NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

NICHOLAS HARRIS, Petitioner

VS.

CALIFORNIA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SIXTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

SIXTH DISTRICT APPELLATE PROGRAM

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QUESTIONS PRESENTED

Does California's Three Strikes Reform Act of 2012 ("the Reform Act"), as interpreted by California's Supreme Court, violate the Ex Post Facto Clause (U.S. Const., Art. 1, § 10) and/or the Due Process Clause of the Fourteenth Amendment, altering the penal consequences of Mr. Harris's convictions for witness dissuasion (Cal. Pen. Code § 136.1) by excluding from the substantial resentencing benefits of the Reform Act any person whose "current offense" conviction is for a crime defined as a "serious felony" under California law *as of the operative date of the Reform Act*, where said current offense crime was not a serious felony *at the time of its commission*?

List of Parties

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The unpublished opinion of the California Court of Appeal, Sixth Appellate District, filed on February 5, 2020, affirming on appeal the resentencing denial order, appears as Appendix A. The unreported order of the California Supreme Court, filed April 16, 2020, denying a petition for review, appears as Appendix B.

JURISDICTION

The judgment of the California Court of Appeal, Sixth Appellate District, was entered on February 5, 2020. A timely petition for review was denied by the California Supreme Court on April 16, 2020. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 10, of the United States Constitution provides, in pertinent part:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Section One of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

California Penal Code section 1170.126 provides:

> *Resentencing, Recall of Sentence*
>
> (a) The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence.
>
> (b) Any person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, 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, may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the act that added this section.

(c) No person who is presently serving a term of imprisonment for a "second strike" conviction imposed pursuant to paragraph (1) of subdivision (e) of Section 667 or paragraph (1) of subdivision (c) of Section 1170.12, shall be eligible for resentencing under the provisions of this section.

(d) The petition for a recall of sentence described in subdivision (b) shall specify all of the currently charged felonies, which resulted in the sentence under paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, or both, and shall also specify all of the prior convictions alleged and proved under subdivision (d) of Section 667 and subdivision (b) of Section 1170.12.

(e) An inmate is eligible for resentencing if:

(1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.

(3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.

(f) Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e). If the petitioner satisfies the criteria in subdivision (e), the petitioner shall be resentenced pursuant to paragraph (1) of subdivision (e) of Section 667 and paragraph (1) of subdivision (c) of Section 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.

(g) In exercising its discretion in subdivision (f), the court may consider:

(1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes;

(2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and

(3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.

(h) Under no circumstances may resentencing under this act result in the imposition of a term longer than the original sentence.

STATEMENT OF THE CASE[1]

A. 1997 conviction and sentencing

In 1997, a jury convicted Harris of two counts of grand theft by false pretenses (Cal. Pen. Code §§ 484, 487(a)[2]) and one count each of access card forgery (§ 484f, subd. (b)), escape from jail (§ 4532, subd. (b)(1)), and dissuading a witness in furtherance of a conspiracy (§ 136.1, subd. (c)(2)). The jury also found true the allegation that one of the grand thefts involved a taking of more than $150,000 in value from the victim. (§ 12022.6, subd. (b).) The trial court denied Harris' *Romero*[3] motion and sentenced him to consecutive sentences of 25 years to life on the two grand theft convictions as well as the escape from jail conviction. The trial court imposed a concurrent 25 years to

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1. As explained below, there were three prior appeals concerning petitioner Harris's convictions, sentencing, and resentencing. Petitioner's references to the record below are from the record on the final direct appeal which is the subject of this petition, Sixth District No. H045257, which in which includes the California Court of Appeal's unpublished opinion in No. H041594, to elucidate the procedural history of the case. Parts A and B below are a verbatim recitation of a portion of the Court of Appeal's summary from that opinion.

2. Statutory references are to the California Penal Code unless otherwise stated.

3. *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. . . .

life sentence on the conviction for dissuading a witness, and an additional 25 years to life sentence was imposed, but stayed under section 654, on his conviction for access card forgery. With the two-year enhancement imposed on one of the grand theft convictions, Harris was originally sentenced to a total term of 77 years to life. We affirmed his conviction in June 2000. (*People v. Miller* (2000) 81 Cal.App.4th 1427. . . .)

B. **Federal habeas corpus proceeding**

In 2010, the Northern District of California granted Harris' petition for writ of habeas corpus, finding he was "entitled to habeas corpus relief as to his conviction of one of the two counts of grand theft" because there was insufficient evidence to support that conviction. (*Harris v. Garcia* (N.D. Cal. 2010) 734 F.Supp.2d 973, 981.) The federal court held that Harris was not otherwise entitled to relief and expressly stated his continued incarceration on his remaining convictions was lawful. With respect to the unsupported grand theft conviction it ordered, "[T]he conviction and the portion of petitioner's sentence based thereon are VACATED. Within 60 days of the date this order is filed, the [People] shall seek a recalculated sentence from the state superior court . . . ." (*Id*. at p. 1018.)

C. Resentencing at the trial court upon remand from federal court

Upon remand from the federal court, Harris sought to bring a renewed *Romero* motion in connection with his resentencing. The trial court concluded the federal court's order did not allow for such a motion and refused to consider it. The trial court dismissed Harris' conviction for grand theft as directed but noted that dismissal of that particular conviction removed the basis for staying Harris' 25 years to life sentence for access card forgery under section 654. Accordingly, the trial court imposed a consecutive 25 years to life sentence on the access card forgery conviction and resentenced Harris to a total term of 77 years to life.

Harris appealed, arguing the trial court erred by failing to consider his renewed *Romero* motion, an argument the People conceded. In a brief unpublished opinion, we accepted the People's concession, reversed and remanded for a renewed *Romero* hearing and resentencing. (*People v. Harris* (Dec. 12, 2012, H036908, H037667) [nonpub. opn.] (the 2012 opinion).) In the 2012 opinion, we quoted *People v. Hill* (1986) 185 Cal.App.3d 831, 834, 230 Cal. Rptr. 109 (Hill) as follows: "When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an

aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme."

(CT 149-151, Unpubl. Opin. in No. H041594, pp. 2-4,)

D. Remand to Trial Court, Sentencing Arguments, Trial Court Ruling, Ensuing Mandamus Petition and Remand.

Remand to the trial court coincided with the enactment of the Three Strikes Reform Act of 2012 ("Reform Act") by the California Electorate. In pertinent part, this new law eliminated the mandatory 25-to-life sentence for current offense crimes, as applicable here, which were not classified as serious felonies, and provided a statutory mechanism, section 1170.126, for persons already sentenced to life terms under the Three Strikes law to seek discretionary resentencing.

In a pleading filed May 23, 2014, counsel for petitioner contended that petitioner was eligible for resentencing under section 1170.126 as a second striker as to his conviction for violation section 136.1 because that crime was not classified as a serious felony when petitioner committed it, arguing that this conclusion was dictated by both settled principles of statutory construction, and the protections of the state and federal constitutions' ex post facto clauses. (CT 1-36) In a separate pleading filed on July 2, 2014, Mr. Harris, through counsel, made the alternative argument that he was entitled to

automatic, non-discretionary sentencing under the amended version of the Three Strikes law created by the Reform Act because he was effectively being sentenced for the first time. (CT 49-60) Without addressing the question of eligibility for resentencing as to the section 136.1 violation, the trial court, over the prosecution's opposition, agreed with petitioner's latter contention, concluding that it was required to resentence Mr. Harris as if it was the first time; since all but one of petitioner's crimes of conviction were for offenses that were not subject to a life sentence under the Reform Act, the court advised the parties that it would resentence petitioner as a "second striker" as to all counts except for the violation of section 136.1, agreeing to a *Romero* hearing as to that count. (CT 151-152, Unpubl. Opin. in No. H041594, pp. 4-5.)

The prosecution thereafter petitioned the California Court of Appeal for a writ of mandamus challenging the propriety of the trial court's sentencing orders. A second unpublished opinion issued by the Court of Appeal in No. H041594 granted the writ of mandate, directing the trial court to vacate its prior order granting petitioner a new, plenary resentencing hearing. (CT 157-158) This opinion concluded that the trial court only had authority under the limited mandate from the earlier appeal to consider the *Romero* motion, and not to engage in a new, full resentencing hearing. (See CT 156, unpub. opin. in No. H041594, p. 9.)

Pertinent to the issue now before this Court, the Court of Appeal further held, with respect to petitioner's conviction for violating section 136.1, that, by virtue of the then-recent decision of the California Supreme Court in *People v. Johnson* (2015) 61 Cal.4th 674 ("*Johnson*"), petitioner was ineligible for resentencing pursuant to section 1170.126 as to the section 136.1 conviction, but concluded that he could seek resentencing relief under section 1170.126 as to the remaining, nonserious felony offenses for which he was eligible for resentencing. (CT 156-157, unpub. opn. in No. H01594, pp. 9-10.)

E. **Proceedings After Remand From Mandate Order.**

Pursuant to the Court of Appeal's opinion in H041594, the trial court on July 21, 2016 ordered reinstatement of the prior resentencing order of April 28, 2011, with an understanding that there would be a *Romero* hearing in the near future. (1RT 3-11; CT 160-164)

Following the submission of written *Romero* pleadings by both parties (CT 177-201 [prosecution opposition], CT 202-214 [defense motion]), and receipt of voluminous subpoenaed prison and jail records, the court heard arguments of counsel and statements by petitioner and family members, then took the matter under submission. (CT 215; Aug. RT 1-33) On July 20, 2017, the court denied the *Romero* request. (CT 223; 2 RT 303-310)

On August 10, 2017, following arguments of counsel, the Court announced its decision as to petitioner's previously filed petition for resentencing under section 1170.126. As to the three nonserious, nonviolent offenses for which petitioner was convicted – excluding his conviction for violation section 136.1 – the court concluded that Mr. Harris would not pose an unreasonable risk to the public at the time he would be released, and granted the resentencing petition as to the convictions for grand theft, access card forgery, and jail escape in counts 1, 6, and 7. (3RT 603-607)

The court then resentenced petitioner, announcing, first, that "on the [section 136.1] charge, that sentence of 25 years to life still remains . . .", and then imposing second strike sentences as to the remaining counts which totaled 10 years, 8 months. (3RT 608; CT 225-232)

Statement of the Facts

As the issue raised herein involves pure questions of law for which the facts of petitioner's underlying offense have no particular relevance, no summary of the facts of petitioner's crimes is provided.

REASONS FOR GRANTING THE PETITION

CALIFORNIA COURTS VIOLATED HARRIS'S CONSTITUTIONAL RIGHTS UNDER THE EX POST FACTO AND DUE PROCESS CLAUSES BY BASING THEIR DENIAL OF RESENTENCING UNDER THE THREE STRIKES REFORM ACT OF 2012, AS TO HIS CONVICTION FOR WITNESS DISSUASION UNDER SECTION 136.1, ON RETROACTIVE CHANGES IN LAW WHICH RECLASSIFIED THIS CRIME AS A "SERIOUS FELONY" UNDER CALIFORNIA LAW, WHEN IT WAS PLAINLY NOT A SERIOUS FELONY OFFENSE WHEN IT WAS COMMITTED.

A. Legal and Procedural Background to the Constitutional Violations.

In 1997, petitioner was convicted of witness dissuasion, § 136.1. Because he had two prior "strike" convictions, he received a term of 25 years to life under California's Three Strikes law for this conviction, as well a 25 to life terms for his other felony crimes of conviction, as detailed above. At the time of petitioner's conviction, California's Three Strikes law made a defendant with two or more strike priors subject to a 25-to-life, third-strike sentence if he or she was subsequently convicted of *any* felony, even one which was not itself a "strike" offense. Former §667(c); former §1170.12(b).

Two subsequent changes of law enacted by the California electorate, and two decisions by the California Supreme Court, have given rise to the issue in the present case. The first change occurred after petitioner's crimes were committed and after he was sentenced. In March of 2000, the California Electorate passed Proposition 21, which included a provision expanding the categories of "serious felony" crimes under California to include, *inter alia*,

"intimidation of victims or witnesses, in violation of Section 136.1 . . .",.§ 1192.7(c)(37), as amended by electorate (Prop. 21) at March 7, 2000 Primary Election, operative March 8, 2000. Thus, petitioner's crime of witness dissuasion, which had not been a "serious felony" under California law when he committed it, had now been redefined as such.

However, this change in law did not affect the sentence imposed in this case. For example, petitioner did not receive a "serious felony" enhancement under section 667(a), the plain language of which requires both a prior serious felony conviction and a current offense serious felony conviction, § 667(a), *People v. Williams*, 34 Cal.4th 397 (2004), precisely because his "current offense" witness dissuasion crime was not a serious felony when he committed it and thus, under settled ex post facto principles, such a sentence would have been unlawful.

The second, more dramatic change in law by the California electorate came in the November 2012 general election, where the voters adopted the Three Strikes Reform Act of 2012 ("Reform Act"), a measure intended to ameliorate the most severe effects of California's Three Strikes law by, as pertinent here, making third-strike life sentences unavailable for most individuals whose "current offense" – i.e., the defendant's "present" crime on which the life sentence was imposed, as contrasted to the defendant's prior

strike offenses – was not itself a "strike" offense under California law. The Reform Act included a provision, section 1170.126, which permitted persons, like petitioner, who had received life sentences under the former Three Strikes law, to petition for resentencing if, under current law, they would not have received a third strike sentence. See § 1170.126(a) & (e)(1).

Mr. Harris petitioned for resentencing as to all of the counts of his conviction, including the witness dissuasion offense, contending in moving papers in support of his petition that, consistent with settled principles of ex post facto jurisprudence, he was eligible because his "current offense" conviction for witness dissuasion was for a crime which was not a serious felony when he committed it. In the convoluted proceedings that followed, summarized above, the California Court of Appeal ultimately directed the trial court to permit a petition for resentencing to proceed as to all counts of conviction on which a 25 to life sentence was imposed under the Three Strikes law except for the conviction for witness dissuasion, basing this exclusion on the controlling effect of the state Supreme Court's holding in *People v. Johnson*, 61 Cal.4th 674, which held, as a matter of statutory construction, that the disqualifier from the resentencing provisions of section 1170.126 for a current offense conviction for a serious felony applies to any current offense which was a serious felony *at the time the Reform Act went into effect* in

November of 2012.

In his direct appeal in the present case, petitioner raised the ex post facto challenge presented herein, pointing out that *Johnson* had not addressed this constitutional claim, and advanced the parallel due process argument described below. The state Court of Appeal rejected both contentions in an unpublished opinion, App. A, and the California Supreme Court thereafter denied review. App. B.

Petitioner contends a careful review of the pertinent principles of ex post facto jurisprudence, combined with due process concerns, compels a conclusion that the controlling law for determining whether the "current offense" is a serious felony must be the law in effect at the time the crime was committed, and that this critical determination cannot be based on later enactments which retroactively expanded the definition of serious felony crimes to include the criminal conduct engaged in by petitioner.

B. The Denial of Resentencing Based on a Conclusion that Petitioner's Witness Dissuasion Conviction is a Serious Felony Violates the Ex Post Facto Clause.

As explained below, the ex post facto analysis has two components, drawing on the second and third categories of ex post facto laws described in *Calder v. Bull*, 3 U.S. 386 (1798). As this Court reiterated not long ago in *Carmell v. Texas*, 539 U.S. 513 (2000), the Ex Post Facto Clause received its

most careful interpretation, followed to this day, from Justice Story's opinion in *Calder*.

> Specifically, the phrase "ex post facto" referred only to certain types of criminal laws. Justice Chase catalogued those types as follows:
>
> "I will state *what laws* I consider *ex post facto laws*, within the *words* and the *intent* of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, *criminal*; and punishes such action. 2d. Every law that *aggravates* a crime, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." [*Calder*, 3 U.S.] at 390 (emphasis in original).

Carmell, 529 U.S. at 522.

As explained below, the change of law at issue here is contrary to both the second and third *Calder* categories.

1. **The Second Category Violation.**

First, and most obviously, the retroactive alteration of Harris's witness dissuasion offense from a nonserious felony to a serious felony under California law runs afoul of the second Calder formulation of an ex post fact law because it "aggravates a crime, or makes it greater than it was, when committed." *Calder,* 3 U.S. at 390. It is unassailable that Proposition 21 made

petitioner's crime, witness dissuasion, "greater than it was when committed" by turning it into a serious felony, a more aggravated genre of crime under California law, which it plainly was not when it was committed. As noted above, for example, it would have unquestionably violated the ex post facto prohibition if petitioner, whose crimes were committed prior to the Proposition 21 changes which converted his current offense crime of witness dissuasion into a serious felony, had been charged with and received separate five year "serious felony" enhancements under section 667(a).[4]

This change of law had no *immediate* impact on Harris. But when the Reform Act was passed in 2012, the impact of this new initiative measure, combined with the prior 2000 initiative measure, Prop. 21, as both were interpreted by the California Supreme Court in *Johnson*, was to retroactively "aggravate" Harris's current offense witness dissuasion offense from a nonserious felony into a greater, serious felony crime. This had an enormous penal consequence: it made Harris ineligible for the benefits of the sweeping ameliorative changes in law affected by the Reform Act as to one of his counts of conviction. Instead of being eligible to have his sentence for witness

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4. Obviously, as the Court of Appeal opinion points out, this did not happen in the present case. App. A at 8. However, this point was made only by way of illustration of a rather obvious way in which the ex post facto clause would have plainly been violated from the reclassification of Harris's current offense witness dissuasion offense into a serious felony.

dissuasion reduced to a "second strike" determinate term no greater than 6 years, petitioner remains sentenced to a 25 to life term for this offense.

As this Court made clear in *Stogner v. California*, 539 U.S. 607 (2003), the second Calder category applies in a situation where a defendant is subjected to *any new penalty* by a retroactive change to a law which makes the crime committed more severe. In discussing the applicability of the second category to a California law which purported to revive an extinguished statute of limitations, *Stogner* referenced a learned treatise from the time period of the enactment of our Constitution which characterized as an ex post facto, "a law that affects punishment by 'making therein some innovation, or creating some forfeiture or disability, not incurred in the ordinary course of law.'" *Id*. at 613, quoting 2 R. Wooddeson, A Systematical View of the Laws of England 638 (1792). The change of law at issue here does precisely this by creating a new "disability" upon Harris's crime, making him ineligible for the benefit of a punishment reduction provision because his witness dissuasion crime had been "aggravated" to serious felony status as the result of a legislative enactment subsequent to the point in time that his crime was committed.

Thus, the change of law at issue here is precluded under the second *Calder* category because it "*aggravates* [Harris's] crime, or makes it *greater* than it was, when committed." *Calder*, 3 U.S. at 390.

2. **The Third Category Violation.**

In perhaps a less obvious sense, the retroactive change at issue here is also contrary to the third *Calder* category, which includes "every law that *changes the punishment*, and inflicts a *greater punishment* than that affixed to the crime, when committed." *Calder*, 3 U.S. at 390. One could say, on the one hand, that the retroactive "aggravation" of Harris's witness dissuasion crime to serious felony status did not, strictly speaking result in an increase in his "term of punishment," since petitioner's sentence for this conviction remained, after passage of the Reform Act and denial of his resentencing petition, 25 years to life.

However, in a more fundamental sense, recognized as pivotal in this Court's "third category" ex post facto jurisprudence, the retroactive transformation of petitioner's witness dissuasion crime into a serious felony violated the Ex Post Facto Clause in the same sense that retroactive alterations of conduct credit earning schemes were found infirm by this Court in *Weaver v. Graham*, 450 U.S. 24 (1981), and *Lynce v. Mathis,* 519 U.S. 433 (1997). As in those cases, the retroactive change here increased Harris's "effective sentence" in the same manner the new laws in those cases did, by "*constrict[ing] the inmate's opportunity to earn early release*, and thereby mak[ing] more onerous the punishment for crimes committed before its

enactment." *Weaver*, at 35-36, emphasis added.

In this sense, such an alteration of the legal consequences of Harris's witness dissuasion conviction parallels the laws found by this Court in *Weaver* and *Lynce* to be contrary to the third *Calder* category because they retroactively altered a criminal defendant's entitlement to punishment reduction based on good conduct. *Weaver*, 450 U.S. at 35-36. Such a change, this Court made clear, amounts to an *increase* in punishment which, if applied retroactively, violates the Ex Post Facto Clause of the federal constitution. *Ibid*. A law reducing such credit entitlements "implcates the *Ex Post Facto* Clause because such credits are one determinant of petitioner's prison term . . . and [the prisoner's] effective sentence is altered once this determinant is changed." *Lynce*, 519 U.S. at 445.

Weaver involved a statute which reduced the amount of good conduct credits that could be accumulated and deducted from a prisoner's sentence. In holding that a reduction in the availability of such credits violated the Ex Post Facto Clause when applied to prisoners whose crimes were committed before the change in the law, this Court held that "decreasing the amount of good time credits that can be earned substantially *alters the consequences of a completed crime and changes the quantum of punishment*." *In re Lomax*, 66 Cal.App.4th 639, 644 (1998), emphasis added, citing *Weaver*, 450 U.S. at 33. "Thus, the

new provision *constricts the inmate's opportunity to earn early release*, and thereby makes more onerous the punishment for crimes committed before its enactment." *Weaver*, at 35-36, emphasis added.

As plainly expressed by the this Court, "[t]he critical question . . . is whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence." *Weaver*, 450 U.S. at 32, fn. 17. Clearly, the same principle applies to the matter before this Court. Retroactively reclassifying petitioner's current offense of witness dissuasion as a serious felony for purposes of eligibility for resentencing under the Reform Act subjects Harris to greater "effective punishment" – a 25 to life term for this conviction – than what could have been imposed upon him under post-Reform Act sentencing based on the date of his offense; and it is equally clear that he is only in this predicament because of the change of law which occurred after the commission of his crime, i.e., the March, 2000 enactment of Proposition 21, which "aggravated" his nonserious felony conviction offense of witness dissuasion into a serious felony. Akin to *Weaver*, this retroactive change in the law which converted his non-serious felony offenses into serious felony crimes "constricts [Mr. Harris's] opportunity to earn early release . . .", *Weaver*, at 35-36, under the Reform Act, and thus runs afoul of the ex post facto prohibition.

C. **The Due Process Dimension of the Ex Post Facto Challenge.**

As a corollary to the Ex Post Facto violation, the California courts' interpretation of the two initiative measures in a manner detrimental to Harris impacts his Fourteenth Amendment due process rights, of which the Ex Post Facto Clause is a vital part. *Bouie v. City of Columbia* 378 U.S. 347 (1964). At the time of his convictions, prior to either of the law-changing initiative measures at issue here, the state effectively "promised" Mr. Harris that, whatever other severe consequences would flow from his conviction for witness dissuasion, this crime was not a "serious" or "violent" felony under California law, and carried none of the attendant penal consequences of such a current offense conviction. For example, as noted above, converting his witness dissuasion crime into a serious felony did not allow the state to further increase his punishment with separate five-year "serious felony" enhancements under section 667(a), which are triggered by both a "current offense" serious felony conviction and prior serious felony convictions, because of that "promise" and the protection against ex post facto laws.

Under this Court's due process jurisprudence, ex post facto principles which disfavor retroactive increases in punishment have been held to apply where a retroactive change of law is from an unforeseeable judicial construction of a law, rather than a legislative enactment. *Bouie v. City of*

Columbia, 378 U.S. 347. In *Bouie*, this Court noted the *Calder* definition of an ex post facto law as "one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater than it was, when committed.' *Id*., at 352, quoting *Calder*, 3 U.S. at 390. As further explained in *Bouie*, "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id*. at 352-353.

Here, a change in the law, whether effected by the language of various initiative-amended statutes or by judicial constructions of them – such as the one adopted by California's highest court in *Johnson* – could not retroactively aggravate the nature of Mr. Harris's current offense witness dissuasion conviction, turning it into a serious felony for punishment purposes when it clearly not serious felonies when committed. As explained above, the result of this retroactive transformation is obvious and dramatic, impacting Mr. Harris's substantive rights by making him categorically ineligible for a reduction of his life sentence for witness dissuasion under the Reform Act.

The additional requirement of *Bouie*, that the "judicial enlargement" of a criminal statute adopted by a court be "unexpected and indefensible by

reference to the law which had been expressed prior to the conduct in issue . . .", *Bouie*, 378 U.S. at 900 (internal quotations and citations omitted), is easily met here. Surely in 1997, when Mr. Harris was convicted of witness dissuasion, he knew he could be subjected to high punishment for this criminal act, but also knew that it was not then, and never could be, treated by the courts, as a "serious felony" crime, with all the attendant penal consequences of such a designation. From this viewpoint, it was entirely unforeseeable, unexpected, and "indefensible" that a Court, sixteen years later, could decide, based on a change of law enacted after the crimes were committed, that this witness dissuasion crime was now a "serious felony" for purposes of making him ineligible for later-enacted initiative relief from his draconian third strike sentence.

Looked at from a different angle, the decision in *Johnson* was itself unforeseeable and unexpected because, as explained above, it was made without due regard to settled ex post facto principles which precluded retroactive changes in the law from aggravating a crime or increasing punishment. Thus, in both these senses, the judicial construction by the California Supreme, which is contrary to constitutional ex post facto principles, was both unforeseeable and unexpected.

It follows that if this Court concludes that the impactful retroactive change in the law to Mr. Harris's detriment is viewed as a consequence of the California Supreme Court's construction of the Reform Act in *Johnson*, rather than the combined product of the two initiative measures themselves, the same wrong and remedy are cognizable and subject to correction as a violation of due process under *Bouie*.

D. Under California Law Consistent with the Ex Post Facto Prohibition and the Due Process Clause, Harris Must Be Eligible for Resentencing Under the Reform Act as to His Conviction for Witness Dissuasion.

For the foregoing reasons, petitioner submits, the change of law affected by the combined impact of the post-offense initiative measures in 2000 and 2014, and the state supreme Court's holding in *Johnson*, violated the Ex Post Facto Clause and the due process restrictions of *Bouie*.

The only constitutionally permissible interpretation of section 1170.126(e)(1) is the one advanced by petitioner below, which employs the definition of "serious felony" that was in effect when his crimes were committed. Consistent with the prohibition against ex post facto laws and the due process principles at issue in *Bouie*, this interpretation would permit Harris to be resentenced under the Reform Act as to his witness dissuasion conviction based on the undisputable fact that this current offense was not a serious

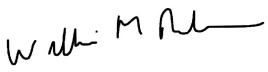
felony when his crimes were committed.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted to review the judgment of the California Court of Appeal in this case, and to correct the California courts' failure to recognize and remedy the constitutional errors complained of herein.

Dated: July 10, 2020

Respectfully submitted,



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