

COPY

**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

SUPREME COURT  
**FILED**

AUG 25 2014

Frank A. McGuire Clerk  
Deputy

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

**RESPONDENT'S BRIEF ON THE MERITS**

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## QUESTION 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))?

## STATEMENT

In October 2009, a jury convicted defendant Darren Sasser of 11 sexual offenses perpetrated against Jane Doe 1 (JD1) on November 9, 2005, and Jane Doe 2 (JD2) on November 17, 2005. As to JD1, defendant was found guilty of one count of oral copulation (Pen. Code,<sup>1</sup> § 288a, subd. (c)(2)), one count of sodomy (§ 286, subd. (c)(2)), and three counts of forcible rape (§ 261, subd. (a)(2)). As to JD2, defendant was found guilty of two counts of oral copulation (§ 288a, subd. (c)(2)), two counts of sodomy (§ 286, subd. (c)(2)), and two counts of forcible rape (§ 261, subd. (a)(2)). Collectively, he sustained convictions for three counts of oral copulation (count 2 as to JD1, counts 10 & 15 as to JD2); three counts of sodomy (count 5 as to JD1, counts 11 & 17 as to JD2); and five counts of forcible rape (counts 6, 7, & 8 as to JD1, counts 13 & 16 as to JD2). (CT 1-6, 32-33; RT 5-6.)

The jury found true various enhancements and allegations, including a special circumstance under Jessica's Law (§ 667.6, subd. (d)) that the offenses "involved the same victim on separate occasions," a multiple victim special circumstance under the One Strike Law (OSL) (§ 667.61, subd. (c)), and a prior serious felony enhancement (§ 667, subd. (a)). (CT 1-2.) Defendant had previously admitted a prior conviction for lewd act on a child (§ 288, subd. (a)) with allegations exposing him to life terms under

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

the Habitual Sexual Offender Law (HSOL) (§ 667.71) and the Three Strikes Law (§§ 667, subd. (b)-(i); 1170.12). (CT 2, fn. 4.) In January 2010, defendant was sentenced to consecutive life terms for each of his 11 convictions, with a minimum of 458 years 4 months. (CT 2.)

On appeal, the Court of Appeal reversed two of the sodomy convictions for instructional error, and those charges were later dismissed. The Court of Appeal also found an unauthorized sentence because the court had reduced to one third several indeterminate life sentences and five-year prior enhancements that required full term consecutive sentences. (*People v. Sasser* (July 27, 2011, A127431) [2011 WL 3198786] ).

On remand, the trial court resentenced defendant to a total unstayed indeterminate term of 495 years to life, using Three Strikes, HSOL, and Jessica's Law. The court arrived at that sentence by imposing a term of 25 years to life for each of the offenses under the HSOL, doubling that term pursuant to Three Strikes, and then adding an additional five-years to each term under section 667, subdivision (a) (section 667(a)). (CT 35.)

Under the OSL, the trial court found two of defendant's acts met the OSL's broad "single occasion" requirement as described in *People v. Jones* (2001) 25 Cal.4th 98, 107 and imposed, but stayed, a sentence of 229 years to life. That term is composed of two consecutive indeterminate terms of 55 years to life (25 years to life under the OSL, doubled, with a section 667(a) five-year prior added), plus a 119-year sentence composed of 17-year determinate terms on each of the other seven counts (the midterm of six years, doubled pursuant to the Three Strikes law, plus five years for the serious felony prior pursuant to section 667(a)). (CT 36.)<sup>2</sup>

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<sup>2</sup> The present version of the OSL would have required indeterminate sentences on all nine counts. (See Stats.2006, c. 337 (S.B. 1128), § 33.) It  
(continued...)

On a second appeal, defendant challenged one component of the stayed sentence, namely, the five-year enhancements for the prior serious felony conviction (§ 667(a)), which the trial court added to the indeterminate terms on counts 2 and 10, and to each of the second strike determinate terms on the seven other counts. Defendant argued that only one recidivism enhancement can be imposed on the entire determinate term portion of the sentence (along with an enhancement for each of the indeterminate terms). The Court of Appeal rejected that claim. (*People v. Sasser* (Feb. 11, 2014, A136655), review granted May 14, 2014, S217128 (*Sasser*).

### SUMMARY OF THE ARGUMENT

The lower court properly imposed consecutive five-year enhancements under section 667(a), on each of defendant's seven determinate terms as part of his stayed second-strike sentence. Three Strikes is a separate sentencing scheme intended to ensure longer prison sentences for recidivist offenders. Whether the Three Strikes sentence is for a second strike or a third strike, determinate sentencing principles govern the calculation of the principal and/or subordinate terms rather than additional enhancements to those terms.

This court has ruled that a five-year enhancement for a prior serious felony conviction for a sexually violent offense under section 667.6, subdivision (a), is a "status" enhancement that can only be applied once to enhance one aggregate sentence. (*People v. Tassell* (1984) 36 Cal.3d 77, overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401.) That rule does not apply to the Three Strikes scheme. No distinction under

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(...continued)

is only the prior version used by the court at sentencing that contemplates determinate subordinate terms. (See Stats.1998, c. 936 (A.B. 105), § 9.)



Three Strikes exists between status enhancements and other types of enhancements. Accordingly, there is no restriction under that scheme on the number of enhancements that can be imposed pursuant to section 667(a). The Court of Appeal properly upheld the second-strike sentences in which defendant received nine, five-year enhancements, one for each of his nine current convictions as part of the stayed sentence.

## **ARGUMENT**

### **A. Introduction**

This case arises at the intersection of five sentencing schemes: the Three Strikes law (§§ 667, subd. (b)-(h), 1170.12), the Habitual Sexual Offender Law (HSOL) (§ 667.71), the One Strike Law (OSL) (§ 667.61), Jessica's Law (§ 667.6), and the five-year sentence enhancement for each prior serious or violent felony (former § 667, subd. (a), see now (§ 667(a)(1), as amended by Stats. 1994, ch. 12, § 1, p. 72) as added to the Penal Code in 1982 by the passage of the voter initiative Proposition 8, commonly known as the Victims' Bill of Rights. Each scheme has bearing on defendant's stayed sentence of 229 years to life.

Each of those schemes except convictions for certain felony offenses from the usual sentencing under the Determinate Sentencing Law (DSL) (§§ 1170, 1170.1) and provide alternate sentencing for those offenses. The application of these later enacted sentencing schemes almost invariably results in longer prison terms for recidivist offenders than would occur under DSL. When DSL is preempted by the subsequently enacted sentencing schemes, DSL only provides a means of calculating certain limited components of the overall sentence.

As to defendant's stayed sentence, DSL governs the calculation of principal and subordinate determinate terms for defendant's second strike offenses. But DSL does not otherwise apply to the recidivist enhancement

for a prior serious felony conviction applicable to each of the current sexual felony offenses. The Court of Appeal properly recognized this fact by upholding five-year enhancements under section 667(a) under Three Strikes on each of defendant's current serious felony convictions as part of his stayed sentence. The sentence should be upheld.

**B. *Tassell* Does Not Apply to Second or Third Strike Sentences Because the DSL Is Only a Method of Calculating Component Terms Within the Three Strikes Scheme**

In 1984, this court held that a five-year enhancement for conviction of a prior sexually violent offense under section 667.6, subdivision (a), was a "status" enhancement and could only be applied once, regardless of the number of current convictions. (*People v. Tassell* (1984) 36 Cal.3d 77, overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401 (*Tassell*)). This court distinguished status enhancements based on the nature of the offender from those based on the nature of the offense. (*Tassell, supra*, 36 Cal.3d at pp. 90-91.) *Tassell* rejected the argument that then section 1170.1, subdivision (i) (now § 1170.1, subd. (h)) was intended to affect the method by which enhancements for prior convictions are imposed, and ruled that the statute instead was enacted to nullify other limitations on enhancements set forth in section 1170.1 itself. (See *id.* at pp. 91-92.)<sup>3</sup>

*Tassell* has subsequently been applied to prohibit imposition of multiple enhancements under section 667(a). (See, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1163-1164 [reducing 25-year aggregate determinate term for substantive offenses and enhancements imposed in conjunction with death penalty].) But *Tassell* was decided prior to the

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<sup>3</sup> This court did not grant review to reconsider *Tassell*'s holding on that issue, and we do not discuss it.

enactment of Three Strikes. The section 667(a) terms at issue here are components of Three Strikes sentences, consisting of both second strike determinate terms and indeterminate terms on each of defendant's current sexually violent felony offenses.

Following this court's opinion in *People v. Williams* (2004) 34 Cal.4th 397 (*Williams*), and the Fourth District Court of Appeal's opinion in *People v. Misa* (2006) 140 Cal.App.4th 837 (*Misa*), the Court of Appeal below reasoned that when a court imposes sentence under Three Strikes, the Legislature and the electorate intend longer prison sentences for recidivists serious and violent felons, and that *Tassell's* limitations do not apply. (Typed opn. at p.11.)

That decision is correct. *Williams* held that *Tassell* does not apply to Three Strike sentences. (*Williams, supra*, 34 Cal.4th at pp. 404-405.) This court stated: "Adding the five-year enhancement to the sentence for each new serious felony conviction is . . . consistent with the logic of the Three Strikes law." (*Id.* at p. 404.) The court reasoned, "[T]he Three Strikes law uses a defendant's status as a recidivist to *separately* increase the punishment for *each* new felony conviction." (*Ibid.*) This court ultimately applied the multiple enhancements to the defendant's third strike sentence. But the logic underlying the court's holding in *Williams* applies equally to second strike sentences. Indeed, this court spoke of second strike offenses and did not distinguish between determinate and indeterminate terms imposed under Three Strikes. (See *ibid.*, citing *People v. Nguyen* (1999) 21 Cal.4th 197, 202-207.)

In *Williams*, this court concluded:

The Three Strikes law, unlike section 1170.1, does not draw any distinction between status enhancements, based on the defendant's record, and enhancements based on the circumstances of the current offenses, and the Three Strikes law generally discloses an intent to use the fact of recidivism to

separately increase the sentence imposed for each new offense. 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.

(34 Cal.4th at pp. 404-405.)

*Williams* was followed by *Misa*, *supra*, 140 Cal.App.4th 837. *Misa* extended *Williams* to second strike terms—one determinate and one indeterminate. (*Id.* at pp. 845-847.) In *Misa*, the defendant was convicted of torture and assault with a deadly weapon. A prior strike was found true. The court imposed an indeterminate life sentence for the torture, as well as a determinate term of 18 years for the assault with enhancements.<sup>4</sup> (See *id.* at p. 841.) Echoing language in *Williams*, the *Misa* court reasoned that “the section 667, subdivision (a) enhancement was enacted as part of a statutory and constitutional scheme intended to increase sentences for recidivist offenders.” (*Id.* at p. 846, citing *Williams*, *supra*, 34 Cal.4th at p. 404.) Although *Misa* was a second and not a third striker, he was still a recidivist. Thus, the statutory scheme permitted imposition of the section 667(a) enhancements for both the torture and assault convictions. (*Id.* at pp. 845-847; see also *People v. McKee* (1995) 36 Cal.App.4th 540, 547 [holding, in second strike determinate term case, “the Legislature’s use of the phrase, ‘notwithstanding any other law’ [in] § 667, subd. (c) removed” any limitations imposed by *Tassell*’], disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600 fn. 10.)

Under the reasoning in *Williams* and the holding in *Misa*, the operative distinction is not whether the defendant was sentenced to determinate or indeterminate terms, but whether the scheme under which he

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<sup>4</sup> The court did not break down the determinate sentence for the assault conviction. It did, however, note that punishment for one of the assault counts was also stayed. (*Id.* at p. 841.)

was sentenced was the DSL or Three Strikes. Here, defendant was sentenced under Three Strikes. Accordingly, defendant's claim fails.

In an attempt to distinguish indeterminate sentences, defendant argues that determinate sentencing under sections 1170 and 1170.1 applies directly to second strike terms.<sup>5</sup> (See AOB 21-22.) We agree, but only in part. The DSL applies to the extent of calculating the doubled second strike "term" itself. (See, e.g., *People v. Nguyen, supra*, 21 Cal.4th at p. 204.) It is not properly invoked to restrict the term prescribed by law for the enhancements, whether or not the latter are viewed as status enhancements. This is because Three Strikes makes no such distinction. (*People v. Williams, supra*, 34 Cal.4th at p. 404 ["The Three Strikes law, unlike section 1170.1, does not draw any distinction between status enhancements, based on the defendant's record, and enhancements based on the circumstances of the current offenses . . . ."].)

As this court has stated, Three Strikes is its own statutory scheme. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527 ["The Three Strikes law . . . articulates an alternative sentencing scheme for the current offense rather than an enhancement."]; see also *People v. Acosta* (2002) 29 Cal.4th 105, 132-133 [finding Three Strikes properly applied even though defendant also qualified under OSL]; *People v. Hojnowski* (Aug. 4, 2004) \_\_\_ Cal.App.4th \_\_\_, 2014 WL 3823724, at \*9 ["[A] defendant who has a qualifying prior conviction must be sentenced under the Three Strikes law, and in the case of a conflict, the Three Strikes law will control"] (Needham, J.); *People v. Franklin* (1997) 57 Cal.App.4th 68, 73-74.) The statutory scheme under which the defendant was sentenced in

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<sup>5</sup> Defendant does not claim that *Tassell* restricts imposition of the enhancements to his indeterminate terms, whether sentenced under the stayed OSL, or the unstayed HSOL, terms.

this case was Three Strikes, not section 1170.1. Thus, *Tassel* does not apply.

We acknowledge that in its opinion at page 204 of *People v. Nguyen, supra*, 21 Cal.4th 197, this court employed the “aggregate” term. But the word “aggregate” was a misnomer in this context. This court employed DSL only to calculate a subordinate term, rather than the aggregate term. In *Nguyen*, the court held that the calculation of subordinate terms by taking one-third the mid-term in the style of section 1170.1 and doubling it was the proper method of determining the subordinate term under Three Strikes. (See *id.* at p. 204.) If the court was truly doubling the aggregate term, then it should have imposed –and doubled – any enhancements as well. The court rejected the argument that a full subordinate term should be imposed, then doubled, for second strikes, because that would actually greatly exceed twice “the term otherwise provided as punishment for the current felony conviction.” (*Id.* at p. 207.)

In the context of calculating the doubled “terms,” the court’s reference did not apply to the calculation of an aggregate term, but only to the doubled subordinate term. Put another way, this court used section 1170.1 to calculate the proper second strike subordinate “term,” under the “otherwise provided” language. (See § 667, subd. (e).) This court referenced the principal/subordinate term approach of sections 1170 and 1170.1 to make the preliminary calculations as to what is doubled under Three Strikes. Had the court been applying the DSL’s rules to enhancements included as part of the “term” referenced in sections 667 and 1170.12, it would have been required to double those enhancements as well. That was clearly not the intent of the drafters. (See *People v. Ramirez* (1995) 33 Cal.App.4th 559, 574; see also *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1560-1561 [distinguishing section 667(a)]

enhancements from section 667.5(b) enhancements on basis that the former cannot be struck under section 1385].)

Defendant was sentenced under the Three Strikes scheme, not under the DSL. (See *People v. Williams, supra*, 34 Cal.4th at pp. 404-405.) That scheme evinces a clear intent to apply longer sentences to recidivists, and particularly those that commit serious felonies. (§ 667, subd. (b).) It does not follow from the fact that a DSL method of calculation for principle or subordinate terms is employed, that Three Strikes is governed or controlled by the DSL.

Section 667(a) applies equally in the second and third strike contexts. Defendant was properly sentenced under the Three Strikes law.

**C. Policy Concerns in this Case Should Favor Closure and Finality**

Defendant argues that the costs to society of lengthier incarceration and the intent of the voters in reforming the Three Strikes Law through Proposition 36's Three Strikes Reform Act in 2012 favor his position. (See AOB 16.) We disagree.

As the 2012 initiative reflects, the purpose of the Three Strikes Reform Act is to “restore the original intent of California’s Three Strikes law-imposing life sentences for dangerous criminals like *rapists*, murderers and *child molesters*.” (Voter Information Guide, Gen. Elec., (Nov. 6, 2012) text of proposed law, Prop. 36, § 1, p. 105, italics added; 49 West’s Ann. Pen. Code (2014 supp.) Historical and Statutory Notes, foll. § 667, p. 41.) As amended, the Three Strikes Law is still meant “to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of one or more serious and/or violent felonies.” (§ 667, subd. (b).)

It is apparent that defendant’s own sentence is not affected by the enactment of the Three Strikes Reform Act. Defendant is a violent sexual

recidivist falling squarely within the Three Strikes Law. Defendant was convicted of nine separate serious and violent sex offenses. He has a prior serious felony for child molestation as well as his numerous present convictions for rape and other violent sexual offenses.

Moreover, reducing the costs of incarceration are not implicated by the issue in the instant case. Defendant's unstayed and unchallenged prison sentence is 495-years-to-life. The sentence fits squarely within the consistent intent of the original and reform initiatives under Three Strikes.

Moreover, defendant's claim goes only to a particular component of a stayed portion of his sentence. It is exceedingly unlikely his stayed sentence will ever be served. Were the unstayed sentence someday overturned and the stayed sentence activated, the elimination of the additional enhancements of which he now complains would make no substantive difference in terms of his life term. Regardless of the resolution of the claim, defendant will not be eligible for parole.<sup>6</sup>

We are mindful of the costs to the taxpayer for increased medical care of the incarcerated population of life term prisoners. But the Three Strikes Reform Act makes clear that life imprisonment is wholly appropriate to ensure public safety for recidivist violent offenders like defendant.

A more persuasive policy argument than defendant's as regards recidivist serious and violent offenders like him—those whose crimes are the direct target of the Three Strikes Law—would aim at providing closure and finality to victims of the offenders' aggravated felonies. That policy argument would give victims an assurance that a recidivist violent offender

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<sup>6</sup> Defendant's only objection to the sentence in the trial court was a claim of cruel and unusual punishment. (See RT 4.) That contention is not before the court.



cannot gnaw ways back into the victims' memories by whittling at parts of the sentence that the offender is not serving and almost certainly never will.

*Tassell* does not apply to recidivist offenders sentenced under the Three Strikes scheme. Defendant's sentence should not be reduced.

### CONCLUSION

The People respectfully request that the judgment be affirmed.

Dated: August 22, 2014

Respectfully submitted,

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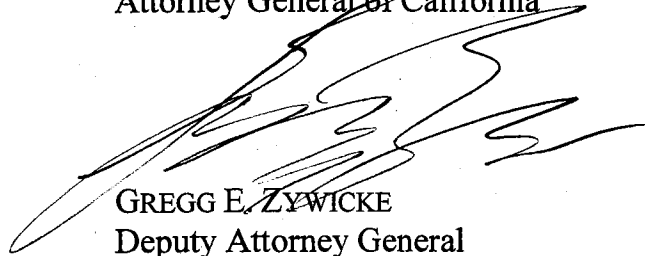
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**CERTIFICATE OF COMPLIANCE**

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3,302 words.

Dated: August 18, 2014

KAMALA D. HARRIS  
Attorney General of California

A handwritten signature in black ink, appearing to read 'Gregg E. Zywicke', is written over the printed name and title of the Deputy Attorney General.

GREGG E. ZYWICKE  
Deputy Attorney General  
*Attorneys for Respondent*



**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **People v. Darren Derae Sasser**  
No.: **S217128**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On August 20, 2014, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 20, 2014, at San Francisco, California.

\_\_\_\_\_  
Nelly Guerrero  
Declarant

\_\_\_\_\_  
*N. Guerrero*  
Signature