No. S223676

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CLIFFORD PAUL CHANEY, Defendant and Appellant.	No. C073949

PETITION FOR REVIEW

Appeal from the Judgment of the Superior Court
of the State of California for the County of Amador
No. 05CR08104

HONORABLE J.S. HERMANSON, TRIAL COURT JUDGE

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By appointment of the Court of
Appeal under the Central
California Appellate Program's
independent case system

TOPICAL INDEX

Page #

TABLE OF AUTHORITIES iii

PETITION FOR REVIEW 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

ARGUMENT 6

I. THE COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE ELECTORATE INTENDED PROPOSITION 47'S DEFINITION OF "UNREASONABLE RISK TO PUBLIC SAFETY" IN ITS RETROACTIVITY PROVISION TO APPLY TO PROPOSITION 36'S USE OF THAT SAME PHRASE IN ITS PARALLEL RETROACTIVITY PROVISION, INCLUDING PROPOSITION 36 CASES ON APPEAL. 8

A. Introduction. 8

B. Proposition 47's Definition of "Unreasonable Risk of Danger" Applies to Proposition 36's Use of that Same Phrase. 11

C. Proposition 47's Definition of Dangerousness Applies Retroactively to Proposition 36 Cases on Appeal. 26

II. THE COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE REFORM ACT'S EXCEPTION TO RESENTENCING FOR PRISONERS THE COURT DEEMS AN "UNREASONABLE RISK TO PUBLIC SAFETY" REQUIRES THE COURT TO FIND A LIKELIHOOD THAT THE PRISONER WOULD COMMIT AN OFFENSE THAT STILL QUALIFIES FOR LIFE IMPRISONMENT UNDER THE REFORM ACT. 35

CONCLUSION 38

WORD COUNT CERTIFICATE

TABLE OF AUTHORITIES

California Cases

Beckman v. Thompson (1992)
4 Cal.App.4th 481 31

Brosnahan v. Brown (1982)
32 Cal.3d 236 22

City of Clovis v. County of Fresno (2014)
222 Cal.App.4th 1469 31

Day v. City of Fontana (2001)
25 Cal.4th 268 20

Delaney v. Superior Court (1990)
50 Cal.3d 785 20

Gonzales v. Munoz (2007)
156 Cal.App.4th 413 36

Holder v. Superior Court (1969)
269 Cal.App.2d 314 10

In re Estrada (1965)
63 Cal.2d 740 28

In re Robert L. (1993)
21 Cal.App.4th 1057 36

Johnston v. Sanchez (1981)
121 Cal.App.3d 368 31

Kuykendall v. State Board of Equalization (1994)
22 Cal.App.4th 1194 31

Negrette v. California State Lottery Commission (1994)
21 Cal.App.4th 1739 31

People v. Brown (2012)
54 Cal.4th 314 ..... 29, 30

People v. Carmony (2004)
33 Cal.4th 367 35

People v. Cole (2006)
38 Cal.4th 964 27

People v. Conley (2013)
215 Cal.App.4th 1482, rev. granted August 14, 2013, S211275, 160 Cal.Rptr.3d 408 [304 P.3d 1070] [2013 Cal. LEXIS 6683] 7

People v. Contreras (2013)
221 Cal.App.4th 558, rev. granted January 29, 2014, S215516, 167 Cal.Rptr.3d 108 [316 P.3d 1218] [2014 Cal. LEXIS 679] 7

People v. Leal (2004)
33 Cal.4th 999 13

People v. Lester (2013)
220 Cal.App.4th 291, rev. granted January 15, 2014, S214648, 166 Cal.Rptr.3d 494 [315 P.3d 1182] [2014 Cal. LEXIS 422] 7

People v. Manzo (2012)
53 Cal.4th 880 34

People v. Nasalga (1994)
12 Cal.4th 784 32

People v. Osuna (2014)
225 Cal.App.4th [1020 18

People v. Valencia (Dec. 16, 2014, No. F067946)
___ Cal.App.4th ___ [2014 Cal.App. LEXIS 1149] ..... 7, passim

People v. Yearwood (2013)
213 Cal.App.4th 161 33

Re-Open Rambla, Inc. v. Board of Supervisors (1995)
39 Cal.App.4th 1499 31

Robbins v. Omnibus R. Co. (1867)
32 Cal. 472 22

Santa Clara County Local Transportation Authority v. Guardino (1995)
11 Cal.4th 220 20

Wright v. Jordan (1923)
192 Cal. 704 20

United States Constitution

Fourteenth Amendment 10

California Constitution

Article I, § 7 (a) 10
Article II, § 10 (a) 5

California Statutes

Vehicle Code § 23143 (a) 3
§ 23143 (b) 3
§ 23152 (a) 3
§ 23152 (b) 3

Penal Code § 211 3
§ 667 ..... 32, 33
§ 667 (b)-(i) 3
§ 667 (e) (former) 2
§ 667 (e)(2)(C) 3
§ 667 (e)(2)(C)(iv) 11, 12
§ 667.5 (c) 3
§ 1168 10
§ 1170.12 ..... 3, 32, 33
§ 1170.12 (c)(2)(C) 3
§ 1170.18 ..... 11, 12, 22, 34
§ 1170.18 (b) 11
§ 1170.18 (c) 9, 12, 13, 14
§ 1170.126 ..... 10, passim
§ 1170.126 (a) 4, 27
§ 1170.126 (b) 4, 27
§ 1170.126 (f) 4
§ 1192.7 (c) 3

California Rules of Court

Rule 8.264 (b)(3) 6
Rule 8.264 (c) 6
Rule 8.268 6
Rule 8.500 (b)(1) 6
Rule 8.500 (c) 6
Rule 8.504 (b)(4) 2

Internet Citations

Ballot arguments in favor of Proposition 36

http://ballotpedia.org/California_Proposition_36,_Changes_in_the_%22Three_Strikes%22_Law_%282012%29 16

Couzens & Bigelow, *Proposition 47 "The Safe Neighborhoods and Schools Act"* (Dec. 2014)

http://www.courts.ca.gov/documents/Prop-47-Information.pdf 23

Partnership for Safety & Justice, "The Diminishing Influence of Tough-on-Crime Political Rhetoric" (Dec. 10, 2012)

http://www.safetyandjustice.org/news/diminishing-influence-tough-crime-political-rhetoric 17

Media Citations

Cantil-Sakauye, *Keeping kids in school, and out of juvenile court*, S.F. Daily Journal (Nov. 7, 2014) 15

No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CLIFFORD PAUL CHANEY, Defendant and Appellant.	No. C073949 (Superior Court No. 05CR08104 Amador County)

PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Defendant and appellant CLIFFORD PAUL CHANEY petitions this Court for review of the judgment of the Court of Appeal, Third Appellate District, filed October 29, 2014, as modified and certified for partial publication by order filed December 1, 2014, affirming the trial court's judgment denying him resentencing under Proposition 36, the Three Strikes Reform Act.

Copies of the opinion affirming the trial court judgment and of the order modifying that opinion and certifying it for

partial publication are appended hereto in accordance with California Rules of Court, rule 8.504 (b)(4) as Appendix A and B, respectively.

QUESTIONS PRESENTED

1.

Does Proposition 47's restrictive definition of "unreasonable risk of danger to public safety" apply on review of the trial court's denial of resentencing for Chaney under Proposition 36 after it found he was an "unreasonable risk of danger to public safety"?

2.

If not, did the trial court properly determine Chaney was an "unreasonable risk of danger to public safety" in the absence of a showing or finding that he was likely to commit a strike or other offense that under Proposition 36 continues to expose an offender to a third-strike life sentence?

STATEMENT OF THE CASE

On December 12, 2005, the Amador County Superior Court committed Chaney to prison on a term of 25 years to life pursuant to the Three Strikes Law (see former §§ 667, subd. (e);

1170.12[1]). (2 CT 374, 378.) The felony conviction followed from Chaney's conviction by guilty plea of driving with a blood alcohol content (BAC) of .08 or higher with prior convictions (former Veh. Code, § 23152, subd. (b)), to wit: two prior convictions of driving under the influence with injury (Veh. Code, § 23143, subds. (a) & (b)) and one prior conviction of driving under the influence (Veh. Code, § 23152, subd. (a)). The life sentence followed from his admissions of six prior convictions of serious or violent felonies defined in sections 1192.7, subdivision (c) and 667.5, subdivision (c), respectively, arising out of two separate incidents of robbery (§ 211) two weeks apart in 1983, which qualified as "strikes" under the Three Strikes Law (§§ 667, subds. (b)-(i); 1170.12). (2 CT 374, 378, 412.)

On November 6, 2012, the voters of California approved Proposition 36, the Three Strikes Reform Act. (1 CT 19, 32-33, 35.) That act restricts a third-strike sentence to those offenders whose current offense is a serious or violent felony, or whose current or past offense meets certain enumerated factors not applicable here. (§§ 667, subd. (e)(2)(C); 1170.12, subd. (c)(2)(C).) Except in those cases, the convicted felon must be sentenced as a second-strike offender. (§ 1170.12, subd. (c)(2)(C).)

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

The Act also contains a retroactivity provision that gives prisoners who currently are serving third-strike sentences, but who would have qualified for second-strike sentences under the Act, the opportunity to obtain such a sentence upon petition to the sentencing court. (§ 1170.126, subds. (a) and (b).) " '[T]he petitioner shall be resentenced [as a second-striker] unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' " (Appendix A, p. 1, quoting § 1170.126, subd. (f).)

"In this appeal, defendant challenges the trial court's denial of his petition for resentencing under the Three Strikes Reform Act .... [¶] The court based the denial on its finding that 'the court cannot in good conscience say that you do not pose an unreasonable risk to the public safety if released. The court is not convinced that you would not re-engage in alcohol use and place the public at risk.' The court cited defendant's numerous DUI's that caused injuries, stating drinking was the root of his criminality." (Appendix A, p. 2.)

On October 29, 2014, the Court of Appeal issued an opinion affirming the judgment, and ordered that it not be published. (See Appendix A.) It concluded that the trial court's finding "that defendant posed an unreasonable risk to public safety if released because he likely would reengage in alcohol use and place the public at risk ... was exactly the finding the court was required to make." (Appendix A, p. 7.) It further

concluded that the court "acted well within its discretion in denying the petition." (Appendix A, p. 2.)

On November 4, 2014, the electorate passed Proposition 47, which went into effect the next day, November 5, 2014. (Cal. Const., article II, § 10, subd. (a) ["An initiative statute ... approved by a majority of votes thereon takes effect the day after the election"]; see also Appendix B, p. 2.)

On November 10, 2014, Chaney petitioned for rehearing on the ground that Proposition 47, gave him a basis for reversal: "Defendant contends that because his case is a nonfinal judgment pending in this court, he is entitled to a new resentencing hearing under the Act in which the trial court should apply the definition of 'unreasonable risk to public safety' contained in Proposition 47." (Appendix B, p. 4.) After soliciting an answer to the petition, the Court of Appeal filed an 8-page order on December 1, 2014, that modified its opinion, certified the opinion for partial publication, and denied the petition for rehearing. (See Appendix B.)

In that order, the court ruled:

> We partially publish this decision to address the potentially retroactive application of the definition of "unreasonable risk of danger to public safety" in Proposition 47 to defendant. We hold that the definition of "unreasonable risk to public safety" in Proposition 47 does not apply retroactively to a defendant such as the one here whose petition for resentencing under the Act was decided before the effective date of Proposition 47.

(Appendix B, p. 4.) It expressly declined to "decide whether the definition of "unreasonable risk to public safety" in Proposition 47 applies prospectively to petitions." (Appendix B, p. 6, fn. 3.)

On December 8, 2014, Chaney filed a second petition for rehearing (see Cal. Rules of Court, rules 8.264, subd. (b)(3) and (c), and 8.268), arguing at p. 2 that "[t]his petition for rehearing is especially appropriate given the importance of the Court's holding in the published portion of its opinion on a critical and novel issue that was never subject to full briefing by the parties or argument before the Court, since it arose only after the Court had initially issued its unpublished opinion."

On December 11, 2014, the Court of Appeal summarily denied that petition.

This petition for review is timely filed. (See Cal. Rules of Court, rule 8.264, subd. (b)(3), and rule 8.500, subd. (c).)

ARGUMENT

This Court may grant review of a decision by a Court of Appeal "[w]hen necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500, subd. (b)(1).) Both bases for review apply here.

The lead question whether the electorate's definition of the phrase "unreasonable risk of danger to public safety" in Proposition 47 applies to that same phrase it used just two years earlier in Proposition 36, including in the context of an appeal

of a denial of relief under Proposition 36 based on a finding of unreasonable danger, is an important issue of law that merits this Court's attention. Indeed, this Court has granted review of a related issue in terms of the retroactive application of Proposition 36 to appeals of criminal convictions covered by that proposition. (See, e.g., *People v. Contreras* (2013) 221 Cal.App.4th 558, rev. granted January 29, 2014, S215516, 167 Cal.Rptr.3d 108 [316 P.3d 1218] [2014 Cal. LEXIS 679]; see also *People v. Conley* (2013) 215 Cal.App.4th 1482, rev. granted August 14, 2013, S211275, 160 Cal.Rptr.3d 408 [304 P.3d 1070] [2013 Cal. LEXIS 6683]; *People v. Lester* (2013) 220 Cal.App.4th 291, rev. granted January 15, 2014, S214648, 166 Cal.Rptr.3d 494 [315 P.3d 1182] [2014 Cal. LEXIS 422].) While those cases deal with a related issue, that issue is independent of the issues here raised and its resolution does not promise to resolve the issues here presented. Thus, this Court should grant plenary review here, rather than a "grant and hold," to consider Chaney's issues on their merits.

In addition, grant of review will serve to secure uniformity of decision. For example, another panel has split on the lead issue raised here. (Compare the majority and concurring opinions in *People v. Valencia* (Dec. 16, 2014, No. F067946) ___ Cal.App.4th ___ [2014 Cal.App. LEXIS 1149].) In *Valencia*, the majority found that Proposition 47's definition of dangerousness does not apply at all to Proposition 36's use of the identical phrase, while a concurring opinion disagreed with

that analysis and found that it applies prospectively, but — agreeing with the *Chaney* opinion here at issue — not retroactively to Proposition 36 cases on appeal. And if this Court denies review or finds against Chaney on the lead issue, then the complementary issue of what Proposition 36 intended that phrase to mean becomes important for this Court to consider.

I.

THE COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE ELECTORATE INTENDED PROPOSITION 47'S DEFINITION OF "UNREASONABLE RISK TO PUBLIC SAFETY" IN ITS RETROACTIVITY PROVISION TO APPLY TO PROPOSITION 36'S USE OF THAT SAME PHRASE IN ITS PARALLEL RETROACTIVITY PROVISION, INCLUDING PROPOSITION 36 CASES ON APPEAL.

A. Introduction.

As noted, the court below eschewed determination of whether Proposition 47's definition of "unreasonable risk to public safety" applied prospectively to petitions for resentencing under the Act. (Appendix B, p. 6, fn. 3.) But the determination of whether Proposition 47's definition of dangerousness applies to Proposition 36 cases on appeal cannot be determined in a vacuum of abstract legal principles on retroactivity; rather, it necessarily depends on the breadth of the electorate's intent to apply that definition generally, including to Proposition 36 cases and including to such cases on appeal. Thus, this Court

should take the approach that the majority did in *Valencia*, by determining first whether the electorate intended to apply the definition to the same phrase in Proposition 36, and if so, whether it also intended to apply that definition to Proposition 36 cases on appeal.

This approach is further advisable because "a finding of nonretroactivity inexorably leads to the possibility of prospective-only application, and ... prospective-only application of Proposition 47's definition to resentencing petitions under the Act would raise serious, perhaps insurmountable, equal protection issues." (*People v. Valencia*, *supra*, 2014 Cal.App. LEXIS 1149 at **35-36, fn. 25.) Given that the express and more restrictive definition in Proposition 47 (§ 1170.18, subdivision (c)) effectively or at least "arguably changes the lens through which the dangerousness determination under the Act is made" (Appendix B, p. 6), it makes no sense to put an arbitrary divide between prospective petitions entitled to determination through the new lens and determinations already made through a discarded lens. Likewise, it makes no sense that the electorate would decline to apply its new, improved, and explicit definition of dangerousness to the same phrase it used in Proposition 36, and to as many of those cases as it could.

Prospective-only application would create two categories of Proposition 36 petitions, based only on the happenstance of timing, running afoul of the due process and equal protection

provisions in the California and United States Constitutions. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).) It would also run afoul of the principle that legislation concerning a remedial resentencing mechanism is entitled to the fullest retroactive application. (*Holder v. Superior Court* (1969) 269 Cal.App.2d 314.) Like this case, *Holder* concerned a statutory procedure for recall and reconsideration of a sentence. An intervening amendment to section 1168 allowed a trial court to "recall" a previously-imposed prison sentence and to resentence the defendant "if it is deemed warranted" by a diagnostic study. (*Id.* at p. 315.) In view of the legislation's remedial and rehabilitative objects, "the statute should be read and applied literally *and without qualification.*" (*Id.* at p. 318 (emphasis added).) The *Holder* court saw no reason "why the Legislature might have intended earlier offenders should not have available to them the contemporaneous approaches to supervision and rehabilitation which are implicit" in the amendment's resentencing provision. (*Ibid.*) *Holder*'s analysis is equally applicable to the anomalies and injustice which would result from any disparate application of Prop. 47's dangerousness definition to different groups of inmates, depending upon the timing of their resentencing applications.

It would be especially unjust to deny the benefit of the revised standard to inmates such as Chaney, whose section 1170.126 petitions were promptly filed and decided shortly after the Reform Act was adopted. A prospective-only construction of

the definition would have the perverse effect of penalizing diligent inmates such as Chaney, who filed early in the process, and of rewarding those who sat on their rights and waited almost to the statutory deadline of two years to seek relief. Thus, Chaney here first addresses whether Proposition 47's definition of dangerousness applies at all to Proposition 36 petitions; and then, assuming the answer is yes, then addresses whether it applies to denials of such petitions pending on appeal.

B. Proposition 47's Definition of "Unreasonable Risk of Danger" Applies to Proposition 36's Use of that Same Phrase.

Proposition 47 reduced specific felony/wobbler offenses to misdemeanors. Like Proposition 36 (see § 1170.126), it contains a retroactivity provision for those prisoners serving terms on those offenses to petition for resentencing to obtain the benefit of its reduced punishment. (See § 1170.18.) And, again like Proposition 36, Proposition 47 requires the court "in its discretion" to grant the petition unless it finds that to do so would present "an unreasonable risk of danger to public safety." (See §§ 1170.126, 1170.18, subd. (b).) Unlike Proposition 36, however, Proposition 47 further expressly defined that risk as an unreasonable risk that the petitioner would commit one of the major violent or serious felonies listed in section 667, subdivision (e), paragraph (2), subparagraph (C) clause (iv) — otherwise known as "super strikes."

The electorate's elucidation in section 1170.18, subdivision (c) of what "unreasonable risk of danger to public safety" means applies to resentencing proceedings under section 1170.126, first and most fundamentally, because section 1170.18, subdivision (c) explicitly says that definition applies to *all* uses of that phrase in the Penal Code:

> As used throughout this Code, "unreasonable risk of danger to public safety" means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.

(§ 1170.18, subd. (c).)

Both the majority and concurring opinions in *Valencia* concluded that this language clearly and unambiguously referred to the entire Penal Code, not just Proposition 47. (See *People v. Valencia, supra*, 2014 Cal.App. LEXIS 1149 at *20 (maj. opn.), brackets omitted ["On its face, 'as used throughout this Code,' as employed in section 1170.18, subdivision (c), clearly and unambiguously refers to the Penal Code, not merely section 1170.18 or the other provisions contained in Proposition 47."]; *id.* at *38 (con. opn. of Peña, J.) ["Where the statutory language is so clear and unambiguous, there is no need for statutory construction or to resort to legislative materials or other outside sources."].)

The majority invoked the narrow exception to the cardinal rule of statutory construction that the plain and unambiguous

language of the statute controls in ascertaining intent: where application of the literal language actually "conflicts with the lawmakers intent" and "would result in absurd consequences" that the voters could not have intended. (*People v. Valencia, supra*, 2014 Cal.App. LEXIS 1149 at **20-21.) As the majority held:

> [W]e conclude its literal meaning does not comport with the purpose of the Act, and applying it to resentencing proceedings under the Act would frustrate, rather than promote, that purpose and the intent of the electorate in enacting both initiative measures.

(*Id.* at *22.)

The majority's reasoning is unconvincing. As the concurring justice critiqued it:

> The majority pays lip service to the plain meaning rule and then ignores it. While acknowledging the language used is unambiguous, it nonetheless engages in statutory construction to determine whether the electorate really intended to say what it actually enacted. The end result is a rewriting of the statute so that it comports with the majority's view of what the voters really intended. The majority has rewritten section 1170.18 (c) so that it now states: "As used in this section only, 'unreasonable risk of danger to public safety' means ..." The majority does so without providing a compelling reason to do so and without showing the plain language used has a "meaning that is repugnant to the general purview of the act." (*People v. Leal* [(2004) 33 Cal.4th [999,] 1008.) Because the

> Act had not previously defined the phrase "unreasonable risk of danger to public safety," the definition in section 1170.18 (c) cannot be repugnant or contradictory to the Act, nor does the majority claim the definition is repugnant to the general purview of Proposition 47.

(*People v. Valencia, supra*, 2014 Cal.App. LEXIS 1149 at **35-36 (conc. opn. of Peña, J).)

The majority acknowledged that "Proposition 47 and the Act address related, but not identical subjects." (*People v. Valencia, supra*, 2014 Cal.App. LEXIS 1149 at *22.) Nevertheless, it "question[ed] whether Proposition 47 and the Act are truly in pari materia" because "the two measures (albeit with some overlap) address different levels of offenses and offenders." (*Id.* at *34.). But they both involve the same subject of sentencing reform, with Proposition 47 coming on the heels of the Three Strikes Reform Act of 2012, and using it as a model and building block; indeed, as the majority acknowledged, they "overlap."

Both propositions seek to improve public safety by moving away from reliance on expensive overlong incarceration for offenders whose crimes do not justify such indiscriminate incarceration, and in favor of more effective and economical use of resources to fight crime and provide for public safety. A stated goal of both propositions is to extend the reduction of punishment to as many qualified prisoners as possible consistent with public safety, so that only those who pose an

unreasonable risk to public safety may be denied that reduction of punishment. Noting that "we currently spend $62,000 a year to keep one inmate in prison," the Chief Justice recently wrote that "applying evidence-based practices in sentencing decisions" was also "cost-effective ... in working with adult offenders," noting: "Focusing on those factors that drive criminal behavior saves tax payers money, reduces recidivism and improves public safety." (Cantil-Sakauye, *Keeping kids in school, and out of juvenile court*, S.F. Daily Journal (Nov. 7, 2014) p. 9.) These sentiments are exactly what drove enactment of both Proposition 36 and Proposition 47, including the definition of dangerousness set forth in the latter that separates those prisoners who can safely be released in accordance with the reduced punishment specified in those propositions from those who cannot and thus must remain incarcerated pursuant to their original sentences.

The *Valencia* majority's effort to distinguish the purposes of Proposition 36, which "clearly placed public safety above the cost savings likely to accrue as a result of its enactment," from those of Proposition 47, which "in contrast ... emphasized monetary savings" (*People v. Valencia, supra*, 2014 Cal. App. LEXIS 1149, at *26), is unavailing. Both propositions clearly placed public safety over cost savings, as can be seen by the restrictions they each placed on prospective eligibility for the reduced punishment and the "public safety" exception they provided for retroactive application of the reduced punishment

to eligible prisoners. Moreover, both propositions have the same overall design and purpose: to 1) reduce reliance on imprisonment by reserving it for truly dangerous offenders[2], and 2) redirect the resultant savings to fund measures that fight crime and preserve public safety in ways more economical and effective than indiscriminate imprisonment.

Nor does the *Valencia* majority's conclusion that Proposition 36 emphasized public safety while Proposition 47 emphasized cost savings demonstrate that applying to the Proposition 36 determination of dangerousness the restrictive definition of dangerousness in Proposition 47 would be repugnant to the general purview of either proposition. (*Valencia, supra,* 2014 Cal.App. LEXIS 1149 at *26-27, 34.) Rather, in the early uncodified sections in each proposition setting forth their findings and purposes, both propositions emphasize that the sentences of murderers, rapists and child molesters will not be decreased; that the sentences of less serious offenders will be reduced; and the cost savings resulting therefrom can be used more effectively to fight crime. (Compare Prop. 36, § 1 with Prop. 47, §§ 2 & 3.) The propositions are simply two complementary ways to achieve the same ends. Both

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[2] The ballot arguments in favor of Proposition 36 included this one: "Criminal justice experts and law enforcement leaders carefully crafted Prop. 36 so that truly dangerous criminals will receive no benefits whatsoever from the reform." (See http://ballotpedia.org/California_Proposition_36,_Changes_in_the_%22Three_Strikes%22_Law_%282012%29.)

are aimed at reforming past laws that rely on imprisonment to fight crime, which the voters now understand have caused severe prison overcrowding and major budget deficits that in fact run contrary to the interests of public safety.

These propositions reflect the more modern and some might say enlightened philosophy of enhancing public safety by being "smart on crime," as opposed to the discredited "tough on crime" punishment model dependent on indiscriminate imprisonment. As has been noted by knowledgeable observers:

> People recognize that policies promoted by tough-on-crime posturing have brought very little benefit, if not a whole lot of problems. **The public is embracing a smart-on-crime agenda, a more rational and cost-effective approach to public safety, accountability, and crime prevention.** A smart-on-crime agenda questions the efficacy of mass incarceration and looks to invest resources in more effective approaches to building safe communities like community policing, addiction treatment, mental health services, victim services, and programs designed to help formerly incarcerated people succeed.

(See Partnership for Safety & Justice, "The Diminishing Influence of Tough-on-Crime Political Rhetoric" (Dec. 10, 2012), at http://www.safetyandjustice.org/news/diminishing-influence-tough-crime-political-rhetoric, bold in original.)

The majority in *Valencia* further reasoned:

> The Act clearly placed public safety above the cost savings likely to accrue as a result of its enactment. Thus, uncodified section 7 of the Act provides: "This act is an exercise of the public power of the people of the State of California for the protection of the health, safety, and welfare of the people of the State of California, and shall be liberally construed to effectuate those purposes." (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 36, p. 110, italics omitted.) As we explained in *People v. Osuna* [(2014)] 225 Cal.App.4th [1020,] 1036, "Although the Act 'diluted' the three strikes law somewhat [citation], '[e]nhancing public safety was a key purpose of the Act' [citation]."

(*People v. Valencia*, *supra*, 2014 Cal.App. LEXIS 1149, at *26.)

Osuna is inapposite, however, because it concerned what felonious conduct the Reform Act excluded from its reach to leave intact the life sentences of the original Three Strikes Law. Thus, in that context it made sense for the *Osuna* court to refer back to the original incapacitation purpose of the original Three Strikes Law, as it did immediately preceding its recognition that the Reform Act "diluted" the incapacitation/punishment purpose of the Three Strikes Act for less serious and violent felonious conduct, to inform the electorate's determination of what felonious conduct still warranted a third-strike life sentence. (See *People v. Osuna*, *supra*, 225 Cal.App.4th at pp. 1035-1036.) But the *Valencia* majority's harkening back to the Reform Act's purposes of "protection of the health, safety, and

welfare of the people of the State of California" conflates the means the original Three Strikes Law sought to preserve public safety with the means the Reform Act did so. The latter provided for public safety by specifically reducing reliance on imprisonment for the kind of relatively less dangerous offense that Chaney committed. Thus, the electorate's direction that Proposition 36 "shall be liberally construed to effectuate those purposes" supports application of Proposition 47's stringent definition of dangerousness to Proposition 36 determinations of dangerousness.

This may be most clearly demonstrated by the fact that Proposition 47, too, provides: "This act shall be liberally construed to effectuate its purposes." (Prop. 47, § 18.) Given that its chief purpose, like that of Proposition 36, is to be "smart on crime" by targeting "truly dangerous" individuals for imprisonment and reducing the existing reliance on imprisonment for less dangerous individuals — all in the name of public safety — the courts should straightforwardly construe the plain language of Proposition 47 here to apply its definition of dangerousness to Proposition 36. Doing so would be "smart on crime" and in the eyes of the electorate would thus better provide for public safety. The majority's negation of that language, on the other hand, reflects the "tough on crime" approach of the original Three Strikes Law, which is the very opposite of liberal construal of their terms to carry out the purposes of these reform measures.

The majority in *Valencia* also asserts that because the ballot materials in Proposition 47 did not explicitly inform the voters that its definition of dangerousness applied to the same phrase describing dangerousness in Proposition 36, the voters cannot have intended it to do so. (*Valencia, supra,* 2014 Cal.App. LEXIS 1149 at **28-31.) The majority cites no authority for its assertion that ballot materials somehow bind and limit and control over the initiative's clear language, and in fact all of this Court's precedent is to the contrary.

For example, this Court has held that while ballot arguments are accepted sources from which to ascertain voters' intent, "a possible inference based on the ballot argument is an insufficient basis on which to ignore *the unrestricted and unambiguous language of the measure itself.* (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 803, italics in original.) Likewise, this Court has held that "it is of no consequence here that the ballot materials did not specifically refer to the act's application in actions against local public entities for nuisance and dangerous condition of property." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 282.)

Further, in *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 237, this Court observed that ballot arguments "are not legal briefs and are not expected to cite every case the proposition may affect." Finally, in *Wright v. Jordan* (1923) 192 Cal. 704, 713, this Court pointed out that the voters who enacted an initiative "must be assumed

to have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered, regardless of any insufficient recitals in the instructions to voters or the arguments pro and con of its advocates or opponents accompanying the text of the proposed measure."

In short, the clear language in the text of Proposition 47 did not need explanation to the voters in the ballot materials to endorse it. The *Valencia* majority avoided application of the plain language of the statute by claiming voter ignorance. (See *People v. Valencia, supra,* 2014 Cal.App. LEXIS 1149 at *34 ["Voters cannot intend something of which they are unaware."].) This Court, however, has firmly rejected similar claims by those advocating for an interpretation of an initiative different than its apparent meaning:

> Petitioners' entire argument that, in approving Proposition 8, the voters must have been misled or confused is based upon the improbable assumption that the people did not know what they were doing. It is equally arguable that ... the people knew exactly what they were doing. In any event, we should not lightly presume that the voters did not know what they were about in approving Proposition 8. Rather, in accordance with our tradition, "*we ordinarily should assume that the voters who approved a constitutional amendment 'have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior*

> *to the election and which they must be assumed to have duly considered.*' " [Citations.]

(*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 252, italics added by Court, ellipsis in quote deleted.)

Particularly given the same purposes and aims of the propositions, the explicit definition of the phrase in Proposition 47 serves to elucidate the meaning of the same phrase used in the earlier proposition and makes compelling its application to that earlier proposition. As this Court said long ago: "The two Acts are not only *in pari materia*, but the latter is, in effect, an amendment of the former; and it is not to be supposed that a word used in a certain sense in the original Act was used in a different sense in the subsequent one." (*Robbins v. Omnibus R. Co.* (1867) 32 Cal. 472, 474.)

Such is the view of Judge Richard Couzens and Justice Patricia Bigelow in their recent analysis of Proposition 47:

> Section 11 of Proposition 36 provides, in relevant part: "Except as otherwise provided in the text of the statutes, the provisions of this act shall not be altered or amended except by one of the following: "(c) By statute that becomes effective when approved by a majority of the electors." Since section 1170.18 is a statute approved by a majority of the electors, Proposition 47 has effectively amended the provisions of section 1170.126 enacted by Proposition 36.

(Couzens & Bigelow, *Proposition 47 "The Safe Neighborhoods and Schools Act"* (Dec. 2014), p. 73[3]; see also *People v. Valencia, supra*, 2014 Cal.App. LEXIS 1149 at *31 ["We are cognizant one of the Act's authors has taken the position Proposition 47's definition of 'unreasonable risk of danger' applies to resentencing proceedings under the Act."].)

In addition, it is not to be supposed that the electorate used a phrase in a certain sense in the latter proposition differently than it used that same phrase when it enacted the earlier proposition. It certainly is not to be supposed that the electorate meant to sustain two different meanings of the same phrase when it acted to explicate the phrase in Proposition 47. Especially is this true when the goals of Proposition 36 and 47 are identical: to reduce punishment for enumerated lesser offenses and reduce unnecessary incarceration for those offenses, consequently saving millions of dollars in prison costs that can more effectively be used to combat violent crime.

The majority in *Valencia* reasoned that the electorate could not have meant for the definition of dangerousness in Proposition 47 to apply to those petitioning for resentencing under Proposition 36 because of the asserted "huge difference" between those two groups:

> There is a huge difference, both legally and in public safety risked, between someone with

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[3] This publication can be found at http://www.courts.ca.gov/documents/Prop-47-Information.pdf.

> multiple prior serious and/or violent felony convictions whose current offense is (or would be, if committed today) a misdemeanor, and someone whose current offense is a felony. Accordingly, treating the two groups differently for resentencing purposes does not lead to absurd results, but rather is eminently logical.

(*Valencia, supra,* 2014 Cal.App. LEXIS 1149 at *33.)

The majority considerably overstates its premise, for in fact there is little difference between the two groups in the seriousness of the qualifying offenses, despite the fact that one group's offenses are reduced to a misdemeanor (Prop. 47) while the other group's offenses remain a felony (Prop. 36). First, the offenses committed by those who qualify for Proposition 36 relief typically carry the least onerous sentence of 16 months, two or three years, as here, so they are as close to a misdemeanor as one can get; indeed, some of them are wobblers, so that they are in fact misdemeanors in the discretion of the district attorney. Moreover, the minimal difference between the two groups covered by the propositions is illustrated by the fact that there is considerable overlap of them. (See *People v. Valencia, supra,* 2014 Cal.App. LEXIS 1149 at *19, fn. 22 ["It appears that a number of inmates will be eligible to seek resentencing under both the Act and Proposition 47."].)

The *Valencia* majority has it backwards in concluding that Proposition 47's definition of dangerousness does not apply to

Proposition 36 because "treating the two groups differently for resentencing purposes does not lead to absurd results, but rather is eminently logical." (*People v. Valencia*, 2014 Cal.App. LEXIS 1149 at *33.) The question is whether applying the same definition would lead to absurd results or is logical. It is neither absurd nor illogical to apply the restrictive definition of dangerousness in Proposition 47 to the retroactive determination of what prisoners may be denied resentencing under the Act to preserve public safety.

The majority likewise has it backwards in relying on the fact that "[a]llowing trial court's broad discretion to determine whether resentencing an eligible petitioner under the Act 'would pose an unreasonable risk of danger to public safety,'" unconstrained by the definition of such a risk in Proposition 47, "clearly furthers the Act's purpose." (*Id.* at *34.) It may, but the question is whether application of "Proposition 47's policy of near-universal re-sentencing" for the non-violent and non-serious felons covered by Proposition 36 — whom the majority characterizes as "the worst *felony* offenders" — "manifestly does not comport with voters' intent in enacting either measure." (*Id.* at *35.).

In concluding that such application is manifestly inconsistent with both initiatives, the majority simply adopted its own view of public safety rather than the reformers' in passage of those acts. Moreover, the majority's conflation of the non-violent and non-serious felons covered by Proposition 36

with "the worst *felony* offenders" again overstates the public safety concern: Proposition 36 already excludes the worst felony offenders from its reach. Those offenders, whether they committed their crimes before or after passage of Proposition 36, will remain imprisoned on their life sentences. It is only prisoners whose felonies are comparatively nonviolent and non-serious — indeed, the *best* felony offenders — that Proposition 36 offers the opportunity for resentencing consistent with public safety.

C. Proposition 47's Definition of Dangerousness Applies Retroactively to Proposition 36 Cases on Appeal.

Assuming Proposition 47's definition of dangerousness applies prospectively to Proposition 36 cases, it makes no sense that the electorate would decline to apply its new, improved, and explicit definition of that phrase to as many Proposition 36 cases as it could. There is no logical basis to infer an intent of the electorate in Proposition 47 to extend the definition of dangerousness to Proposition 36 cases, but to deny the benefits of the that definition to those inmates whose section 1170.126 petitions were pending on appeal at the time Proposition 47 was enacted.

Another reason to apply the retroactivity principle of remedial statutes here is based on the timing of Proposition 47 in relation to the remedial mechanism established two years earlier by the Reform Act. The most obvious reason that Proposition 47 made the clarification of the dangerousness

standard applicable "[t]hroughout this Code" was to ensure its application to section 1170.126, for it is the only other Penal Code statute employing the phrase "unreasonable risk of danger to public safety." That point is made even clearer because of the seeming coincidence that Proposition 47 has enacted the new definition of that term at the very moment in time that the two-year deadline for filing a Reform Act resentencing petition under section 1170.126 was expiring, except for good cause. (See § 1170.126, subd. (a).) Thus, as a practical matter, any construction of the definition as purely prospective would render the legislation's applicability to section 1170.126 nugatory, which would be contrary to the established principle of statutory construction that requires courts to endeavor to give meaning to every provision of an enactment. (See, e.g., *People v. Cole* (2006) 38 Cal.4th 964, 980-981.)

There is no rhyme or reason to distinguish between petitions on appeal and petitions still to be filed or now before the trial court in applying the new, improved standard for determining dangerousness. Proposition 36 itself provides that a prisoner may petition for resentencing under the Act at any time "upon a showing of good cause." (§ 1170.126, subd. (b).) The establishment of a higher standard for demonstrating dangerousness than commonly understood to that point presumably would provide such good cause. Thus, the Court of Appeal's focus on retroactivity here is a red herring, for it does not appear that Chaney requires retroactivity of that definition

to obtain a redetermination of his dangerousness under the current restrictive standard that Proposition 47 elucidated.

Both propositions intend to extend reduction of punishment to all affected prisoners, except those who are truly dangerous. There thus is no interest served by keeping in prison those Proposition 36 petitioners who do not meet the current definition of "unreasonable danger." Rather, the continued imprisonment of such prisoners is contrary to the aims and purposes of both Proposition 36 and 47. Having refined and polished to the point of clarity in Proposition 47 the cloudy lens it fashioned as a prototype in Proposition 36 to identify dangerousness, why would the electorate restrict a court in its review of a dangerousness determination to that inferior and discarded instrument?

The Court of Appeal's determination that *In re Estrada* (1965) 63 Cal.2d 740 "does not apply here because applying the definition of 'unreasonable risk to public safety' in Proposition 47 to petitions for resentencing under the Act does not reduce punishment for a particular crime" (Appendix B, p. 4) relies on a distinction that makes no difference here. The propositions here at issue are different from the one considered in *Estrada* only because they are legislative acts mitigating the penalty for a number of particular crimes. Moreover, the inference of retroactivity is even stronger than in *Estrada*, for not only are both Proposition 36 and Proposition 47 *designed* to upset the repose of even final judgments of sentence, but also because the

clarified definition concerns the retrospective mechanisms themselves. Applying on appeal the more exacting bar to the finding of dangerousness effectively *does* act to reduce the punishment for those petitioners who do not meet that higher bar of dangerousness, for it enables them to take advantage of the reduced punishment the propositions applied retroactively to all affected non-dangerous prisoners.

The lower court's reliance on *People v. Brown* (2012) 54 Cal.4th 314 here (see Appendix B, pp. 6-7) is similarly misguided. *Brown* concerned a prisoner who sought application of a statute's increase in pre-sentence credits for good behavior in jail for time he spent in jail before the statute became effective. This Court there explained that the amendment "does not alter the penalty for any crime .... Instead of addressing punishment for past criminal conduct, the statute addresses future conduct in a custodial setting by providing increased incentives for good behavior." (*People v. Brown, supra,* 54 Cal.4th at p. 325.) In contrast, the retroactive provisions of both propositions implicated here do address punishment for past criminal conduct (by requiring resentencing with reduced punishment unless the individual is deemed an unreasonable risk), and the dangerousness determination in their particular retroactivity provisions depends entirely on past events.

Moreover, in contrast to *Brown* and the lower court's determination here (Appendix B, p. 6), Propositions 36 and 47, including their retroactivity provisions, decidedly *do* "represent

a judgment about the needs of the criminal law with respect to [the] criminal offense[s]" those propositions cover. (See Appendix B, p. 4, quoting *People v. Brown*, *supra*, 54 Cal.4th at p. 325.) Indeed, the divide between those who are deemed too dangerous to be given the benefit of the reduced punishment and those who are entitled to such is at the heart of the retrospective operation of those laws, including their evolving meaning of "unreasonable danger" in this respect.

As such, Proposition 47's definition of "unreasonable risk" is quintessentially "a judgment about the needs of the criminal law." The propositions indubitably "support[] the inference that the [electorate] would prefer the new, shorter penalty rather than to 'satisfy a desire for vengeance" (Appendix B, p. 7, quoting *People v. Brown*, *supra*, 54 Cal.4th at p. 325) for *all* prisoners who committed the designated offenses except those, in the words of the Legislative Analyst advising the voters about Proposition 47, "the court finds ... likely ... will commit a specified severe crime." (Gen. Elec. (Nov. 4, 2014), analysis of Prop. 47 by Legislative Analyst, p. 35.) Certainly Proposition 47's broad, inclusive language embracing determinations of "unreasonable risk to public safety" wherever a finding of such is made "throughout the Code" evidences an intent to apply that definition without limitation.

That conclusion is fortified by other principles of law. "If the judgment is not yet final because it is on appeal, the appellate court has a duty to apply the law as it exists when the

appellate court renders its decision." (*Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489; *Kuykendall v. State Board of Equalization* (1994) 22 Cal.App.4th 1194, 1207.) Generally, a court must apply any intervening legislation which redefines or clarifies a statutory standard, even where that definition or clarification was enacted after the original denial of the claim at issue. (See *Negrette v. California State Lottery Commission* (1994) 21 Cal.App.4th 1739, 1743-1745 [applying intervening legislative definition of statutory "substantial proof" standard]; accord, *Re-Open Rambla, Inc. v. Board of Supervisors* (1995) 39 Cal.App.4th 1499, 1510-1511.)

Moreover, a "remedial" or "curative" statutory amendment is ordinarily given full retroactive effect. (*Kuykendal, supra*, 22 Cal.App.4th at pp. 1209, 1211, fn. 20; *Johnston v. Sanchez* (1981) 121 Cal.App.3d 368, 375.) "A statute which affects a penalty is considered to be remedial in nature and will be given retroactive effect if it has the effect of mitigating the penalty." (*Johnston, supra*, at p. 375.) Thus, "when statutes are remedial or procedural, courts consistently apply them in cases pending, including cases pending on appeal, when the statutes become effective, even though the underlying facts predate their effective dates. Courts apply new laws in that situation unless there is evidence of a legislative intent not to do so." (*City of Clovis v. County of Fresno* (2014) 222 Cal.App.4th 1469, 1484-1485.)

Estrada reflects the fact that this general principle carries still greater weight when the "penalty" being mitigated is criminal punishment. As this Court explained in *People v. Nasalga* (1994) 12 Cal.4th 784, 792:

> *Estrada* stands for the proposition that, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactive[Citation.] To ascertain whether a statute should be applied retroactively, legislative intent is the "paramount" consideration: "Ordinarily, when an amendment lessens the punishment for a crime, one may reasonably infer the Legislature has determined imposition of a lesser punishment on offenders thereafter will sufficiently serve the public interest." [Citation.]

Most *Estrada* issues concern intervening provisions which directly lessen the sentences for a particular offense. As noted above, this Court has granted review to consider whether Reform Act amendments to the Three Strikes Law apply to criminal judgments not yet final when the initiative was enacted. The question in those cases is whether the revisions of sections 667 and 1170.12, which prescribe second-strike rather than third-strike life sentences for certain offenses, apply to cases not yet final as of the effective date of the Reform Act, so that those defendants would be entitled to automatic reduction of their sentences without the necessity of a section 1170.126 hearing on "unreasonable risk of danger to public safety."

Courts that have rejected the *Estrada* argument in that context have done so by distinguishing the Reform Act's prospective components — the amendments of sections 667 and 1170.12, — from its retrospective mechanism — the section 1170.126 resentencing procedure, finding that the amendments to sections 667 and 1170.12 apply only prospectively precisely because the section 1170.126 procedure is intended to be fully retroactive. (See *People v. Yearwood* (2013) 213 Cal.App.4th 161, 175-177.) In this analysis, the section 1170.126 resentencing procedure "is correctly interpreted to apply to all prisoners serving an indeterminate life sentence imposed under the former three strikes law." (*Id.* at p. 175.)

By contrast, the retroactivity issue in the present case is not focused on a distinction within the initiatives between prospective and retrospective application. Rather, the question here concerns the impact of Proposition 47's retroactivity provisions upon the retroactivity provisions of the Reform Act, i.e., the definition of the key phrase, "unreasonable risk of danger to public safety," employed in both resentencing provisions. Consequently, the question whether Proposition 47's carefully delineated definition of "danger to public safety" applies to appeal cases involving dangerousness denials under section 1170.126 presents a much more compelling case for fidelity to the *Estrada* principle than the Reform Act amendments now before the Court. The clarified definition concerns what everyone agrees is a retrospective mechanism

because both statutes implicated by the new Proposition 47 definition, section 1170.126 and new section 1170.18, are intended to be both retrospective and remedial.

An interpretation of Proposition 47 that extends its definition of dangerousness to Proposition 36 cases also sensibly accords with the rule of lenity in construing penal legislation. That rule acts as a tie-breaker when the statute is insolubly ambiguous and uncertain, leaving the court to guess which of two vying interpretation the enactors intended. (*People v. Manzo* (2012) 53 Cal.4th 880, 889.)

In sum, every applicable principle of statutory construction compels application of the newly-promulgated "unreasonable risk" definition to Chaney's pending appeal from the trial court's denial of section 1170.126 relief. For these reasons, this Court should grant review here and conclude that Proposition 47's explicit definition of dangerousness applies to Proposition 36 determinations of dangerousness, including those determinations pending review at the time of Proposition 47's enactment.

* * * * * *

II.

THE COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE REFORM ACT'S EXCEPTION TO RESENTENCING FOR PRISONERS THE COURT DEEMS AN "UNREASONABLE RISK TO PUBLIC SAFETY" REQUIRES THE COURT TO FIND A LIKELIHOOD THAT THE PRISONER WOULD COMMIT AN OFFENSE THAT STILL QUALIFIES FOR LIFE IMPRISONMENT UNDER THE REFORM ACT.

The court below authorized the trial court to deny resentencing to Chaney without finding that there was a likelihood that he would commit an offense that still qualifies for a life sentence under the Reform Act. In this regard, it stated: "Here, the court found that defendant posed an unreasonable risk to public safety if released because he likely would reengage in alcohol use and place the public at risk, which was exactly the finding the court was required to make." (Appendix A, p. 7.) The trial court's finding, however, was decidedly *not* the finding that the Reform Act required to deny resentencing: the Act required a finding that the defendant would likely commit one of the crimes that still warrants a life term under it — a finding above and beyond that which the trial court found.

This Court has emphasized that "all discretionary authority is contextual." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) "The scope of discretion always resides in the particular law being applied; action that transgresses the

confines of the applicable principles of law is outside the scope of discretion and we call such action an abuse of discretion." [Citations.] (*Gonzales v. Munoz* (2007) 156 Cal.App.4th 413, 420-421; see also *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067 ["The scope of discretion lies in the particular law to be applied."].)

Here, the lower courts did not take into account the context of the Reform Act, whose animating force was to restrict life sentences to those who show their danger by the commission of serious or violent felonies, or offenses where the defendant is armed with a firearm or intends to inflict great bodily injury. Since it is only that level of criminality for offenders like Chaney that warrants a life sentence in the future to protect public safety, the Reform Act sought to deny resentencing only to those prisoners who posed a likelihood of committing such an offense. The trial court's finding here, however, fell short of that finding — it was only that Chaney would endanger public safety by drinking and presumably driving. (See, e.g., Appendix A, p. 8 ["defendant's pattern is a return to alcoholism when free in society with dangerous consequences"].) Chaney has no pattern of returning to the commission of a serious or violent offense or any other offense that still warrants a life sentence under the Reform Act, however, so that the trial court abused its discretion in denying him resentencing.

In sum, there must be a likelihood the petitioner would commit a crime that approximates the danger of an offense that the Reform Act left unaffected for purposes of warranting a life sentence. That is, the Reform Act requires the court to find a likelihood that he will commit one of the offenses that still carries a life sentence to conclude that resentencing of him would pose an unreasonable risk. Because the trial court never so found here, the Court should grant review to address this issue.

* * * * * *

CONCLUSION

For these reasons, the Court should grant review.

Dated: January 5, 2015

Respectfully submitted,

MICHAEL SATRIS

Attorney for Appellant
CLIFFORD PAUL CHANEY

Court of Appeal, Third Appellate District, Case No. C073949
Amador County Superior Court No. 05CR08104
People v. Chaney

CERTIFICATE OF APPELLATE COUNSEL

I, Michael Satris, counsel for Appellant, hereby certify, pursuant to rule 8.504 (d)(1) of the California Rules of Court, that I prepared the foregoing petition for review on behalf of my client, and that the word count for this Petition for Review, including footnotes, is **8,227 words**. This petition for review therefore complies with the rule, which limits a petition for review or answer to petition for review to 8,400 words. I certify that I prepared this document in Microsoft Word 2003, and that this is the word count Microsoft Word generated for this document.

DATED: January 5, 2015

MICHAEL SATRIS
Attorney for Appellant

APPENDIX A

Filed 10/29/14 Modified and Certified for Publication 12/1/14 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE, Plaintiff and Respondent, v. CLIFFORD PAUL CHANEY, Defendant and Appellant.	C073949 (Super. Ct. No. 05CR08104)

Defendant Clifford Paul Chaney has eight strikes: six robberies with arming enhancements and two first degree burglaries. These eight strikes arose from two separate incidents in which defendant and two others robbed the same chemical laboratory and imprisoned 20 employees.

Defendant's current offense for which he was sentenced to prison for 25 years to life in 2005 was driving under the influence of alcohol (DUI) with prior convictions for three other DUI's, two of which resulted in injuries. When he committed the current

DUI, he was on two grants of probation. Following his current DUI conviction, defendant explained he "drinks too much" and is "emotionally weak."

In this appeal, defendant challenges the trial court's denial of his petition for resentencing under the Three Strikes Reform Act of 2012 (the Act). Under the Act, "prisoners currently serving sentences of 25 years to life for a third felony conviction which was not a serious or violent felony may seek court review of their indeterminate sentences and, under certain circumstances, obtain resentencing as if they had only one prior serious or violent felony conviction." (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1286 (*Kaulick*).) If a defendant such as the one here satisfies certain criteria, "the petitioner shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (Pen. Code,[1] § 1170.126, subd. (f).)

The court based the denial on its finding that "[t]he [c]ourt cannot in good conscience say that you do not pose an unreasonable risk to the public safety if released. The [c]ourt is not convinced that you would not re-engage in alcohol use and place the public at risk." The court cited defendant's numerous DUI's that caused injuries, stating drinking was the root of his criminality.

On appeal, defendant contends: (1) the court erred by allowing his petition to be heard by a different judge than the one who originally sentenced him; (2) the court erred by not obtaining a supplemental probation report; and (3) the court abused its discretion in denying the petition.

We hold: (1) defendant forfeited his right to have the original sentencing judge hear his petition; (2) no supplemental probation report was required; and (3) the court acted well within its discretion in denying the petition.

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1 All further section references are to the Penal Code.

DISCUSSION

I

Defendant Forfeited His Right To Have The Original Sentencing Judge Consider His Petition

"Penal Code section 1170.126, subdivision (b) specifies that a prisoner petitioning for resentencing must file the petition 'before the trial court that entered the judgment of conviction in his or her case.' The reference to 'the trial court that entered the judgment' is clearly a reference to the trial judge. This is confirmed by a later subdivision, which uses the terms 'judge' and 'court' interchangeably, when identifying the judicial officer who must rule on the petition. (Pen. Code, § 1170.126, subd. (j).) Penal Code section 1170.126, subdivision (j) provides, 'If the court that originally sentenced the defendant is not available to resentence the defendant, the presiding judge shall designate another judge to rule on the defendant's petition.' [¶] It is therefore clear that the initial sentencing judge shall rule on the prisoner's petition." (*Kaulick, supra*, 215 Cal.App.4th at pp. 1300-1301.)

Defendant contends the court erred by allowing his petition to be heard by a different judge than the one who originally sentenced him to his three strikes' sentence. Defendant has forfeited this contention by not objecting in the trial court. In a similar context, our court has held that where a defendant does not object to sentencing by a judge other than the one who accepted his plea, the defendant has forfeited his right to later contend he was entitled to have the original judge sentence him. (*People v. Serrato* (1988) 201 Cal.App.3d 761, 764-765 [defendant waives his right to have the same judge who accepted the plea also sentence him when he fails to object to a different judge as the sentencing judge in the trial court]; *In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1 ["correct term is 'forfeiture' rather than 'waiver' "].)

II

The Trial Court Did Not Need To Obtain A Supplemental Probation Report

Defendant contends the court erred in failing to obtain a supplemental probation report before denying his petition. He acknowledges that this subject "was not raised by the prosecutor, defense counsel, or the court at any time."

The People contend defendant forfeited any right to such a report, citing *People v. Johnson* (1999) 70 Cal.App.4th 1429. In *Johnson*, the Fourth District Court of Appeal held that a "defendant has waived his right to object to the absence of a supplemental [probation] report by failing to do so in the trial court." (*Johnson*, at p. 1433.)

A later case by this court has held that when a supplemental probation report is *required*, an appellate court cannot infer forfeiture because there must be a written stipulation of waiver of the supplemental report or a stipulation orally in open court. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 182.) This court relied on section 1203, subdivision (b)(4), which provides as follows: "The preparation of the report or the consideration of the report by the court may be waived only by a written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court, except that a waiver shall not be allowed unless the court consents thereto."

Here, because the preparation of a supplemental probation report was not required, there did not have to be a written or oral stipulation of waiver. California Rules of Court, rule 4.411(c) provides: "The court shall order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared." The hearing here was not a "sentencing proceeding[]." "There are . . . three . . . determinations at issue under Penal Code section 1170.126, subdivision (f): First, the court must determine whether the prisoner is eligible for resentencing; second, the court must determine whether resentencing would pose an unreasonable risk of danger to public safety; and third, if the prisoner is eligible and

resentencing would *not* pose an unreasonable risk of danger, the court must actually resentence the prisoner." (*Kaulick, supra,* 215 Cal.App.4th at p. 1299.)

The trial court found that defendant's release would pose an unreasonable risk of danger to public safety, so it never reached the third step of resentencing him. Thus, the court was not required to obtain a supplemental probation report, and the rule of forfeiture in *Johnson* applies here. (*People v. Johnson, supra,* 70 Cal.App.4th at p. 1433; *In re Sheena K., supra,* 40 Cal.4th at p. 880, fn. 1 ["correct term is 'forfeiture' rather than 'waiver' "].)

III

The Court Was Well Within Its Discretion To Deny Defendant's Petition

Defendant contends the court abused its discretion in denying his petition. Included in this contention are defendant's arguments that: (a) the court shifted the burden of proof to him and did not make the required finding; (b) there was no substantial evidence that resentencing him posed an unreasonable risk of danger to public safety; and (c) the court failed to consider conditions of resentencing to reduce his risk upon release.

A

The Court Did Not Shift The Burden Of Proof To Defendant; The Court Made The Required Finding

According to defendant, the court shifted the burden of proof to him and did not make the required finding to deny the petition. The record shows otherwise on both points.

In the People's opposition to defendant's petition, the People stated that once defendant showed he was eligible for resentencing, "the burden likely shifts to the People to demonstrate that he poses an unreasonable risk of danger to public safety if released." Consistent with this position (and fixing the standard of proof at preponderance of evidence), at the hearing that took place after defendant established he was eligible for resentencing, the court began by asking the People to present evidence and their

witnesses. At the conclusion of their evidence and witnesses, the People argued to the court that defendant "poses an unreasonable risk of danger to the public if he's released" and then the "People rest[ed]." Thus, contrary to defendant's contention, the court placed the burden of proof on the People.[2]

As to defendant's second argument that the court did not make the required finding, again, the record shows otherwise. Before the court announced its ruling, the court stated, "[the court] has to decide, based upon your history, whether you pose an unreasonable risk to the public." When making that finding, the court stated, "[t]he [c]ourt cannot in good conscience say that you do not pose an unreasonable risk to the

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[2] Defendant also argues (with a limited discussion) about the standard of proof. As noted, the court stated the standard was preponderance of evidence that resentencing defendant would pose an unreasonable risk to public safety. Defendant argues the standard was proof beyond a reasonable doubt. Not so.

As explained in *Kaulick*, "[t]his argument presumes that a finding of dangerousness is a factor which justifies enhancing a defendant's sentence beyond a statutorily presumed second strike sentence" and "that, once the trial court concluded that he was *eligible* for resentencing under the Act, he was subject *only* to a second strike sentence, *unless* the prosecution established dangerousness." (*Kaulick, supra*, 215 Cal.App.4th at pp. 1301, 1302.)

"The statutory language, however, is not amenable to [the defendant]'s interpretation." (*Kaulick, supra*, 215 Cal.App.4th at p. 1302.) "The maximum sentence to which [the defendant] . . . is subject was . . . the indeterminate life term to which he was originally sentenced. . . . As such, a court's discretionary decision to decline to modify the sentence in his favor can be based on any otherwise appropriate factor (i.e., dangerousness), and such factor need not be established by proof beyond a reasonable doubt to a jury." (*Id.* at p. 1303.)

We also agree with *Kaulick* (and the trial court) that "the proper standard of proof is preponderance of the evidence. Evidence Code section 115 provides that, '[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.' There is no statute or case authority providing for a greater burden, and [the defendant] has not persuaded us that any greater burden is necessary." (*Kaulick, supra*, 215 Cal.App.4th at p. 1305, fn. omitted.)

public safety if released. The [c]ourt is not convinced that you would not re-engage in alcohol use and place the public at risk."

This finding was what the Act required. Under the Act, defendant "shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) Here, the court found that defendant posed an unreasonable risk to public safety if released because he likely would reengage in alcohol use and place the public at risk, which was exactly the finding the court was required to make. We turn to the evidence supporting that finding next.

B

The Court Did Not Abuse Its Discretion In Finding That Defendant's Resentencing Posed An Unreasonable Risk Of Danger To Public Safety

Defendant contends there was no substantial evidence that resentencing him posed an unreasonable risk of danger to public safety. We review a trial court's finding here for abuse of discretion, under which it is not enough for a defendant to show that reasonable people might disagree about the court's sentencing decision but rather, the defendant must show, for example, the court was unaware of its discretion or acted arbitrarily. (See *People v. Carmony* (2004) 33 Cal.4th 367, 376-378 [making these observations in terms of a trial court's exercise of discretion in determining whether to strike a defendant's strike].)

Defendant's argument is based on his belief that the court should not have found that his *prior* alcohol abuse made him a *current* danger to public safety. The problem with defendant's argument is a rational basis existed for the court to believe that defendant's prior alcohol abuse and current state was predictive of his current dangerousness. Although defendant points out that there was no evidence he had used alcohol for the last eight years, there was also no evidence presented that defendant

completed any alcohol abuse programs or otherwise rehabilitated himself from his alcoholism. And, as the court noted, alcoholism was the root of his criminality.

When defendant was released from prison following his sentence for the laboratory robberies in April 1995, only four months later, in August 1995, defendant drove his car under the influence of alcohol, colliding head-on with another car, injuring three people in that car. He was sentenced to prison for four years. Within a few years of his release from prison, in October 2002, he again drove his car under the influence of alcohol into the wall of a restaurant causing the partial collapse of a wall, injuries to the restaurant cook, and destruction of property. Two years later, in March 2004, he drove his car under the influence of alcohol yet again. Despite spending time in jail and having his license revoked, in June 2005, only months after being released on his last DUI and while still on probation with a revoked license, defendant committed his current DUI offense, which landed him in prison for 25 years to life. Thus, defendant's pattern is a return to alcoholism when free in society with dangerous consequences. Defendant has not shown the court's exercise of its discretion was an abuse.

C

The Court Did Not Have To Consider Conditions Of Resentencing, And There Was No Error In The Court's Failure To Do So Here

Defendant contends the court abused its discretion by failing to consider conditions of resentencing to reduce his risk upon release. There was no abuse. There is no authority that requires the court to consider conditions of resentencing to reduce a defendant's risk upon release under the Act. Moreover, defendant has demonstrated his failure to comply with supervised release, given that he was on two grants of probation when he committed the current DUI offense.

DISPOSITION

The judgment (the court's order denying defendant's petition for resentencing) is affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

MAURO, J.

APPENDIX B

Filed 12/1/14

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE, Plaintiff and Respondent, v. CLIFFORD PAUL CHANEY, Defendant and Appellant.	C073949 (Super. Ct. No. 05CR08104) ORDER MODIFYING OPINION, CERTIFYING OPINION FOR PARTIAL PUBLICATION, AND DENYING PETITION FOR REHEARING (NO CHANGE IN JUDGMENT)

THE COURT:

The opinion of this court filed October 29, 2014, in the above entitled case is modified as follows:

1. On page 2, in the first sentence in the first full paragraph that begins, "In this appeal . . . ," insert the following phrase after "the trial court's": "May 2013."

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* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of parts II, III and IV of the Discussion.

2. On page 2, at the end of the first full paragraph beginning, "In this appeal . . . ," insert the following sentence after the citation to Penal Code section 1170.126, subdivision (f):

"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." (§ 1170.126, subd. (g).)

3. On page 2, delete the last two full paragraphs and insert the following paragraphs in their place:

In a petition for rehearing, defendant challenges the trial court's denial of his petition for resentencing under the Act, which he bases on Proposition 47, passed by California voters on November 4, 2014, effective November 5, 2014. (See Cal. Const., art. II, § 10, subd. (a) ["An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise"].)

The stated "[p]urpose and [i]ntent" of Proposition 47 include, among other things, "[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes"; "[a]uthoriz[ing] consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors"; and "[r]equir[ing] a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subds. (3), (4) & (5), p. 70.)

Proposition 47 created a new resentencing provision, section 1170.18, under which "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence" and request resentencing . (§ 1170.18, subd. (a).)

"If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. In exercising its discretion, the court may consider all of the following: [¶] (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. [¶] (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." (§ 1170.18, subd. (b).)

Defendant's petition for rehearing concerns the language that follows next in Proposition 47: "*As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.*" (§ 1170.18, subd. (c), italics added.) Section 667, subdivision (e)(2)(C)(iv) lists the following felonies: "(I) A 'sexually violent offense' . . . . [¶] (II) Oral copulation . . . as defined by Section 288a, sodomy . . . as defined by Section 286, or sexual penetration . . . as defined by Section 289. [¶] (III) A lewd or lascivious act . . . in violation of Section 288. [¶] (IV) Any homicide offense, including any attempted homicide offense . . . . [¶] (V) Solicitation to commit murder . . . . [¶] (VI) Assault with a machine gun on a peace officer or firefighter . . . . [¶]

(VII) Possession of a weapon of mass destruction . . . . [¶] (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death."

We partially publish this decision to address the potentially retroactive application of the definition of "unreasonable risk of danger to public safety" in Proposition 47 to defendant. We hold that the definition of "unreasonable risk to public safety" in Proposition 47 does not apply retroactively to a defendant such as the one here whose petition for resentencing under the Act was decided before the effective date of Proposition 47.

In the unpublished portion of the opinion, we reject the remainder of defendant's contentions on appeal.

4. On page 3, renumber the original roman numeral "I" to "II."

5. On page 3, above the renumbered roman numeral "II" add the following paragraphs:

I

Proposition 47's Definition of "Unreasonable Risk Of Danger To Public Safety" Does Not Apply Retroactively

Defendant contends that because his case is a nonfinal judgment pending in this court, he is entitled to a new resentencing hearing under the Act in which the trial court should apply the definition of "unreasonable risk to public safety" contained in Proposition 47.[2]

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[2] " '[A] judgment is not final so long as the courts may provide a remedy on direct review. That includes the time within which to petition to the United States Supreme Court for writ of certiorari.' [Citation.] 'Cases in which judgment is not yet final include those in which a conviction has been entered and sentence imposed but an appeal is pending when the amendment becomes effective.' " (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 171-172.)

"No part of [the Penal Code] is retroactive, unless expressly so declared." (§ 3.) The California Supreme Court "ha[s] described section 3, and its identical counterparts in other codes (e.g., Civ. Code, § 3; Code Civ. Proc., § 3), as codifying 'the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.' " (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*).) "In interpreting a voter initiative, we apply the same principles that govern our construction of a statute." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006.)

Proposition 47 is silent as to its retroactive application to proceedings under the Act. Similarly, the analysis of Proposition 47 by the legislative analyst, the arguments in favor of Proposition 47, and the arguments against Proposition 47 are silent as to the retroactive application to proceedings under the Act. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), pp. 34-39.) Thus, there is "no clear and unavoidable implication" of retroactivity that "arises from the relevant extrinsic sources." (*Brown*, *supra*, 54 Cal.4th at p. 320.)

Nevertheless, defendant contends that the principle enunciated in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) compels a finding of retroactivity here. As we explain, *Estrada* does not apply.

In *Estrada*, the California Supreme Court stated: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) This includes "acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Ibid.*) Accordingly, a statute lessening punishment is presumed to apply to all cases not yet

reduced to final judgment on the statute's effective date, unless there is a "saving clause" providing for prospective application. (*Id.* at pp. 744-745, 747-748.)

Estrada does not apply here because applying the definition of "unreasonable risk to public safety" in Proposition 47 to petitions for resentencing under the Act does not reduce punishment for a particular crime. Rather, it arguably[3] changes the lens through which the dangerousness determinations under the Act are made. Using the words of *Brown*, that "does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent." (*Brown, supra*, 54 Cal.4th at p. 325.) As the California Supreme Court explained in *Brown*, "*Estrada* is . . . properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments." (*Brown, supra*, 54 Cal.4th at p. 324.)

Brown illustrates this point. *Brown* addressed the 2010 amendment to former section 4019 that increased the rate at which eligible prisoners could earn conduct credit for time spent in local custody. (*Brown, supra*, 54 Cal.4th at pp. 317-318.) In passing this amendment, the Legislature did not "express[ly] declar[e] that increased conduct

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3 We say "arguably" because we do not decide whether the definition of "unreasonable risk to public safety" in Proposition 47 applies prospectively to petitions for resentencing under the Act. (The People in their answer to the petition on rehearing argue that the new definition of "unreasonable risk of danger to public safety" in Proposition 47 does not apply at all to proceedings under the Act because the reference in Proposition 47 to "the petitioner" refers only to petitions under Proposition 47 and not petitions under the Act.) Rather, we decide only whether the definition of "unreasonable risk to public safety" in Proposition 47 applies retrospectively to petitions for resentencing under the Act.

credits [we]re to be awarded retroactively, and [there was] no clear and unavoidable implication to that effect . . . from the relevant extrinsic sources, i.e., the legislative history." (*Id.* at p. 320.) Thus, the California Supreme Court applied the "default rule" in section 3 that " 'No part of [the Penal Code] is retroactive, unless expressly so declared.' " (*Brown*, at pp. 319-320.) In doing so, the California Supreme Court rejected the defendant's argument that *Estrada* "should be understood to apply more broadly to any statute that reduces punishment in any manner, and that to increase credits is to reduce punishment." (*Brown*, at p. 325.) It rejected defendant's argument for two reasons: "First, the argument would expand the *Estrada* rule's scope of operation in precisely the manner we forbade . . . . Second, the argument does not in any event represent a logical extension of *Estrada*'s reasoning. We do not take issue with the proposition that a convicted prisoner who is released a day early is punished a day less. But, as we have explained, the rule and logic of *Estrada* is specifically directed to a statute that represents ' "a legislative mitigation of the *penalty for a particular crime*" ' [citation] because such a law supports the inference that the Legislature would prefer to impose the new, shorter penalty rather than to ' "satisfy a desire for vengeance" ' [citation.]. The same logic does not inform our understanding of a law that rewards good behavior in prison." (*Brown*, at p. 325.)

Expanding the *Estrada* rule's scope of operation here to the definition of "unreasonable risk to public safety" in Proposition 47 in a petition for resentencing under the Act would conflict with "section 3['s] default rule of prospective operation" where there is no evidence in Proposition 47 that this definition was to apply retrospectively to petitions for resentencing under the Act and would be improper given that the definition of "unreasonable risk to public safety" in Proposition 47 does not reduce punishment for a particular crime. For these reasons, we hold that the definition of "unreasonable risk to public safety" in Proposition 47 does not apply retroactively to a defendant such as the

one here whose petition for resentencing under the Act was decided before the effective date of Proposition 47.

6. On page 4, renumber the original roman numeral "II" to "III."

7. On page 5, renumber the original roman numeral "III" to "IV."

8. On page 6, renumber footnote 2 to 4.

The opinion in the above-entitled matter filed on October 29, 2014, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports except for parts II, III and IV of the Discussion, and it is so ordered.

The petition for rehearing is denied. The modification does not affect the judgment.

BY THE COURT:

BLEASE, Acting P. J.

ROBIE, J.

MAURO, J.

EDITORIAL LISTING

APPEAL from a judgment of the Superior Court of Amador County, J.S. Hermanson, Judge. Affirmed.

Michael Satris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputies Attorney General, for Plaintiff and Respondent.

Court of Appeal, Third Appellate District, Case No. C073949
Amador County Superior Court No. 05CR08104
People v. Chaney

PROOF OF SERVICE BY MAIL

(Cal. Rules of Court, rules 1.21, 8.50.)

I, Marcia Bunney, declare that: I am over the age of 18 years and not a party to the case; I am employed in the County of Marin, California, where the mailing occurs; and my business address is Post Office Box 337, Bolinas, California 94924.

On January 7, 2015, I caused to be served the within **PETITION FOR REVIEW** by placing a true copy of each document in a separate envelope addressed to the parties as follows:

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PROOF OF SERVICE BY ELECTRONIC SUBMISSION

(Cal. Rules of Court, rule 8.340.)

Additionally, I, Marcia Bunney, declare that on January 7, 2015, I electronically served a copy of the within **PETITION FOR REVIEW** on the COURT OF APPEAL, THIRD APPELLATE DISTRICT, via its efiling page at http://www.courts.ca.gov/19285.htm.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Bolinas, California, on January 7, 2015.

Marcia Bunney