Three Strikes Reform" initiative. (Proposition 36, approved Nov. 6, 2012, *supra.*) The electorate has clarified that in order to effectively "increase punishment" the Three Strikes law must consider bed-space for new offenders and the fiscal costs of caring for decrepit prisoners. The

Fifth District recently had occasion to examine the electorate's motivation for passing Proposition 36:

> The Act was added by the initiative process. Ballot pamphlet arguments have been recognized as a proper extrinsic aid in construing voter initiatives adopted by popular vote. (People v. Floyd (2003) 31 Cal.4th 179, 187-188 [1 Cal.Rptr.3d 885, 72 P.3d 820] (Floyd); Davis v. City of Berkeley (1990) 51 Cal.3d 227, 237, fn. 4 [272 Cal.Rptr. 139, 794 P.2d 897]; Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com. (2012) 209 Cal.App.4th 1182, 1189 [147 Cal.Rptr.3d 696] (Sunset Beach).) The Act's proponents advanced six arguments in favor of the Act in the Voter Information Guide. The argument headings were titled: (1) "make the punishment fit the crime"; (2) "save California over $100 million every year"; (3) "make room in prison for dangerous felons"; (4) "law enforcement support"; (5) "taxpayer support"; and (6) "tough and smart on crime." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36, p. 52, capitalization omitted.)
>
> (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 171 (pet. Rev. Denied 5/1/2013).)

The Fifth District made clear that the impetus behind passage of the reform act included prison overcrowding and fiscal consequences, such as care for aging and decrepit inmates.[17]

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[17] *Yearwood* continued its explication of the electorate's intent, as gleaned from the official voter pamphlets, "The ballot arguments supporting Proposition 36 were primarily focused on increasing public safety and saving money. The public safety argument reasoned, "Today, dangerous criminals are being released early from prison because jails are overcrowded with nonviolent offenders who pose no risk to the public. Prop. 36 prevents dangerous criminals from being released early. People convicted of shoplifting a pair of socks, stealing bread or baby formula don't deserve life sentences." (Voter Information Guide, Gen. Elec., supra, rebuttal to argument against Prop. 36, p. 53.) Also, "Prop. 36 will help stop clogging overcrowded prisons with non-violent offenders, so we have room

California's prison overcrowding has in fact resulted in the early release of felony offenders. In 2011, the United States Supreme Court ruled on the case of *Brown v. Plata* (2011) 570 U.S. ____ [131 S.Ct. 1910]) a case on prison overcrowding. Over a dissent that cautioned against "perhaps the most radical injunction issued by a court in our Nation's history: an order requiring California to release the staggering number of 46,000 convicted criminals" (570 U.S., at p. ____ [131 S.Ct., at p. 1950], Scalia, J., dissenting), the high court ruled in a 5 to 4 decision that prison overcrowding had resulted in the California Department of Corrections and Rehabilitation violating inmates' Eighth Amendment rights against cruel and unusual punishment. To abide by the federal court's order, California legislature passed Assembly Bill 109 in April 2011. The resulting Public Safety Realignment Act changed how the California state government deals with low level felonies, with the goal of reduced recidivism. The act went into effect October 1, 2011 and allowed the California Department of Corrections and Rehabilitation to reduce its inmate population by moving prisoners to county jails. (See §17.5(5) ["Realigning low-level felony offenders who do not have prior convictions for serious, violent, or sex

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to keep violent felons off the streets" and "Prop. 36 will keep dangerous criminals off the streets." (Voter Information Guide, Gen. Elec., supra, argument in favor of Prop. 36, p. 52.) The Act's proponents stated that "Criminal justice experts and law enforcement leaders carefully crafted Prop. 36 so that truly dangerous criminals will receive no benefits whatsoever from the reform." (Ibid.) The fiscal argument reasoned that the Act could save taxpayers "$100 million every year" that would otherwise be spent "to house and pay health care costs for non-violent Three Strikes inmates if the law is not changed." (Ibid.)" (*People v. Yearwood, supra*, at p. 171.)

offenses ... ."].)[18] The stated impetus for the Realignment Act was budgetary, the statute particularly addressing fiscal policy:

> (7) Fiscal policy and correctional practices should align to promote a justice reinvestment strategy that fits each county. "Justice reinvestment" is a data-driven approach to reduce corrections and related criminal justice spending and reinvest savings in strategies designed to increase public safety. The purpose of justice reinvestment is to manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable.
>
> (§17.5(a)(7).)

The concluding subdivision of the statute codifying the Criminal Justice Realignment Act of 2011 states, "(b) The provisions of this act are not intended to alleviate state prison overcrowding." (§17.5.) Yet, the plan and effect of realignment has been to move offenders from state prison to county jails and to provide for the early release from the terms of imprisonment imposed. Notably, it was soon was after the passage of the Realignment Act that the California electorate passed the Three Strikes Reform initiative.

Second, care for elderly inmates has become a major expense for the California Department of Corrections. In a case published in 2013 the First District, Division Two, noted the cost to the California Department of Corrections and Rehabilitation of the rising cost of care for the aging prison population:

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[18]Realignment resulted in the Department of Corrections promptly moving many inmates from the state prison to the county jails. (Camacho, Albert; Harvis, Mark, "Realignment of California's Criminal Justice Policies," Los Angeles Lawyer (April, 2012).)

> Additionally, the staggering overall cost of prison health care — projected to be $1.5 billion for the current fiscal year — is disproportionately attributable to the care and treatment of ill and aging inmates,[] most of whom are indeterminately sentenced life prisoners, who now constitute more than one-fourth of the state's prison population. (Cal. Dept. of Corrections & Rehabilitation, supra. Prison Census Data as of June 30, 2012, table 10.)

(*In re Stoneroad* (2013) 215 Cal.App.5h 596, 633 (rev. den. 7/11/13).)

Stoneroad also noted that state agencies have complained about the cost of the increasingly geriatric population, "'Unless the State constructively addresses this issue, its increasingly geriatric population of inmates will continue to sap General Fund moneys for necessary health care.'" (*In re Stoneroad* (2013) 215 Cal.App.4th 596, 633, fn. 20.[19]) The cost of housing

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[19]*Stoneroad* references a report by the California Correcitonal Health Care Services. (Cal. Correctional Health Care Services, Achieving a Constitutional Level of Medical Care in California's Prisons, Twenty-second Tri-Annual Report of the Federal Receiver's Turnaround Plan of Action for September 1-December 31, 2012 (Jan. 25, 2013) pp. 32-33; available at [as of Apr. 18, 2013].) Among other things, this report states that "Clinical risk is one of the most important factors in the overall costs of hospital care, and those costs are concentrated in older inmates. Our data shows that average costs for patients at the highest clinical risk and with the most complex cases are nearly 10 times the costs of the lowest risk patients ($4,942 per month for highest risk versus $532 per month for low risk). Only 2.6% of our patients fall into the highest clinical risk category, yet these patients cost CDCR approximately $190,000,000 per year. Sixty percent of these patients are over 50 years of age and eighty-five percent are over 40 years of age. Clearly, we are spending a large sum of money to provide medical care to a relatively small number of aging, ill inmates. Unless the State constructively addresses this issue, its increasingly geriatric population of inmates will continue to sap General Fund moneys for necessary health care." (Id. at pp. 32-33.)

aging inmates continues to be a concern for our state.[20]

Academic authorities diverge on the degree of success of the Three Strikes law. For example, an article published 2007 praised the law with its title and noted, generally, that the reduction in crime was worth the cost. (Goodno, Naomi, Golden Gate University Law Review (Vol. 37, 2007), *Career Criminals Targeted: The Verdict is in, California's Three Strikes Law Proves Effective*, p. 461.) Other authorities, perhaps with the advantage of hindsight regarding the economics of the millennium's first

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[20]The Legislative Analyst's Office has published the following brief summary on the effect of the aging population on the Department of Correction's budget:

> According to the California Department of Corrections and Rehabilitation (CDCR), the percentage of inmates over the age of 55 has more than doubled over the past decade, from 3 percent (or about 4,900 inmates) in 2000, to 8 percent (or about 13,600 inmates) in 2010.
>
> The department projects that the percentage of inmates over the age of 55 will continue to increase over the next few years to about 12 percent of the prison population by 2015.
>
> The growth in elderly inmates is primarily due to various sentencing law changes that have increased the average length of stay in prison, such as the "Three Strikes and You're Out" law.
>
> Although CDCR does not track inmate expenditure data by age group (such as over age 55), our review of research from other states suggests that it costs two to three times more to incarcerate an elderly inmate, as compared to the average inmate. In California, the average annual cost to incarcerate an inmate in prison is about $51,000.

(Legislative Analyst's Office handout, *Elderly Inmates in California Prisons* (May 11, 2010), pp. 2-3.)

decade were more critical:

> After 158 years of statehood, California's criminal punishment system is in a precarious position – its prisons are dangerously overcrowded, its recidivism rates are extraordinarily high, its corrections budget is enormous, and its sentencing system is incoherent.
>
> (Dansky, Kara, University of San Francisco Law Review, *Understanding California Sentencing* (Dec 18, 2008), p. 45.)

It is perhaps past the time where a call for "increased punishment" should be interpreted as an expression of the will to impose sentences beyond practicality. An interpretation of "increased punishment" would be wise to factor in the availability of prison space for those violent criminals actually likely to re-offend.

V. SHOULD THIS COURT DECIDE TO OVERRULE *TASSEL* THE NEW RULE SHOULD BE APPLIED PROSPECTIVELY, ONLY

Finally, should this Court decide to overrule *Tassel* and *Nguyen* and impose a new rule permitting application of 5-year prior serious felony enhancements to multiple components of an aggregate determinate term the rule should be applied prospectively only. "The due process clause is a limitation o the powers of the legislature and does not of its own force apply to the judicial branch of government. However, the principle on which the clause is based, that a person has a right to fair warning of the conduct which will give rise to criminal penalties, is fundamental to our conept of constitutional ibery. As such that right is protected against judicial action by the due process clause of the Fourteenth Amendment to the United States Constitution." (*People v. Correa* (2012) 54 Cal.4th 331, 334, citing *Marks v. United States* (1977) 430 U.S. 188, 191-192; *People v. Superior*

Court (Sparks) (2010) 48 Cal.4th 1, 21; *People v. Morante* (1999) 20 Cal.4t5h 403, 431.) In *Correa* this court overruled the interpretation of Section 654 previously adopted by the Court in *Neal v. State of California* (1960) 55 Cal.2d 11, 18, fn. 1. (*Correa, supra*, 54 al.4th at pp. 334-344.) However, this court held that due process and ex post facto clauses barred application of the new trule to the defendant in that case. (*Id.*, at pp. 344-345; see also *People v. King* (1993) 5 Cal.4th 59, overruling *In re Culbreth* (1976) 17 Cal.3d 330 [application of Section 12022.5 firearm enhancement to multiple counts; new interpretation was a new rule and thus must be applied prospectively, only].)

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CONCLUSION

In the Three Strikes laws the people of the State of California have clearly stated that they wish to punish violent and serious offenders. However, the people have also clearly stated that they intend for such punishment to be applied responsibly, with an eye toward public safety (avoiding the early release of criminals) and fiscal considerations (weighing-in the cost of health care for a geriatric inmate population against the benefits of increased punishment). (Prop. 36, §§ 1 & 7, *supra.*) The Three Strikes law's original call to generally "ensure longer prison sentences and greater punishment" is tempered by public safety, economics, and the reality of early release of inmates due to prison overcrowding.

It is not necessary to further increase the punitive effect of the 5-year prior serious felony enhancement by interpreting the Three Strikes law as altering the manner in which recidivist-type enhancements are applied to aggregate determinate terms. Such interpretation was probably not intended by the electorate, nor contemplated by the legislature, would dramatically increase the maximum penalty faced by second-strike offenders and the increased terms of imprisonment would result in unintended fiscal consequences.

Respectfully Submitted,

Dirck Newbury
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Attorney for Darren D. Sasser, Appellant

CERTIFICATE OF SERVICE BY MAIL

I declare under penalty of perjury that I am a citizen of the United States over eighteen years of age, not a party to the above action or proceeding and that my business address is Post Office Box 5575, Berkeley, California 94705 and that I served a copy of the attached

APPELLANT'S OPENING BRIEF ON THE MERITS

By placing said copy in a sealed envelope addressed as follows:

California Attorney General
455 Golden Gate Blvd., Suite 11000
San Francisco, CA 94102-3664

Alameda County District Attorney
1225 Fallon Street, 9th floor
Oakland, CA 94612

First District Appellate Project
730 Harrison Street, Suite 201
San Francisco, CA 94107

Darren D. Sasser, AC 1109
Mule Creek State Prison
PO Box 409099
Ione, CA 95640

Alameda County Superior Court
1225 Fallon Street
Oakland, CA 94612

First District Court of Appeal, Division Five, 350 McAllister St., S.F., CA (hand delivered)

with postage thereon fully prepaid and thereafter deposited in the United States Mail at Alameda County, California, that there is delivery service or regular communication by United States mail and the place so addressed, and that the date of deposit in the mail is the date of execution of this certificate.

I declare under penalty of perjury that the foregoing is true and correct, executed at Alameda County on June 25, 2014.

_____
Dirck Newbury

CERTIFICATE OF WORD COUNT
(Cal. Rules Court, rule 8.520(c))

I, Dirck Newbury (State Bar No. 87959), declare under penalty of perjury that I am a citizen of the United States over eighteen years of age, not a party to the above action or proceeding and that my business address is Post Office Box 5575, Berkeley, California 94705 and that the attached brief contains 9,362 words (per WordPerfect X5 wordprocessor).

I declare under penalty of perjury that the foregoing is true and correct, executed at Alameda County on June 25, 2014.

_____
Dirck Newbury