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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR LEE JOHNSON, Defendant and Appellant.	B295969 (Los Angeles County Super. Ct. No. NA033342)

APPEAL from an order of the Superior Court of Los Angeles County. Laura L. Laesecke, Judge. Reversed and remanded.

Law Offices of John F. Schuck and John F. Schuck, 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, Assistant Attorney General, Zee Rodriguez and Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.

Petitioner and appellant Arthur Lee Johnson (defendant) appeals from the denial of his petition for resentencing under Penal Code section 1170.91[1] without a statutorily mandated hearing. We agree that a hearing was required, and reverse and remand to give the trial court the opportunity to comply with the procedure set forth in the statute.

BACKGROUND

In 1998, defendant was convicted of three counts of residential burglary. At his sentencing hearing, psychiatrist Dr. Calvin J. Frederick testified that defendant's military service in the Vietnam War caused him to suffer post-traumatic stress disorder (PTSD) and drug addiction, and how that had adversely affected defendant's life.[2] Defendant's sister testified about how defendant's personality changed after his service in Vietnam. The sentencing court denied defendant's *Romero* motion[3] to strike prior serious felonies alleged under the Three Strikes law (§§ 667, subd. (b)-(i), 1170.12, subd. (a)-(d)), and sentenced him to 75 years to life in prison, consisting of three consecutive terms of 25 years to life. That judgment was affirmed on appeal. (*People*

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[1] All further statutory references are to the Penal Code unless indicated otherwise.

[2] Defendant served in the United States Navy in 1972 and 1973, during which time he experienced combat and witnessed his friend's body blown apart. He was awarded the National Defense Service Medal, the Vietnam Service Medal with one Bronze Star, and a combat action ribbon.

[3] See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 and section 1385.

v. Johnson (Mar. 22, 2001, B141948) [nonpub. opn.]; see *People v. Johnson* (Nov. 16, 1999, B123526) [nonpub. opn.].) In 2014, defendant filed a motion to dismiss his prior strikes and to be placed on probation in an appropriate treatment program, pursuant to section 1170.9.[4] The motion was denied on the ground that defendant had failed to establish prima facie grounds for relief. (*People v. Johnson* (Aug.17, 2016, B261443) [nonpub. opn.].)

In January 2019, defendant filed a petition in pro. per. to recall his sentence and for resentencing pursuant to section 1170.91. On January 29, 2019, the matter was before the court for consideration of the petition. No court reporter, attorneys or parties were present at the hearing. The trial court denied the petition as follows: "Petitioner does not qualify for a resentencing hearing. The mitigating factors contemplated by AB 865 were raised and litigated prior to petitioner's sentencing on May 28, 1998." The trial court concluded that defendant was therefore barred from making a motion for resentencing under section "1170.19(a)(1)(A)."[5] Defendant filed a timely notice of appeal from the order.

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[4] Section 1170.9 applies only to military veterans who otherwise qualify for probation. (See § 1170.9, subd. (b).) Two prior felony convictions render a defendant ineligible for probation. (§ 1203, subd. (e)(4).)

[5] The minute order refers to section "1170.19," however that section pertains to juvenile sentencing, and there is no subdivision (a)(1)(A) in section 1170.19. It is probable that the court meant to refer to section 1170.91, subdivision (b)(1)(A), which we discuss within.

DISCUSSION

Defendant contends that the trial court's failure to comply with the hearing procedure mandated by section 1170.91, subdivision (b)(3), requires reversal and remand for hearing. Respondent agrees.

Section 1170.91 was enacted in 2014. (See Stats. 2014, ch. 163, § 2.) As amended in 2018, subdivision (b) of the statute provides in relevant part, as follows:

> "(b)(1) A person currently serving a sentence for a felony conviction, . . . who is, or was, a member of the United States military and who may be suffering from . . . traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service may petition for a recall of sentence, before the trial court that entered the judgment of conviction in his or her case, to request resentencing pursuant to subdivision (a) if the person meets both of the following conditions:
>
> "(A) The circumstance of suffering from . . . traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of the person's military service was not considered as a factor in mitigation at the time of sentencing.
>
> "(B) The person was sentenced prior to January 1, 2015. This subdivision shall apply retroactively, whether or not the case was final as of January 1, 2015.
>
> "[¶] . . . [¶]

> "(3) Upon receiving a petition under this subdivision, the court *shall* determine, *at a public hearing* held after not less than 15 days' notice to the prosecution, the defense, and any victim of the offense, whether the person satisfies the criteria in this subdivision. At that hearing, the prosecution shall have an opportunity to be heard on the petitioner's eligibility and suitability for resentencing. If the person satisfies the criteria, the court may, in its discretion, resentence the person following a resentencing hearing." (Italics added.)

Defendant notes that the Legislature's use of the word "shall" ordinarily imposes a mandatory duty. (See *People v. Ledesma* (1997) 16 Cal.4th 90, 94-95.) He concludes that the court was thus required to consider defendant's eligibility for resentencing in a noticed public hearing. He asks that he be afforded the opportunity, as required by the statute, to be heard regarding his eligibility and suitability for resentencing, based upon emerging research into traumatic brain injury, and to present evidence of the condition.

The word "shall" in a statute may be mandatory or directory, depending upon the intent of the Legislature. (*People v. Ledesma*, *supra*, 16 Cal.4th at p. 95.) "The accused is entitled to the benefit of every reasonable doubt in questions of statutory construction. [Citations.]" (*People v. Casillas* (2001) 92 Cal.App.4th 171, 178.) The word "shall" is not defined in section 1170.91 and has not been judicially construed. However, "[s]tatutes are not to be read in isolation, but must be construed with related statutes. [Citation.] When legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual

presumption is that the Legislature intended the same construction, unless a contrary intent clearly appears. [Citations.]" (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437.)

Here, section 1170.9 is related to section 1170.91, as it involves a similar subject, providing for probation and treatment for current members or veterans of the United States military when the defendant is suffering from "traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems . . . as a result of his or her service." (§ 1170.9, subd. (a).) The words "shall consider" as used in former section 1170.9 have been construed as mandatory rather than permissive. (See, e.g., *People v. Abdullah* (1992) 6 Cal.App.4th 1728, 1735; *People v. Bruhn* (1989) 210 Cal.App.3d 1195, 1199.) The words appear in the present version of section 1170.9, which was last amended in the same legislation which first enacted section 1170.91. (Stats. 2014, ch. 163, §§ 1 & 2.) We may infer from these circumstances that the Legislature intended its use of "shall" in both statutes to be mandatory. (See *People v. Ledesma*, *supra*, 16 Cal.4th at pp. 100-101.)

We thus agree with defendant's and respondent's interpretation of the phrase, "the court shall determine, at a public hearing held after 15 days' notice . . . whether [defendant] satisfies the criteria" (§ 1170.91, subd. (b)(1)(3)) as mandatory. As the trial court was not authorized to determine defendant's eligibility for resentencing without a noticed hearing, we reverse the order and remand for a hearing in compliance with section 1170.91, subdivision (b)(1)(3).

DISPOSITION

The trial court's order of January 29, 2019, is reversed, the matter is remanded, and the Superior Court is directed to comply

with the procedural mandates of section 1170.91, including a public hearing on defendant's petition filed under that section, with not less than 15 days' notice to the prosecution, the defense, and any victim of the offense.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT