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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CRAIG WIMBERLY, Defendant and Appellant.	B281550 (Los Angeles County Super. Ct. No. BA156752)

APPEAL from a judgment of the Superior Court of Los Angeles County, Willian Ryan, Judge. Affirmed.

Jonathan B. Steiner and Suzan E. Hier, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Craig Wimberly, currently serving a 25-year-to-life sentence imposed in 1997 for solicitation of murder (Pen. Code, § 653f, subd. (b)), sought and was denied resentencing under Proposition 36, the Three Strikes Reform Act of 2012.[1] The trial court concluded appellant was not eligible for resentencing due to the nature of his most recent offense. Appellant contends the court misinterpreted the statutory provisions governing eligibility for resentencing. We conclude otherwise, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *1997 Conviction*

In 1997, appellant was convicted of solicitation of murder. (§ 653f, subd. (b).) It was further found that he had at least two prior "strike" convictions within the meaning of the "Three Strikes" law.[2] Appellant was sentenced as a third striker to a term of 25 years to life. In *People v. Wimberly* (February 2, 2000, B124020) (unpub.), this court modified the conviction to reflect a $2,000 parole revocation fine and affirmed.

The essential facts leading to appellant's 1997 conviction are not in dispute. On August 11, 1997, officers stopped appellant while he was driving with passenger Eric Brown. The officers found six baggies of marijuana in the

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1 Undesignated statutory references are to the Penal Code.

2 The jury found that appellant had a total of seven prior convictions for robbery (§ 211) in 1985 and 1988.

car. After his arrest, appellant told the officers the marijuana belonged to Brown, but Brown denied it was his. While in jail, appellant told cellmate Steven Jackson that the marijuana belonged to Brown and that Brown was supposed to have acknowledged his responsibility when they were caught. Appellant offered to pay Jackson $3,000 to "take[]out" Brown. Jackson agreed and the two men discussed methods of carrying out the hit. After his release, however, Jackson told deputies about the offer and agreed to cooperate with their investigation, allowing them to record several telephone calls that further incriminated appellant.

B. *Underlying Petition*

On December 7, 2012, appellant petitioned to recall his sentence under section 1170.126, added to the Penal Code by Proposition 36, the Three Strikes Reform Act of 2012. (See *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1026 (*Osuna*).) Appellant contended that if he had been tried and convicted after Proposition 36 amended the Three Strikes law, he would not have faced an indeterminate life sentence for the crime of solicitation to commit murder. The trial court issued an order to show cause.

Respondent opposed the petition, contending that section 1170.126, subdivision (e)(2), by reference to section 667, subdivision (e)(2)(C)(iii), rendered a defendant convicted of the crime of solicitation to commit murder ineligible for

resentencing.[3] The court ruled that appellant's sentence was ineligible for recall because "soliciting murder is intended to inflict great bodily injury." This appeal followed.

DISCUSSION

Appellant contends his petition for resentencing was wrongly denied and that properly interpreted, the provisions excluding those who during the commission of their current offense "intended to cause great bodily injury to another person" do not apply to his crime. For the reasons discussed, we disagree.

Proposition 36, approved by the voters in 2012, amended the Three Strikes Law in significant ways. (See *Osuna*, *supra*, 225 Cal.App.4th at p. 1026; *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168 (*Yearwood*).) Under the original version of the Three Strikes law, a recidivist with two or more prior strikes was subject to an indeterminate life sentence if convicted of any new felony. (*Yearwood, supra,* at p. 167.) Proposition 36 "'change[d] the requirements for sentencing a third strike offender . . . by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other

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[3] As will be further discussed, section 667, subdivision (e)(2)(C)(iii) renders ineligible for a lesser sentence an offender who "[d]uring the commission of the current offense, . . . intended to cause great bodily injury to another person." (See also § 1170.12, subd. (c)(2)(C)(iii).)

cases, the recidivist will be sentenced as a second strike offender. [Citations.]'" (*Osuna, supra*, at p. 1026, italics omitted, quoting *Yearwood, supra*, at pp. 167-168.) Proposition 36 also added section 1170.126 to the Penal Code, creating a post-conviction proceeding whereby an incarcerated third strike offender such as appellant may petition the trial court to have his or her sentence recalled and be resentenced as a second strike offender. (See *Osuna, supra*, at p. 1026; *Yearwood, supra*, at p. 168.)

With certain exceptions, an inmate is eligible for resentencing if he or she is currently "serving an indeterminate term of life imprisonment imposed pursuant to [the former Three Strikes law] 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."[4] (§ 1170.126, subd. (e)(1).) The primary exceptions are found in subdivisions (e)(2) and (e)(3) of section 1170.126, which require the court to consider the defendant's prior strikes and the nature and/or circumstances of the current conviction in determining his or her eligibility for resentencing.[5] Subdivision (e)(3) of section

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[4] The violent felonies listed in section 667.5, subdivision (c) and section 1192.7, subdivision (c) include murder, mayhem, rape, arson, kidnapping and numerous sexual offenses. Solicitation of murder is not included in either provision.

[5] The trial court must also consider whether "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) Because the court
(*Fn. is continued on the next page.*)

1170.126 provides that the defendant is not eligible for resentencing if any of the prior strikes is among the offenses listed in section 667, subdivision (e)(2)(C)(iv) or section 1170.12, subdivision (c)(2)(C)(iv). Neither of those provisions lists robbery, the offense appellant committed multiple times in the past. Accordingly, appellant's prior crimes did not render him ineligible.[6]

Subdivision (e)(2) of section 1170.126 precludes resentencing if the defendant's current offense meets the criteria set forth in section 667, subdivision (e)(2)(C)(i) through (iii) or section 1170.12, subdivision (c)(2)(C)(i) through (iii). Clause (C)(iii) of both section 667, subdivision (e)(2) and section 1170.12, subdivision (c)(2) (hereafter "(C)(iii)"), when read in conjunction with section 1170.126, provides that a defendant is ineligible for recall and resentencing if, "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person."

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concluded appellant was ineligible for resentencing under subdivision (e)(2) of section 1170.126, it did not address this issue.

[6] Section 667, subdivision (e)(2)(C)(iv)(V) and section 1170.12, subdivision (c)(2)(C)(iv)(V) list solicitation of murder as a disqualifying prior offense, but those provisions are not applicable here, as none of appellant's prior offenses were for that crime.

This issue here is whether, properly interpreted, (C)(iii) applies to a defendant convicted of solicitation to commit murder. The principles governing a court's interpretation of a proposition enacted by popular vote are the same as those applicable to interpreting a statute enacted by the Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796.) "[O]ur task is to discern the lawmakers' intent." (*Ibid.*) "We therefore first look to 'the language of the statute'" (*ibid.*), which provides "'the most reliable indicator'" of the enactor's intended purpose. (*People v. Prunty* (2015) 62 Cal.4th 59, 72.) "Where the statutory language in dispute is clear and unambiguous, there is no need for construction and the judiciary should not indulge in it." (*People v. Massicot* (2002) 97 Cal.App.4th 920, 925.) Where the language of a penal statute is ambiguous, the "rule of lenity" requires the courts to resolve doubts as to its meaning in the defendant's favor. (*People v. Avery* (2002) 27 Cal.4th 49, 57-58.) The rule applies, however, only where the ambiguity is "true" and "'egregious,'" and "'two reasonable interpretations of the same provision stand in relative equipoise . . . .'" (*Id.* at p. 58.)

The statutory language at issue is not ambiguous. When section 1170.126, subdivision (e)(2) and (C)(iii) are read together, they clearly state that a defendant is ineligible for resentencing if the current sentence was imposed for an offense during the commission of which he or she "intended to cause great bodily injury to another person." Solicitation to commit murder is established by

proving that the defendant solicited another to commit murder while holding the specific intent that a murder be committed. (*People v. Bottger* (1983) 142 Cal.App.3d 974, 980; CALCRIM No. 441; CALJIC No. 6.35.) As it cannot seriously be argued that death is not a form of great bodily injury, appellant's current crime fits squarely within the language of (C)(iii), thus rendering him ineligible for resentencing.

Appellant strains to find an ambiguity to which the rule of lenity could apply. First, he points to an issue often raised in connection with the second clause of (C)(iii), the clause applicable where the defendant "was armed with a firearm or deadly weapon." Defendants imprisoned as the result of a conviction for being a felon in possession of a firearm have argued that the clause should be interpreted to require proof of an underlying offense to which the firearm possession can be "'tethered,'" that is, a crime that being armed furthered or facilitated. (See, e.g., *Osuna*, *supra*, 225 Cal.App.4th at p. 1030.) This contention has been uniformly rejected by the courts. (*Osuna*, *supra*, at p. 1027 ["[B]eing 'armed with a firearm' 'during the commission of the current offense,' for purposes of [Proposition 36], does not require the possession be 'tethered' to, or have some 'facilitative nexus' to, an underlying felony"]; accord, *People v. White* (2016) 243 Cal.App.4th 1354, 1362-1364; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797-799; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. Superior Court*

(Cervantes) (2014) 225 Cal.App.4th 1007, 1012-1018; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051-1057; *People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 989-995; *People v. White* (2014) 223 Cal.App.4th 512, 522-527.) Nonetheless, appellant attempts to formulate a similar argument here, contending that (C)(iii)'s reference to intent to cause great bodily injury to another person "during the commission of the current offense" makes sense only "if there is another offense to which the intent to cause injury attaches." (Italics omitted.) Appellant has raised no new arguments not considered and rejected by existing authority.

Attempting to glean support from authorities concluding that a defendant's conviction for constructive, as opposed to personal, possession of a firearm is not disqualifying,[7] appellant contends (C)(iii) should be interpreted as applying to those defendants whose intention is to personally inflict great bodily injury. This would

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[7] (See, e.g., *Osuna*, *supra*, 225 Cal.App.4th at p. 1029-1030 [recognizing that a defendant having constructive possession of a weapon is not "armed with the firearm"]; *People v. Blakely*, *supra*, 225 Cal.App.4th at p. 1057 [explaining that defendant who has a weapon under his or her dominion and control in a secured location could be in possession but would not be "armed"]; *People v. White*, *supra*, 243 Cal.App.4th 1364 ["[T]he revised Three Strikes sentencing provisions allow a third strike felon who is found guilty of possessing a firearm to be sentenced to an indeterminate life sentence if his possession of that firearm also qualified as being 'armed.' . . . [T]he mere possession of the firearm, without arming, is not a disqualifying crime [under the language of (C)(iii)]"].)

rewrite (C)(iii), which requires only that during the offense, the defendant "intended to cause great bodily injury."

Appellant asserts that had the drafters of Proposition 36 intended to include solicitation of a third party to commit murder within the category of current offenses ineligible for resentencing, its provisions would have listed or referenced that offense specifically, and that "the omission leads to the conclusion that conviction for the simple violation of [section 653f] is not meant to [render the defendant] ineligible." Nothing in the language of section 1170.126, subdivision (e) suggests that the defendant is ineligible for resentencing only if his current or prior crimes are listed by name. Under section 1170.126, subdivisions (e)(2) and (e)(3), offense-related conduct that falls within the criteria of clauses (C)(i) through (iv) of sections 667, subdivision (e)(2) and 1170.12, subdivision (c)(2) is also disqualifying. Provisions other than (C)(iii) describe conduct that disqualifies the defendant, using general terms rather than by reference to specific crimes. For example, clause (C)(ii) singles out those whose current offense is "any felony offense that results in mandatory registration as a sex offender [with certain specific exceptions]." Clause (C)(iv)(VIII) applies to "any serious or violent felony offense punishable in California by life imprisonment or death." Appellant's proposed interpretation would render not only (C)(iii), but all provisions that describe the disqualifying conduct generically as surplusage. As explained by the court in *People v. Blakely*: "By including as a disqualifying factor an

inmate's mere intent, during commission of the current offense, to cause great bodily injury to another person, the electorate signaled its own intent that disqualifying conduct not be limited to what is specifically proven or punishable in the form of an offense or enhancement. . . . [V]oters rendered ineligible for resentencing not only narrowly drawn categories of third strike offenders who committed particular, specified offenses or types of offenses, but also broadly inclusive categories of offenders who, during commission of their crimes . . . used a firearm, were armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (*People v. Blakely, supra,* 225 Cal.App.4th at pp. 1054-1055.)[8]

Finally, appellant contends that the (C)(iii) exception does not apply unless the defendant intended the "great bodily injury" to be inflicted contemporaneously with the current offense. Again, the plain language of the statute refutes the contention. Nowhere does (C)(iii) suggest that anything must happen during the current offense other than that the defendant have formed an "inten[t]" to cause great bodily injury. The jury necessarily found appellant formed that intent contemporaneously with his current offense, as it

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[8] This language was quoted with approval by the California Supreme Court in *People v. Estrada* (2017) 3 Cal.5th 661, in which the Court held that trial courts are not limited to the facts encompassed by the plea or verdict when making an eligibility determination under (C)(iii). (*People v. Estrada, supra,* at pp. 668, 670.)

convicted him of the crime of solicitation to commit murder. In short, we find no error in the trial court's interpretation of section 1170.126, subdivision (e)(2) or (C)(iii), and conclude the plain meaning of the language of those provisions disqualifies a defendant like appellant, whose current crime is solicitation to commit murder.

DISPOSITION

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

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.