Appendices to "How to Write a Great Opening Brief"

Appendix 1: "Introduction" from People v. Chase Benoit, H044694, as example of combining global introduction of both facts and legal arguments to be presented.

Introduction

Some time around midnight on May 30-31, 2015, appellant Chase Benoit fatally stabbed Cody Flores in a rural field in Morgan Hill. The incident began with a confrontation between the two young men at a birthday party both were attending, after which Chase, brandishing a knife, pursued Cody across a field for about 400 yards, then fatally stabbed him.

Neither Chase nor Cody knew the other was at the party until their unlikely chance encounter; and neither of them had ever met in person before. But they had an unusual history together.

Nearly four years to the day earlier, Cody Flores stabbed Chase's unarmed brother, Jimmy Benoit, during an incident at a park, a stabbing which Chase had heard all about. And around three weeks prior to the fatal stabbing, Cody Flores and Chase Benoit exchanged an angry set of instant messages, which included threats by Cody to stab Chase, just like he had done to his brother.

The prosecutor's theory of the case was that Chase and his codefendant, Spencer Smith, planned to assault and kill Cody Flores. The jury squarely rejected this theory of the case, acquitting Spencer Smith of all murder charges, and acquitting Chase of first degree murder.

The defense advanced by appellant at trial centered around evidence and expert testimony indicating that Chase Benoit suffered from Post-Traumatic Stress Disorder (PTSD). Chase's PTSD was triggered initially from an incident when Chase was 14 years old when, in Chase's presence, his father was stabbed by Anthony Hernandez, the boyfriend of Chase's sister, with Hernandez then pointing a gun at both Chase and his father. Chase's PTSD was then exacerbated a year later, when he learned of the incident

in the park in which Cody Flores stabbed Chase's brother Jimmy.

Based on this past history, another violent incident involving Cody which Chase knew about, the threats by Cody during the instant message exchange, and provocation by Cody during their confrontation at the party, counsel for appellant contended that the resulting combination of fear and anger, filtered through Chase's severe PTSD, reduced his crime to voluntary manslaughter, based alternatively on imperfect self defense or heat of passion. The jury necessarily rejected these arguments when it convicted Chase of second degree murder.

The issues raised on appeal each concern, in different ways, the impact of PTSD. The first two issues are focused on instructional errors by the trial court with respect to the PTSD-related defenses raised at trial.

In Part I, appellant will demonstrate that the court, while properly giving the "diminished actuality" instruction under CALCRIM No. 3428 based on the PTSD mental disorder evidence, prejudicially erred by refusing to a give defense-requested instruction on involuntary manslaughter, which was supported by the record and case law.

In Part II, appellant challenges two related deficiencies in CALCRIM 3428 which improperly limited the jury's consideration of the PTSD mental disorder evidence to proof of the mental states of malice and premeditation/deliberation. As explained in Parts I-A and II-B respectively, the PTSD evidence was also relevant and admissible – and crucial to the defense theories of the case – with respect to the prosecutor's burden, in connection with the two manslaughter defenses, to prove beyond a reasonable doubt the absence of imperfect self-defense and the absence of a killing on heat of passion from provocation. In Part III, appellant briefly explains the cumulative effect of these related errors.

Finally, in Part IV, appellant will demonstrate why, in light of the recent enactment of Penal Code section 1001.36, appellant is alternatively entitled to conditional reversal of his sentence and a remand to allow the trial court to conduct a hearing to consider his eligibility for mental health diversion.

Appendix 2: AOB Argument in People v. Nicholas Harris, H045257, raising ex post facto, due process, and equal protection arguments re: reclassifying "current offense" as a serious felony for purposes of Prop. 36 resentencing.

ARGUMENT

The Trial Court's Determination, Based on *Johnson*, That Appellant Was Ineligible for Resentencing under Section 1170.126 for His Conviction for Witness Dissuasion under Section 136.1 Was Unlawful. Reclassifying Appellant's "Current Offense" Conviction for Violating Section 136.1 into a Serious Felony, When it Was Plainly Not a Serious Felony Crime When it Was Committed, Violates the Ex Post Facto Clause of the State and Federal Constitutions and Is Contrary to the Due Process and Equal Protection Clauses of the State and Federal Constitutions.

Summary of Argument

In *People v. Johnson*, *supra*, 61 Cal.4th 674, our state Supreme Court decided two questions of statutory construction concerning the Reform Act. The determination pertinent to the present case involved the question raised by defendant Johnson as to whether the statutory disqualifier from the resentencing provisions of section 1170.126 for a current offense conviction for a serious felony (§ 1170.126, subd. (e)(1)) applies only, as Johnson urged, to a current offense which was a serious felony when it was committed, or, as the Government contended, to a current offense that was a serious felony at the time the Reform Act went into effect in November of 2012. This distinction mattered because Johnson's "current offense" which subjected him to a life sentence under the former Three Strikes law was for a crime – witness dissuasion (§ 136.1, subd. (a)(1)) – which was not a serious felony when Johnson committed the crime in 1998, but had become a serious felony by the time the Reform Act went into effect by virtue of the 2000 criminal law ballot initiative, Proposition 21, which added Johnson's crime to the list of serious felony offenses.

The Supreme Court adopted the Government's construction of the initiative measure based on principles of statutory construction, concluding that the Electorate intended the controlling definition of "serious and violent felonies," for purposes of resentencing eligibility under the Reform Act, to be the definitions in effect as of

November 7, 2012.

> In summary, the use of the present tense in the provisions describing the nature of the current conviction reflects an intent that the nature of the current conviction as serious or violent is based on its characterization as of the date of resentencing. In addition, the parallel structure of the Act's sentencing and resentencing provisions appears to contemplate identical sentences in connection with identical criminal histories, unless the trial court concludes that resentencing would pose an unreasonable risk to public safety. Finally, interpreting the scheme to allow resentencing despite the current classification of the offense as serious or violent is not supported by the arguments set forth in the ballot pamphlet. For these reasons, we hold that for purposes of resentencing under section 1170.126, the classification of the current offense as serious or violent is based on the law as of November 7, 2012, the effective date of Proposition 36.

(*Johnson*, *supra*, 61 Cal.4th at p. 687.) The Supreme Court concluded that Johnson was ineligible for resentencing under the Reform Act because his crime was a serious felony when the Reform Act was enacted. (*Ibid*.)

Appellant concedes that he stands in the same shoes as Mr. Johnson. Although resentenced under section 1170.126 for three of the four felony counts of conviction in the present case, by virtue of the holding in *Johnson*, he was deemed ineligible for such resentencing as to his remaining conviction for violating section 136.1 in 1995, as this Court concluded in its unpublished opinion in No. H041954. (CT 156-157)

Here, as with Mr. Johnson, the crime on which the trial court reimposed a sentence of 25-years-to life – dissuasion of a witness under section 136.1 – was not a serious felony when appellant committed the crime in 1995, but was a serious felony when the Reform Act went into law, by virtue of the changes effected in 2000 by Proposition 21. (See *Johnson*, *supra*, at p. 680.) Obviously, as a matter of statutory construction under state law, Mr. Harris, and this Court, are bound by the Supreme Court's decision in *Johnson*.

However, in the moving papers filed in connection with his resentencing petition (see CT 12, 14-17), appellant raised a set of ex post facto constitutional claims which

were not presented in *Johnson* and thus not considered or ruled on by the Supreme Court in that case. (See, e.g., *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372 ["cases are not authority for propositions not considered therein"].) Appellant now seeks to raise on appeal these constitutional issues, which were presented below but never considered either by this Court in its opinion granting the petition for mandate or by the trial court when it resentenced appellant.

Appellant submits that a careful review of the pertinent principles of ex post facto jurisprudence, combined with due process and equal protection concerns, should lead this Court to a reach a different result than the one in *Johnson* because, as explained below, the federal Constitution 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 cannot be based on later enactments which retroactively expanded the definition of serious felony crimes to include the criminal conduct engaged in by appellant.

The ex post facto argument is a basic one. This type of retroactive alteration 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 v. Bull* (1798) 3 U.S. 386, 390; U.S. Const., Art. I, § 10, cl. 1.) It is undisputable that Proposition 21 made Mr. Harris's crime – dissuading a witness under section 136.1 – "greater than it was when committed" by turning it into a serious felony, a more aggravated crime under California law, which it surely was not when it was committed. This change of law had no conceivable effect on Mr. Harris until the Reform Act was passed in 2012. But then, as a combined result of the two initiative measures, Prop. 21 in 2000, and the Reform Act in 2012, and the Supreme Court's construction of the Reform Act in *Johnson*, the retroactive "aggravation" of appellant's current offense crime of violating section 136.1 from a nonserious felony into a greater, serious felony crime suddenly had an enormous penal consequence: it made Mr. Harris ineligible for the benefits of the sweeping ameliorative changes in law affected by the Reform Act.

Although this "aggravation" of appellant's crime did not, strictly speaking result in an increase in the term of punishment imposed – his sentence remained 25 years to life – the retroactive reclassification of his 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 violative of the Ex Post Facto Clause in *Weaver v. Graham* (1981) 450 U.S. 24 ("*Weaver*") and *Lynce v. Mathis* (1997) 519 U.S. 433 ("*Lynce*"). As in those cases, the retroactive change here increased appellant's "effective sentence" in the same way 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*, *supra*, at pp. 35-36, emphasis added.)

Whether viewed as a legislative violation of the ex post facto clause, or a due process violation created by the Supreme Court's interpretation of the Reform Act in *Johnson* (*Bouie v. City of Columbia* (1964) 378 U.S. 347), this situation presents a constitutional wrong in need of a remedy.

In addition to these related claims, appellant presents another challenge, under the Equal Protection Clause of the Fourteenth Amendment, which was neither raised nor addressed by the Supreme Court in *Johnson*. The statutory interpretation adopted in *Johnson* and enforced in the present case improperly treats appellant more harshly than a similarly situated person who committed the same crime, on the same date as appellant, but who, hypothetically had avoided being tried until after the effective date of the Reform Act. Such a person could have avoided being tried on a charge of witness dissuasion under section 136.1 in at least two ways, by being a fugitive from justice, or by being declared, and remaining, mentally incompetent during the ensuing years. It is unquestionably the case that such a person could not have had a third-strike life term sentence imposed upon him *prospectively* for his crimes committed before the change of law expanding the definition of serious felonies. This is so because, under both settled ex post facto principles, and the plain language of the former Three Strikes law and the Reform Act initiative measure which amended it, "the crucial date for determining if a

prior conviction qualifies as a serious felony is the date of the charged offense." (*People v. Ringo* (2005) 134 Cal. App.4th 870, 884.)

Under settled equal protection principles, appellant, who stood trial for his crimes prior to enactment of the Reform Act – and who is, in this sense, less blameworthy than the hypothetical fugitive in the example – is similarly situated to the class of persons described above, such that it is contrary to the equal protection clause of the Fourteenth Amendment to conclude, as the Supreme Court did in *Johnson*, that the controlling date of the determination whether his current offense is a serious felony is no longer the date of his offense, but the effective date of the Reform Act. (See, e.g., *People v. Sage* (1980) 26 Cal.3d 498, 506-508 and 509, fn. 7 [applying equal protection principles of *In re Kapperman* (1974) 11 Cal.3d 542 to award conduct credits retroactively].)

For the reasons developed in greater detail below, these related constitutional claims should lead this Court, on constitutional grounds, to a different result than the purely state-law, statutory construction based conclusion of the Supreme Court in *Johnson*. Although this Court, as an intermediate appellate court, is bound to follow the statutory construction analysis of the Supreme Court in *Johnson* (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), the Supreme Court was not presented in *Johnson* with any of the constitutional arguments advanced herein; thus, this Court's determination of these constitutional issues is not controlled by *Johnson*, since it is axiomatic that cases are not authority for propositions not discussed or considered therein. (See, e.g., *People v. Barragan* (2004) 32 Cal.4th 236, 243; *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 65-66.)

A. **The Ex Post Facto Violation.**

The fundamental premise of appellant's ex post facto constitutional argument is that his "current offense" conviction for witness dissuasion under section 136.1, which was not a serious felony crime when it was committed, cannot be "aggravated" into a serious felony for purposes of deciding his eligibility for resentencing under the Reform

Act without running afoul of the second *Calder* formulation of an ex post fact law, i.e., a law which "aggravates a crime, or makes it greater than it was, when committed." (*Calder v. Bull*, *supra*, 3 U.S. at p. 390; U.S. Const., Art. I, § 10, cl. 1.)

Under California law, numerous consequences attach to the classification of a crime as a "serious felony" offense. To take just one example, if appellant's witness dissuasion offense was a serious felony when he committed this offense, it would have subjected him, in addition to the Third Strike sentences he received, to further five year sentence enhancements as to this crime for every separate prior serious felony conviction. (See § 667, subd. (a) and *People v. Williams* (2004) 34 Cal.4th 397.) It would have unquestionably violated the ex post facto prohibition if appellant, whose current offenses were committed prior to the Proposition 21 changes which converted the witness dissuasion crime into a serious felony, had been charged with and received such additional punishment. While this blatant ex post facto violation did not occur in the present case, this example is raised to illustrate a rather obvious way in which the ex post facto clause would have been violated by reclassifying Mr. Harris's witness dissuasion offense into a serious felony.

Here, as explained above, even though the reclassification did not *directly* increase the term of Harris's sentence, this change violates the ex post facto law prohibition under the second category, by aggravating the nature of his current crime, especially when considered in connection with 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*, *supra*, 3 U.S. at p. 390.) This is so because here, the change in the law being applied retrospectively to Harris's conviction altered his *effective sentence*, making him ineligible for a newly enacted benefit which would dramatically reduce his punishment. (*Weaver*, *supra*, 450 U.S. at pp. 35-36.)

In this sense, such an alteration of the legal consequences of his conviction is closely akin to laws found by the Supreme Court in *Weaver* and *Lynce*, *supra*, 519 U.S. 433, as violative of the third *Calder* category of ex post facto laws because they

retroactively alter a criminal defendant's entitlement to punishment reduction based on good conduct. (*Ibid.*) The High Court has made it clear that such a change 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 "implicates 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*, *supra*, at p. 445; see *In re Lomax* (1998) 66 Cal.App.4th 639, 647.)

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, the High 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*." (*Lomax*, *supra*, 66 Cal.App.4th at p. 644, emphasis added, citing *Weaver*, *supra*, 450 U.S. at p. 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*, *supra*, at pp. 35-36, emphasis added.) As plainly expressed by the Supreme 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*, *supra*, 450 U.S. at p. 32, fn. 17.)

Clearly, the same principle applies to the matter before this Court. Retroactively reclassifying appellant's current offense as a serious felony, as has effectively been done by the Supreme Court's statutory interpretation in *Johnson*, subjects him to greater effective punishment – a twenty-five to life term – than what could have been imposed upon him under post-Reform Act sentencing based on the date of his offense, and he is only in this predicament because of a 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 into a serious felony crime. Akin to *Weaver*, this

retroactive change in the law which, under *Johnson*, converts his nonserious felony offense of witness dissuasion into a serious felony crime "constricts [appellant's] opportunity to earn early release . . ." (*Ibid*.) under the Reform Act, and thus runs afoul of the ex post facto prohibition. Respectfully, the interpretation of the Reform Act by the Supreme Court in *Johnson*, which this Court directed the trial court to follow in the present case, runs afoul of the ex post facto prohibition by both increasing appellant's punishment under the reasoning of *Weaver*, and by aggravating the nature of his crime, making it "greater than it was, when committed."(*Calder v. Bull*, *supra*, 3 U.S. at p. 390.)

By contrast, appellant's proposed constitutional interpretation of subdivision (e)(1) of section 1170.126, which uses the definition of "serious felony" in effect when the current offenses were committed, avoids this potential ex post facto constitutional problem. Consistent with the prohibition against ex post facto laws, it would permit a person in Mr. Harris's situation to be eligible for resentencing under the Reform Act based on the undisputable fact that his current offense was not a serious felony when his crimes were committed. Appellant has thus demonstrated constitutional error in violation of the Ex Post Facto Clauses of the state and federal constitutions.

B. **Due Process Dimension of the Ex Post Facto Challenge.**

This line of analysis has Fourteenth Amendment implications as well. The interpretation adopted by the Supreme Court in *Johnson* runs afoul of basic due process considerations, of which the ex post facto clause is a vital part. At the time of his conviction, the state effectively "promised" Mr. Harris that, whatever other severe consequences there would be from his conviction for witness dissuasion under section 136.1, this offense was not a "serious" felony, and carried none of the penal consequences of these aggravated category of crime. Using the same example noted above, even if the law changed between the time this offense was committed and the time of sentencing, converting appellant's witness dissuasion crime into a serious felony, the state could not have further increased his punishment with five-year "serious felony" enhancements

under section 667(a) because of that "promise" and the protection against ex post facto laws.

Under the Fourteenth Amendment's Due Process Clause, ex post facto principles which disfavor retroactive increases in punishment have been held to apply in certain situations, e.g., where a retroactive change of law is from a judicial decision, rather than a legislative enactment. (*Bouie v. City of Columbia* (1964) 378 U.S. 347; U.S. Const., 14th Amend., Due Process Clause.) Here, a change in the law, whether effected by the language of various amended statutes or by judicial constructions of them – such as the one adopted by the Supreme Court in *Johnson* – cannot retroactively alter the nature of the current offense, turning it into a serious felony when it was clearly not a serious felony when committed, where it is plainly to the detriment of the substantive rights of Mr. Harris, a criminal defendant, who would otherwise be presumptively eligible for a reduction of his sentence under the Reform Act.

Thus, assuming, *arguendo*, that the improper retroactive change in the law is seen as a consequence of the Supreme Court's construction of the Reform Act in *Johnson*, rather than of the enactment itself, the same wrong and remedy are cognizable and subject to correction as a violation of due process under *Bouie*.

C. **The Equal Protection Challenge.**

The Fourteenth Amendment is further implicated by the impact of the decision in *Johnson* upon appellant, this time involving the equal protection clause. As explained above, the interpretation adopted in *Johnson* improperly treats appellant more harshly than a similarly situated hypothetical person who committed the same crimes, on the same dates as appellant, but who had managed to avoid being tried until after the effective date of Proposition 36. Had such a person – let's call him Mr. X – avoided being tried on a charge of witness dissuasion under section 136.1 because, for example, he was a fugitive from justice, or mentally incompetent during the ensuing years, it is unquestionably the case that he could *not* have had a third-strike life term sentence imposed upon him for his

crime committed before the change of law expanding the definition of serious felonies. (See *People v. Ringo* (2005) 134 Cal.App.4th 870, 884 [for post-Prop. 21 cases, "the crucial date for determining if a prior conviction qualifies as a serious felony is the *date of the charged offense*"].)

Under settled equal protection principles, appellant, who stood trial for his crimes prior to enactment of the Reform Act, is "similarly situated" to the persons described above, such that it is contrary to the equal protection clause of the Fourteenth Amendment to conclude, as the Supreme Court did in *Johnson*, that the controlling date of the determination whether his current offense is a serious felony is no longer the date of his offense, but the effective date of the Reform Act. (See, e.g., *People v. Sage*, *supra*, 26 Cal.3d at p. 506-508 and 509, fn. 7 [applying equal protection principles of *In re Kapperman*, *supra* 11 Cal.3d 542, to award conduct credits retroactively].)

D. **Cognizability.**

As explained above, in briefing by counsel for Mr. Harris filed on May 23, 2014, counsel for appellant contended that appellant 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 appellant committed it. This argument was premised both on principles of statutory construction – an argument which did not prevail in *Johnson* – but also upon a contention that a contrary interpretation would violate the protections of the state and federal ex post facto clauses. (See CT 12, 14-17) Ultimately, counsel prevailed in the trial court on a second, unrelated argument, advanced in subsequent briefing, that appellant was entitled to automatic, non-discretionary sentencing under the amended version of the Three Strikes law created by the Reform Act. (See CT 151-152) As explained above, this Court reversed this ruling in its unpublished decision in No. H041594. As part of this opinion, this Court held, under *Johnson*, that appellant was ineligible for resentencing as to the section 136.1 current offense conviction. (CT 156-157) Notably, neither this Court nor the trial court ever addressed

the ex post facto constitutional argument advanced in counsel's original briefing. (See CT 151-152, 156-157)

When the case was remanded to the trial court for the proceedings which are the subject of the present appeal, and after the *Romero* denial, it was agreed by the parties that counsel's previously filed section 1170.126 petition and supporting documents would be considered by the Court. (See 3RT 603.[1]) As noted above, this pleading included, as a complementary argument to the statutory construction claims, an assertion that the Ex Post Facto Clauses of the state and federal constitutions required treating appellant's section 136.1 conviction as a nonserious felony for purposes of eligibility for resentencing under the Reform Act. (CT 12, 14-17) Plainly then, the issue was raised in the trial court. It is equally clear that the trial court expressly concluded that it was bound by this Court's unpublished decision in No. H041594 which held that appellant was ineligible for resentencing as to the dissuasion conviction (CT 156-157 [unpub. opin.]; see 3RT 603.[2]) On this record, appellant submits that the present constitutional challenge was properly raised and preserved for appellate review.

If it is assumed, *arguendo*, that the ex post facto constitutional argument was

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1. The record reflecting this is as follows:

THE COURT: . . . [W]e discussed last time, when I denied Mr. Harris's Romero motion, that the Court would entertain a petition for resentencing under 1170.126 of the Penal Code. Generally, there is a petition that's filed for that, but I think we talked about the fact that that could be done orally.

MS. VASQUEZ [defense counsel]: Yes, your Honor. I do believe I filed a petition back in 2015 or 2016, that I asked the Court to hold once the other issues came up. There was something filed.

THE COURT: All right. That will be in the file. . . .

(3RT 603)

2. "THE COURT: . . . I believe the Court of Appeal's decision . . . indicated that if the Romero was not granted, then we could go on to this other phase [section 1170.126 petition] because it does appear that Mr. Harris is eligible for consideration for that on all counts, except the Penal Code 136.1(c)(2) charge for which the sentence of 25 years to life has to remain." (3RT 603)

forfeited based on counsel for appellant's failure to press for a ruling on this constitutional question (see, e.g. *People v. Braxton* (2004) 34 Cal.4th 798, 813), appellant contends, for three separate but related reasons, that this Court should nonetheless reach the merits of this issue in the current appeal.

First, the issues presented involve pure questions of constitutional law, and can be resolved based on undisputed facts. (See, e.g., *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Second, under settled principles of appellate review, this Court can consider appellant's constitutional legal argument based on undisputed facts on appeal in order to avoid a claim of ineffective assistance of counsel based on Mr. Harris's attorney's failure to press for a ruling in the trial court. (See, e.g., *People v. Cox* (1991) 53 Cal.3d 618, 682.) And finally, the failure to raise the issue at the section 1170.126 hearing must be forgiven because, as explained above, the trial court correctly determined that it was bound by the holding in *Johnson* and this Court's direction, in its opinion in No. H041594, that the court was precluded under *Johnson* from resentencing appellant on the witness dissuasion current offense. (See *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 292, fn. 1 [Supreme Court holds that challenge not forfeited despite failure to raise it in trial or appellate court, since it would have been "pointless for defendant to ask either the trial or appellate court to overrule one of our decisions"].)

CONCLUSION

Based on the foregoing alternative arguments presented in Part D, appellant submits that the constitutional issue presented herein is properly before the Court in this appeal, and should be decided on its merits.

Based on the constitutional arguments presented in Parts A through C, Mr. Harris respectfully submits that he is eligible for resentencing as to the section 136.1 conviction; thus, the order finding him ineligible as to that current offense conviction must be reversed, and the case should be remanded to the superior court with directions to find appellant eligible for resentencing as to this offense and for further proceedings under

section 1170.126.