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SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

VERONICA LORRAINE DEHOYOS et al.,

Defendants and Appellants.

Fourth Appellate District, Division One, No. D065961
San Diego County Superior Court No. SCD252670
The Honorable Lisa C. Schall, Judge

PETITION FOR REVIEW

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By Appointment of the Court of Appeal under the Appellate Defenders, Inc. independent case system.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VERONICA LORRAINE DEHOYOS et al., Defendants and Appellants.

PETITION FOR REVIEW

TO THE HONORABLE TANI CANTI-SAKAUYE, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rules 8.500 and 8.504 of the California Rules of Court, appellant Veronica Lorraine DeHoyos respectfully requests that this Honorable Court review the published decision of the Court of Appeal, Fourth Appellate District, Division Three, which affirmed the judgment of the superior court. A copy of the opinion filed on June 30, 2015, is attached hereto as Appendix "A."

MEMORANDUM IN SUPPORT OF THE PETITION

STATEMENT OF THE ISSUES

1. Does Proposition 47 - the "Safe Neighborhoods and Schools Act" ("the Act") - which reduced numerous offenses to misdemeanors - apply retroactively to a defendant who was sentenced before the Act's effective date but whose judgment was not final at that time, so that such a defendant is not required to file a petition to recall sentence in the trial court pursuant to Penal Code section 1170.18 in order to obtain the ameliorative benefits of the Act?[1]

2. If the Act is found to be retroactive, does a defendant who was sentenced prior to the operative date of the Act but whose judgment was not final at that time have the option of seeking Proposition 47 relief on appeal pursuant to the applicable revised statute reducing the offense to a misdemeanor, and at the same time filing a petition to recall his sentence in the trial court so that he can obtain the most expeditious relief possible and thereby avoid serving a felony sentence for an offense reduced to a misdemeanor by the Act?

3. If the Act is found to operate only prospectively, is a defendant who was sentenced before the effective date of the Act, but whose judgment was not final at that time, required to wait until his judgment is final before filing a petition to recall sentence pursuant to section 1170.18?

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

4. Does a prospective only application of Proposition 47 violate the equal protection clauses of the California and United States Constitutions because it would create a class of individuals with nonfinal judgments who are treated differently without any legitimate basis for doing so?

STATEMENT OF THE CASE

On April 24, 2014, a jury convicted appellant of one felony count of possession of a controlled substance - methamphetamine (Health & Safety Code § 11377, subd. (a)). (1CT 211; 4RT 441.) On May 8, 2014, the court suspended imposition of sentence and placed appellant on formal probation for a period of three years. (1CT 214-216; 3RT 451-453.) Appellant filed a timely notice of appeal. (1CT 194.)

In an opinion certified for partial publication, filed on June 30, 2015, the Court of Appeal affirmed the judgment of the superior court. (Slip opn. p. 13.) Appellant filed a Petition for Rehearing which was denied by the Court of Appeal on July 22, 2015.

STATEMENT OF FACTS

For purposes of this Petition for Review, appellant adopts the facts set forth in the "Background" section of the opinion. (Slip opn. pp. 2-6.)

NECESSITY FOR REVIEW

Review of this case is necessary to address important and recurring questions of law regarding whether Proposition 47 applies retroactively to defendants whose judgments were not final on the operative date of the Act. This petition is also necessary to exhaust appellant's state remedies before seeking federal review. (See e.g. *O'Sullivan v. Boerckeli* (1999) 526 U.S. 838 [144 L.Ed.2d 1, 119 S.Ct. 1728].)

On appeal appellant contended that Proposition 47 applied retroactively to defendants like her, whose judgments were not final on its operative date, and therefore the Court of Appeal was required to reduce her conviction for possession of methamphetamine to a misdemeanor and remand the matter for resentencing. Although the Court of Appeal properly recognized that Proposition 47 does not include an express savings clause, it found the Legislature's intent was for prospective, rather than retroactive application of Proposition 47. (Slip opn. pp. 10-12.) But contrary to the court's conclusion, the Legislature did not demonstrate with sufficient clarity its intention that Proposition 47 apply only prospectively.

The opinion states:

> DeHoyos relies on the rule of retroactivity expressed in *In re Estrada* (1965) 64 Cal.2d 740 (*Estrada*). "Under that rule, a legislative amendment that lessens criminal punishment is presumed to apply to all cases *not yet final* (the Legislature deeming its former penalty too severe), unless there is a 'saving clause' providing for prospective application." (*People v. Smith*

> (2015) 234 Cal.App.4th 1460, 1464-1465; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1195-1196 [courts will assume, absent contrary evidence, the Legislature intended for an amended statute reducing punishment for a particular offense to apply to all defendants whose judgments are not yet final on the amended statute's operative date]; *People v. Brown* (2012) 54 Cal.4th 314, 323 [same].)

(Slip opn. p. 10.)

After acknowledging that Proposition 47 mitigates punishment and does not contain an express savings clause, the Court of Appeal found the language of Proposition 47 stated with "the requisite clarity" the Legislative intent for prospective, rather than retroactive, application. (Slip opn. p. 11.) It also found said conclusion "is consistent with the Legislative Analyst's analysis of Proposition 47," as well as with the ballot arguments. (Slip opn. pp. 11-12.)

In *Estrada*, the amendatory act which lessened the punishment occurred after the date the crime was committed, but before the defendant was tried, convicted, and sentenced. (*In re Estrada, supra*, 64 Cal.2d 744.) Although the *Estrada* court indicated the timing of the ameliorative statute presented a stronger case for retroactivity than a case where the amendatory act did not become effective until after the defendant's case was pending on appeal, it recognized that legally both presented the same issue. It held, "If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the

old statute in effect when the prohibited act was committed, applies." (*Ibid.*)

On the day *Estrada* was decided this court also filed an opinion in a companion case - *In re Kirk* (1963) 63 Cal.2d 761 (*Kirk*). In *Kirk*, as in appellant's case, the ameliorative statute was passed after the criminal act was committed when the defendant's case was pending on appeal. (*Id.* at pp. 762-763.) This Court held that under the rule announced in *Estrada*, the petitioner was "entitled to the benefits of the amendatory statute." (*Id.* at p. 763.) Just like those presently being prosecuted as misdemeanants for violations of statutes amended by Proposition 47 that occurred prior to November 5, 2014, those whose sentences had not been imposed by that date ("*Estrada*" defendants), and those in appellant's position ("*Kirk*" defendants), should be treated exactly the same."

Defendants whose judgments were not final at the time Proposition 47 became effective are treated distinctively differently from those whose judgments were final prior to November 5, 2014. In order for such an individual who is still serving their sentence to obtain the ameliorative benefits of Proposition 47, he or she must file a petition for recall of their sentence in the trial court (§ 1170.18, subd. (a)). Such defendants are, however, subject to the trial court's discretion to deny their request upon a finding resentencing under the new law "would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) But in situations where the defendant's

judgment was not final - as in *Estrada* and *Kirk* - the defendant is automatically entitled to the amelioration.

Appellant's case presents the same situation as that in *Kirk.* She had been tried, convicted, and sentenced prior to the passage of Proposition 47, and the ameliorative statute - Health and Safety Code section 11377 - became effective during the pendency of her appeal. As such she should be entitled to the ameliorative remedy provided in the amendment to the statute.

It is presumed that voters know the law. (*Anderson v. Superior Court* (1995) 11 Cal.4th 1152, 1161; *People v. Shabazz* (2006) 38 Cal.4th 55, 65, fn. 8.) Thus it is presumed the electorate knew that defendants whose judgments were not final on the operative date of Proposition 47 would gain the benefit of amelioration of lessened punishment, and ordinarily those whose judgments were final would not. But Proposition 47 granted amelioration even greater than in the usual situation - by adding section 1170.18 which stands to benefit many defendants whose judgments were final well before the passage of Proposition 47.

A question may then arise as to whether this *added* level of amelioration for judgments already final was intended to operate as a quasi savings clause, which would be applied to defendants like appellant, but not to defendants in a situation like *Estrada.* There is no rational basis or logical reason for reaching such a conclusion, and to do so would contradict the

holdings of this Court in *Estrada* and *Kirk*.

After concluding the legislative intent was for Proposition 47 to not apply retroactively to persons serving sentences for included offenses,[2] the Court of Appeal held that in order for appellant "to be considered for resentencing, she must utilize the procedure specified in section 1170.18." (Slip opn. p. 12, citing *People v. Noyan* (2014) 232 Cal.App.4th 657, 672 (*Noyan*). In *Noyan*, the defendant was charged with numerous counts in multiple cases. Prior to the enactment of Proposition 47, he pleaded guilty to several counts, including two counts for possession of heroin which were later encompassed in Proposition 47. (*Id.* at p. 661.) Under the plea bargain the defendant was sentenced to an aggregate term of five years, four months in state prison, including felony terms for the two counts of possession of heroin. The court imposed sentence but suspended its execution and placed the defendant on probation for three years in each case. The defendant did not file a notice of appeal, and thus the judgment originally imposed became final after the expiration of the 60 day period in which to file an appeal. He subsequently violated his probation, the court revoked probation, the defendant admitted violating probation, and after a hearing the court executed the previously suspended prison sentence. The defendant thereafter appealed

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[2] This issue is addressed in the following section.

but did not obtain a certificate of probable cause.[3] (*Id.* at pp. 661-662.) On appeal the defendant argued the trial court abused its discretion by failing to reinstate probation. He also raised an equal protection claim regarding the fact he was required to serve his sentence in state prison. The defendant did not raise his Proposition 47 claim until he filed a petition for rehearing in his appeal in which he contended he was entitled to have his convictions for possession of heroin reduced to misdemeanors because he did not have any disqualifying prior convictions. (*Id.* at p. 662.) The Court of Appeal disagreed and simply concluded:

> Defendant is limited to the statutory remedy of petitioning for recall of sentence in the trial court *once his judgment is final*, pursuant to Penal Code section 1170.18. (See *People v. Yearwood* (2013) 213 Cal.App.4th 161, 170, 177 [151 Cal.Rptr.3d 901].)

(232 Cal.App.4th at p. 672 [emphasis added].)

The defendant in *Noyan* did not fall within the *Estrada/Kirk* amelioration principle because his original judgment became final *prior* to the enactment of Proposition 47. In appellant's case, the judgment was not final at the time Proposition 47 was enacted, and appellant raised the issue in her appeal prior to the issuance of the opinion. The *Noyan* court did not provide any analysis or discussion regarding the retroactivity of the provisions of

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[3] The Third District Court of Appeal docket for the appeal (C074049) indicates the notice of appeal was filed on June 21, 2013.

Proposition 47. Instead, it relied solely on *People v. Yearwood, supra*, 213 Cal.App.4th 161 - where the court found the *Estrada* rule inapplicable to the Three Strikes Reform Act. Although *Yearwood* remains a published opinion, the issue of whether the *Estrada* rule applies in the context of the Three Strikes Reform Act is presently pending before this Court in *People v. Conley*, S211275, review granted August 14, 2013.

The holding of the Court of Appeal that requires appellant to utilize section 1170.18 to obtain Proposition 47 is not supported by authority. Section 1170.18, subdivision (m) provides, "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant." Although this language is a clear indication of the electorate's intent that section 1170.18 was not meant to be an exclusive remedy, the Court of Appeal concluded otherwise, and the opinion does not even mention section 1170.18, subdivision (m).

The Court of Appeal found the language in Proposition 47 demonstrated the Legislative intent that it was not to be applied retroactively. (Slip opn. p. 11, citing Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70.) But retroactive application of Proposition 47 would not result in an "automatic application of Proposition 47" to an *Estrada* or *Kirk* defendant. Instead, it would require either judicial review of the appellate record and findings by the reviewing court that the defendant did not have any

disqualifying felonies, or a remand for the trial court to conduct proceedings to make such a determination.

Proposition 47 was enacted "to ensure that prison spending is focused on violent and serious offenses" and to retain severe sentences "for people convicted of dangerous crimes like murder, rape, and child molestation." (Prop. 47, § 2.) The Court of Appeal opinion makes no reference to section 2 of Proposition 47. Appellant's position is consistent with the stated purpose of the Act because retroactive application of Proposition 47 would still require a finding that the defendant had not been convicted of a designated serious and violent "super strike" felony.

The opinion includes a finding that prospective application is consistent with the Proposition 47 analysis of the Legislative Analyst. It notes the following language, "'This measure allows offenders currently serving felony sentences for the above crimes *to apply* to have their felony sentences reduced to misdemeanor sentences. . . . However, no offender who has committed a specified severe crime could be resentenced or have their conviction changed.'" (Slip opn. p. 11.) While an *Estrada* or *Kirk* defendant is certainly *allowed* to apply for Proposition 47 relief through section 1170.18, subdivision (a), subdivision (m) of the statute makes it clear that a petition for recall of sentence is not the sole avenue available for such a defendant seeking Proposition 47 relief. Further, a defendant who committed one of the

specified severe crimes would not qualify for Proposition 47 resentencing under a retroactive application of the applicable statute.

The Court of Appeal also pointed to the following language, "the measure states that a court is not required to resentence an offender currently serving a felony sentence if the court finds it likely that the offender will commit a specified severe crime." (Slip opn. pp. 11-12.) If the defendant committed an offense that was reduced to a misdemeanor by Proposition 47, and had no disqualifying convictions, there would be no basis for the court to conclude that it would be likely the defendant would commit one of the designated severe crimes.

The opinion of the Court of Appeal concludes that the legislative intent for prospective application is consistent with Proposition 47 ballot arguments, in which its proponents argued that it would not require the automatic release of any offender. (Slip opn. p. 12.) For the reasons discussed herein above, retroactive application of Proposition 47 would not result in the automatic release of any *Kirk* or *Estrada* defendant.

An absurd result would occur if Proposition 47 is not applied retroactively. If a defendant has already served his or her sentence, he or she may file an application in the trial court to have their offense designated as a misdemeanor. (§ 1170.18, subd. (f)). And if their felony or felonies would have been a misdemeanor if Proposition 47 had been in effect at the time of

their offense, the court *is required* to designate their offense a misdemeanor. (§ 1170.18, subd. (g).) Therefore absent retroactive application of Proposition 47, a defendant whose judgment was not final at the time Proposition 47 was enacted can be denied ameliorative relief under Proposition 47, while a defendant whose judgment was final at that time, and who had completed his or her sentence prior to the passage of Proposition 47 - even years before - will be able to have their felony reduced to a misdemeanor as long as the offense would have been a misdemeanor if Proposition 47 had been in effect at the time of the offense. The Legislature could not have intended such an absurd result, which is a strong indication that it intended Proposition 47 to apply retroactively.

Additionally, applying Proposition 47 only prospectively would constitute a legislative classification between persons sentenced before and after its enactment. Given the purpose of Proposition 47, to reduce penalties for non-serious and non-violent offenses, this classification would not be reasonably related to a legitimate public purpose and would violate the Equal Protection Clauses of our state and federal constitutions. (Proposition 47, §§ 3, 4; U.S. Const, 14th Amend.; Cal. Const., art. I, § 7; see *In re Kapperman* (1974) 11 Cal.3d 542, 546-550.)

Despite the Court of Appeal's "belief" and "interpretation" that the Legislature intended Proposition 47 to apply prospectively, and not

retroactively, appellant asserts that such an intent was not manifested with any degree of clarity, and there are strong indications to the contrary. Given the objectives of Proposition 47, the plain language of section 1170.18, subdivision (m), and absent an explicit abrogation of *Estrada* or a specific statement that section 1170.18 provides the sole and exclusive remedy under the Act, it is impossible to find section 1170.18 is an exclusive remedy. Therefore it must be assumed the Legislature intended for Proposition 47 to apply to all defendants whose judgments were not final on the date it became operative.

Although the Court of Appeal relied on *Noyan* in holding that appellant must utilize the section 1170.18 procedure to be reconsidered for sentencing under the Act, it did not indicate whether she must wait until her judgment is final in order to do so. (Slip opn. p. 12.) Requiring the judgment to become final before an *Estrada* or *Kirk* defendant can file a section 1170.18 petition may result in that defendant having to choose between pursuing a direct appeal and abandoning it in order to obtain Proposition 47 relief prior to completing his or her felony sentence.

This Court should grant review and determine whether the Court of Appeal properly analyzed the issue and correctly held that Proposition 47 applies only prospectively. If this court finds that the Act applies only prospectively, it should also determine whether a defendant must wait until

their judgment is final before filing a section 1170.18 petition for recall of sentence.

ARGUMENT

I.

APPELLANT'S CONVICTION FOR POSSESSION OF METHAMPHETAMINE MUST BE REDUCED TO A MISDEMEANOR AND THE MATTER REMANDED FOR RESENTENCING BECAUSE THE JUDGMENT WAS NOT FINAL ON THE OPERATIVE DATE OF PROPOSITION 47

A. Introduction

On November 4, 2014, California voters enacted Proposition 47, the "Safe Neighborhoods and Schools Act" ("the Act"), which became effective the following day. The provisions of the Act reduce certain felonies to misdemeanors if the defendant does not have any disqualifying prior convictions. Appellant was convicted of such an offense - possession of a controlled substance in violation of Health & Safety Code section 11377, subdivision (a). She contends that her conviction must be reduced to a misdemeanor and the matter remanded for resentencing because she does not have any disqualifying priors and her conviction was not final on the day the Act became effective.

B. Possession of a Controlled Substance in Violation of Health & Safety Code Section 11377 Is Now a Misdemeanor If the Defendant Does Not Have Any Disqualifying Prior Convictions

Health & Safety Code section 11377 was amended due to the passage of Proposition 47. Subdivision (a) of the revised statute, which became

effective November 5, 2014, now provides that violations of the statute constitute misdemeanors unless "that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code."

C. Proposition 47 Created a Post-Conviction Procedure For Recalling a Sentence For Defendants Who Were Convicted of a Felony Reduced to a Misdemeanor Under the Act

Proposition 47 created section 1170.18, which provides a post-conviction procedure for defendants currently serving a sentence for a felony that was reduced to a misdemeanor under the Act. Subdivision (a) of the statute provides:

> 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 before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, ...

Defendants who are eligible for resentencing under the Act are subject to the trial court's discretion to deny resentencing upon a finding that resentencing under the new law "would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Subdivision (b) of the statute lists the following factors that the court may consider in making this determination:

(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.

D. Appellant's Conviction Should Be Reduced to a Misdemeanor Pursuant to Revised Health & Safety Code Section 11377 Because Her Conviction Was Not Final On The Operative Date of the Act and the Procedure for Obtaining Resentencing in Section 1170.18 Is Not An Exclusive Remedy for Defendants Whose Cases Are Not Final On Appeal

When an amendment to a statute mitigates punishment and does not contain a saving clause, a criminal defendant is entitled to the benefit of the change in the law if his conviction was not yet final on the date the change went into effect. (*In re Estrada, supra*, 63 Cal.2d 740, 744-748; see also *People v. Babylon* (1985) 39 Cal.3d 719, 722; *People v. Wright* (2006) 40 Cal.4th 81, 90.) The *Estrada* court stated its reasoning as follows:

> 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.)

For the purposes of determining the retroactive application of a statute that mitigates the consequences of a crime, a case is not final until the expiration of the time for petitioning for a writ of certiorari in the United States Supreme Court. (*People v. Vieira* (2005) 35 Cal.4th 264, 305, 306; *In re Pedro T.* (1994) 8 Cal.4th 1041, 1046; *In re Pine* (1977) 66 Cal.App.3d 593, 594; see also *Teague v. Lane* (1989) 489 U.S. 288 [109 S.Ct. 106, 103 L.Ed.2d 334, 295-296; *Bell v. Maryland* (1964) 378 U.S. 226, 230 [84 S.Ct. 1814, 12 L.Ed.2d 822 ["The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)

Last year in *People v. Hajek & Vo, supra*, 58 Cal.4th 1144, this Court further addressed the issue regarding the retroactivity of a statute that mitigates punishment. It stated:

> As we recently explained, *Estrada* represents "an important, contextually specific qualification to the ordinary presumption that statutes operate prospectively: When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. [Citation.] We based this conclusion on the premise that ' "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law." ' [Citation.] ' "Nothing is to be gained," ' we reasoned, ' "by imposing the more severe penalty after such a pronouncement ... other than to satisfy a desire for vengeance" ' [citation]—a motive we were unwilling to attribute to the Legislature." (*People v. Brown*

(2012) 54 Cal.4th 314, 323 [142 Cal.Rptr. 3d 824, 278 P.3d 1182] (*Brown*).)

> . . . *Estrada* is today 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. [Citation.]" (*Brown, supra*, 54 Cal.4th at p. 324.)

(58 Cal.4th at pp. 1195-1196.)

Health and Safety Code section 11377, subdivision (a) now provides that violations of the statute constitute misdemeanors unless the defendant has a disqualifying prior conviction. By contrast section 1170.18 provides disparate treatment and a less complete remedy than the revised statutes, such as Health & Safety Code section 11377, that reduce prior felony offenses to misdemeanors, for defendants who come before the sentencing court on a petition for recall of sentence. Under the recall procedure, defendants who are eligible for resentencing under the Act are nevertheless subject to the trial court's discretion to deny resentencing upon a finding that resentencing under the new law "would pose an unreasonable risk of danger to public safety." (§1170.18, subd. (b).)

On April 24, 2014, appellant was convicted of felony possession of a controlled substance in violation of Health and Safety Code section 11377. (1CT 211; 4RT 441.) There is no evidence in the record indicating that appellant has ever been convicted of any disqualifying offense delineated in

subdivision (a) of the statute.[4]

Revised Health and Safety Code section 11377 applies to appellant because it constitutes an ameliorative sentencing statute and *Estrada* requires retroactive application of the mandatory provisions of the Act to all qualifying cases not yet final on appeal. The procedure set forth in Penal Code section 1170.18 is not an exclusive remedy applicable to defendants whose cases are not final on appeal. Penal Code section 1170.18 does not constitute a saving clause or the equivalent of a saving clause, and under its plain language, it is not "intended to diminish or abrogate any rights or remedies otherwise available to the defendant." (§1170.18, subd. (m).) This provision would be meaningless and surplusage if section 1170.18 were intended to be an exclusive remedy abrogating *Estrada's* application to cases pending on appeal. Rather, the principal function of section 1170.18 is to create and regulate a statutory procedure for resentencing eligible inmates whose cases were final prior to the Act's effective date and thus beyond the reach of *Estrada.*

A new statutory remedy is exclusive only if it exhibits "a legislative intent to displace all preexisting or alternative remedies." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 80.) When a statute expressly disclaims an intent to supplant other remedies, it is cumulative, not exclusive. (*Home Depot U.S.A.,*

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[4] The information alleged that appellant had four prior convictions that rendered her presumptively ineligible for probation - three violations of Health & Saf. Code § 11377, subd. (a), and one violation of Health & Saf. Code § 11379, subd. (a). (1CT 6.)

Inc. v. Superior Court (2010) 191 Cal.App.4th 210, 223 [when statute states its remedies are in addition to any others that may be available, its remedies are nonexclusive].) Penal Code section 1170.18, subdivision (m), explicitly disclaims an intent to diminish or abrogate otherwise available rights and remedies. Therefore to construe Penal Code section 1170.18 as the exclusive remedy would require reading subdivision (m) out of the statute altogether. This cannot be done because proper interpretation requires meaning to be given to every provision where possible and not to render any part of the statute surplusage. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118.)

Further, it is presumed the electorate or Legislature is aware of previous decisional law when it enacts a new statute. (*Walters v. Weed* (1988) 45 Cal.3d 1, 10-11; *People v. Garrett* (2001) 92 Cal.App.4th 1417, 1432.) *Estrada* is an example of such decisional law and it remains authoritative precedent. The California Supreme Court declined an invitation to reconsider the *Estrada* rule in *People v. Nasalga* (1996) 12 Cal.4th 784, noting that the Legislature had been aware of *Estrada* for decades, had ample opportunity to abrogate it, which it easily could have done, and yet took no such action. (*Id.* at 792, fn. 7.)

If Penal Code section 1170.18 was meant to be an exclusive remedy, subdivision (m) would be meaningless surplusage and self-defeating. The

statutory language is plain and unambiguous and does not involve an absurdity; thus the plain meaning governs and further interpretation is neither necessary nor proper. (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 519; *People v. Boyd* (1979) 24 Cal.3d 285, 294; *Lewis v. Clarke* (2003) 108 Cal.App.4th 563, 567.) Given that the electorate is presumed to have been aware of *Estrada*, failure to exclude it from the reach of subdivision (m) signifies a positive intent to include it among the rights and remedies not abrogated or diminished by the Act.

It appears the principal function of Penal Code section 1170.18 is not to abrogate *Estrada* or provide an exclusive remedy, but rather to provide a statutory remedy to qualifying inmates who are beyond *Estrada's* reach, and thus to achieve the Act's objectives to authorize resentencing for inmates convicted of offenses that under the Act were reduced from felonies to misdemeanors, to "save significant correction dollars on an annual basis," and to "increase investments in programs that reduce crime and improve public safety." (Proposition 47, § 3.)

For all of these reasons, given the objectives of the Act, the plain language of Penal Code section 1170.18, subdivision (m), and absent an explicit abrogation of *Estrada* or a specific statement that section 1170.18 provides the sole and exclusive remedy under the Act, it is impossible to find that Penal Code section 1170.18 is an exclusive remedy while still maintaining

any fidelity to the text of the statute. *Estrada* and the plain language of the statutes therefore require application of revised Health and Safety Code section 11377 to appellant.

The recall procedure set forth in section 1170.18 is available to all eligible defendants, but it is not mandatory that defendants whose appeals are still pending elect this procedure in lieu of the mandatory sentencing in the particular revised statute under which they were convicted which is available to them under *Estrada*. Health & Safety Code section 11377 and the other statutes revised pursuant to the Act do not preclude any defendant from invoking the recall procedure. Appellant is thus in a category of inmates to whom both routes to relief are available.

Section 1170.18 imparts jurisdiction on the superior court to consider a recall petition during a pending appeal, in the same manner that section 1170, subdivision (d) allows for recall of sentence within 120 days of commitment despite the pendency of an appeal. (See *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1835-1836 [trial court retains jurisdiction for 120 days from sentencing to recall and resentence defendant under Penal Code section 1170, subdivision (d) despite pendency of appeal].) The only difference here is that Penal Code section 1170.18, subdivision (j) provides, "Any petition or application under this section shall be filed within three years after the effective date of the act that added this section or at a later date upon

a showing of good cause."

The section 1170.18 recall procedure thus provides a resentencing option for a defendant whose case is pending on appeal, without affecting their right to go forward with their appellate issues. If the rule were otherwise, a defendant might have to serve months or years of dead time awaiting the conclusion of their appeal. Such a defendant should be allowed to opt for the section 1170.18 recall procedure which, while hopefully providing faster relief, nevertheless gives the trial court discretion to determine that resentencing the defendant "would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) However, nothing in the Act supports forcing a defendant whose judgment is not final into choosing the recall procedure under section 1170.18.

Should the Act be found to be ambiguous in regard to whether nonfinal judgments are entitled to *Estrada* retroactive application of the mandatory sentencing provisions of Health and Safety Code section 11377 (and other revised statutes reducing prior felonies to misdemeanors under the Act), then the rule of lenity requires rejection of any contention that section 1170.18 – without so stating – somehow provides the exclusive remedy for cases pending final judgment. (See *People v. Soria* (2010) 48 Cal.4th 58, 65 [rule of lenity requires that "ambiguity in a criminal statute should be resolved in favor of lenity, giving the defendant the benefit of every reasonable doubt on

questions of interpretation]; *People v. Lee* (2003) 31 Cal.4th 613, 627; *United States v. Bass* (1971) 404 U.S. 336, 348 [92 S.Ct. 515, 30 L.Ed. 2d 488]; see *Cleveland v. United States* (2000) 531 U.S. 12, 25 [121 S.Ct. 365, 148 L.Ed.2d 221] [refusing to "choose the harsher alternative" sought by government].)

E. The Equal Protection Clauses of the California and United States Constitutions Require That Appellant Receive the Same Remedy Under Proposition 47 As Other Defendants With Active Cases

The Equal Protection Clause of the Fourteenth Amendment "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all person similarly situated should be treated alike." (*City of Cleburne, Texas, et al. v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439 [105 S.Ct. 3249, 87 L.Ed.2d 313], quoting *Pyler v. Doe* (1982) 457 U.S. 202, 217 [72 L.Ed.2d 786, 102 S.Ct. 2382].)

The right to Equal Protection is also guaranteed by article I, section 7 of the California Constitution. The California Supreme Court explained, "The concept of the equal protection of the laws compels recognition of the proposition that similarly situated with respect to the legitimate purpose of the law receive like treatment." (*Purdy & Fitzpatrick v. State* (1969) 71 Cal.2d 566, 578.)

To establish an equal protection violation, a party must show that "the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner. [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 [emphasis in original].) "Under the equal protection clause, we do not inquire 'whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' [Citations.]" (*Id.* at pp. 1199-1200.) And in most cases a party must show that the challenged classification does not bear "a rational relationship to a legitimate state purpose." (*Id.* at p. 1200.)

In *In re Kapperman, supra*, 11 Cal.3d 542, this Court reviewed a 1972 amendment to section 2900.5 that credited county jail time as time served for the prison sentence. The amendment explicitly stated that the change would be applied prospectively. (*Id.* at pp. 544-545.) Nevertheless, the defendant sought the benefit of the new law, even though he had been transferred out of county jail before the law became effective. (*Id.* at p. 546.) The *Kapperman* court concluded that the defendant was "clearly a member of a class to whom the Legislature has denied a benefit granted to others." (*Ibid.*) It found no legitimate interest in the distinction between inmates who had been transferred from jail to prison before the law took effect, and those who transferred afterwards, and it held that the law would be applied retroactively. (*Id.* at pp. 549-550.)

Similar to the situation in *Kapperman*, if the changes to the statutes that resulted from the implementation of Proposition 47 were applied in a prospective manner, equal protection would also be violated. Prospective application would create a class of individuals who are treated differently. Defendants whose cases are not yet final would be treated differently based on whether they had been sentenced prior to the time Proposition 47 took effect. Those sentenced before that time would be eligible for immediate relief, while those sentenced afterwards would be required to petition for relief under the more stringent requirements of section 1170.18. There is no legitimate interest in distinguishing between these two groups because a judgment is not final until the appeal process has concluded. (*People v. Rossi* (1976) 18 Cal.3d 295, 302.)

F. Conclusion

Under *Estrada*, appellant, whose appeal is pending, is entitled to be resentenced under the mandatory reduced penalties of revised Health and Safety Code section 11377, and she is not required to petition for recall of sentence under section 1170.18. Appellant's conviction was not final as of the effective date of the new law. The amendments enacted under Proposition 47 became effective on November 5, 2014. Thus, because appellant's conviction was not final at that time, appellant is entitled to the application of the more lenient sentencing in revised Health and Safety Code section 11377.

Appellant's conviction for possession of a controlled substance must be reduced to a misdemeanor, and the matter remanded to the trial court for resentencing.

CONCLUSION

Based on all of the foregoing reasons, appellant respectfully requests this Honorable Court to grant review in this matter.

DATED: July 30, 2015

Respectfully Submitted;

Valerie G. Wass
Attorney for Appellant
Veronica Lorraine DeHoyos

CERTIFICATE OF APPELLATE COUNSEL PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.504 (d)(1)

I, Valerie G. Wass, hereby certify, pursuant to California Rules of Court, rule 8.504 (d)(1), that I prepared the foregoing Petition for Review, and the computer-generated word count for this brief is 6,437, which does not include the cover, tables, appendix or this certificate.

Dated: July 30, 2015

Valerie G. Wass

APPENDIX "A"

Filed 6/30/15

CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. VERONICA LORRAINE DEHOYOS et al., Defendants and Appellants.	D065961 (Super. Ct. No. SCD252670)

APPEALS from a judgment of the Superior Court of San Diego County, Peter C. Deddeh, Gale E. Kaneshiro, and Lisa C. Schall, Judges. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant Veronica Lorraine DeHoyos.

Lewis A. Wenzell, under appointment by the Court of Appeal, for Defendant and Appellant Gary Richard DeGraff.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Sean M. Rodriquez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of the Background and part I of the Discussion.

INTRODUCTION

A jury convicted Gary Richard DeGraff and Veronica Lorraine DeHoyos of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a).) The trial court suspended imposition of their sentences for three years and granted them formal probation.

They both appeal. DeGraff contends we must reverse his conviction because the trial court erred in failing to suppress the evidence against him. DeHoyos contends recent amendments to Health and Safety Code section 11377 require we reduce her conviction to a misdemeanor and remand the matter for resentencing. We are unpersuaded by these contentions and affirm the judgment.

BACKGROUND[1]

Prosecution Evidence

Search of DeGraff

San Diego Police Officers Andres Ruiz and Tyler Cockrell approached DeGraff while DeGraff was outside in front of his home cleaning his car. At the time, DeGraff's home was known to be a location where narcotics sales occurred. DeGraff agreed to speak with Ruiz. Ruiz asked him if he had ever been arrested and he stated he had. Ruiz asked him whether he was on probation or parole and he stated he was on probation. Ruiz asked whether he could search him and he responded, "Yes. I'm on probation."

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1 The evidence presented at trial is not relevant to either issue raised on appeal. We base our summary on the evidence presented at the preliminary hearing as this is the evidence the trial court relied upon to decide DeGraff's suppression motion.

Officer Ruiz searched DeGraff and found a folded paper containing 1.72 grams of methamphetamine in his back right pocket. Ruiz started handcuffing him and he asked why he was being arrested. When Ruiz told him he was being arrested for the methamphetamine in his pocket, he hung his head and remarked, "Oh, f--k. I didn't know that was there. I forgot. It's not mine."

After Officer Ruiz searched DeGraff, arrested him, and placed him in a patrol car, Ruiz conducted a records check and learned DeGraff was not actually on probation. However, Ruiz testified that when he searched DeGraff, he believed DeGraff was on probation and under a search condition because DeGraff "seemed pretty adamant that he was on probation." When cross-examined about whether police department procedure required him to confirm the existence of a search condition in advance, Ruiz testified he had no knowledge of such a procedure. Rather, he understood he could "search somebody without confirming they're Fourth waiver if they tell you they're a Fourth waiver. You take that at their faith." Officer Cockrell had the same understanding.

Search of DeHoyos

As Officer Ruiz was arresting DeGraff, DeGraff yelled to his girlfriend DeHoyos. DeHoyos came outside and Officer Cockrell contacted her. He asked her whether she had anything illegal on her and whether he could search her. She replied, "Yeah. I don't have anything on me." He searched her and found a baggie containing .50 grams of methamphetamine in her right front pocket. He then arrested her and placed her in the patrol car.

Search of DeGraff's Home

After Officer Cockrell arrested DeHoyos, he asked DeGraff for permission to search his house. DeGraff verbally consented to the search. He also signed a written consent form after he had an opportunity to read the form and Cockrell read it to him. The consent form stated, "I, [DeGraff], having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant, and of my right to refuse to consent to such a search, hereby authorized [the officers] to conduct a complete search of my premises .... [The officers] are authorized by me to take from my premises any letters, papers, materials, contraband or other property which they may desire." Immediately after this sentence are the handwritten words, "and garage!" DeGraff had Cockrell add this language to the form because DeGraff wanted the garage thoroughly searched since a friend had stayed there for awhile. The consent form then concluded, "This written permission is being given by me to the above named Officers voluntarily and without coercion, threats or promises of any kind."

Officer Ruiz searched DeGraff's home. He found a baggie containing 19.2 grams of methamphetamine in a bedroom being used as an office.

Defense Evidence

DeGraff testified Officer Cockrell initially asked him where "Eric" was. DeGraff believed Cockrell was referring to a person who had briefly lived in DeGraff's garage two months earlier.

DeGraff told the officers he did not know whether he was subject to a search condition and denied giving them permission to search him. After his arrest, he repeatedly attempted to tell Officer Cockrell not to search his home. He was not allowed to read the consent form before he signed it, and he only gave the officers permission to search his garage.

DeHoyos also testified. She said she came outside because Officer Cockrell called for her. Once she was outside, Cockrell immediately had her place her hands behind her back and started searching her. He did not ask for her consent. According to DeHoyos, she found the pants she was wearing in the garage and the methamphetamine found in the pocket was not hers.

Suppression Motion

DeGraff moved to suppress the evidence against him under Penal Code section 1538.5, subdivision (a).[2] The magistrate denied the motion, finding Officer Ruiz reasonably relied upon DeGraff's representation he was on probation. The magistrate also found DeGraff had voluntarily consented to the search of his house.

DeGraff later renewed his suppression motion under section 1538.5, subdivision (i). For the first time, he argued the search of his person was invalid because a San Diego police department procedure required officers to verify a suspect is subject to a valid

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2 Further statutory references are also to the Penal Code unless otherwise stated.

search condition before searching him.[3] The trial court denied the motion, finding Officer Ruiz reasonably relied upon DeGraff's representation as DeGraff was in the best position to know whether he was on probation and under a search condition. The trial court also found DeGraff had voluntarily agreed to the search of his home.

DISCUSSION

I

DeGraff's Appeal

DeGraff contends we must reverse his conviction because Officer Ruiz's search of him was unlawful and, consequently, the trial court erred in denying his suppression motion. More particularly, he contends Officer Ruiz should have and failed to verify DeGraff was under a search condition before conducting the search.

"In ruling on a motion to suppress, the trial court is charged with (1) finding the historical facts; (2) selecting the applicable rule of law; and (3) applying the latter to the former to determine whether or not the rule of law as applied to the established facts has been violated. [Citation.] On appeal, we review the trial court's resolution of the first inquiry, which involves questions of fact, under the deferential substantial-evidence standard, but subject the second and third inquiries to independent review." (*People v.*

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3 Although DeGraff filed a copy of the procedure with his renewed suppression motion, the trial court declined to admit the procedure into evidence. DeGraff is not directly challenging the court's evidentiary ruling. Rather, DeGraff requested this court take judicial notice of the content of the procedure to establish the truth of certain matters asserted within it. We conclude the content of the procedure is not properly subject to judicial notice and deny the request. (*In re Vicks* (2013) 56 Cal.4th 274, 314.)

Parson (2008) 44 Cal.4th 332, 345.) In conducting our review, we apply federal constitutional standards. (Cal. Const., art. I, § 24; *People v. Schmitz* (2012) 55 Cal.4th 909, 916.)

"The Fourth Amendment prohibits only those searches and seizures that are unreasonable." (*People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1011, citing *Florida v. Jimeno* (1991) 500 U.S. 248, 250, and *Brigham City v. Stuart* (2006) 547 U.S. 398, 403.) Generally, "a search conducted without a warrant is per se unreasonable under the Fourth Amendment." (*Chapman*, *supra*, at p. 1011.) However, a probation search is a recognized exception to the warrant requirement provided as the decision to search is not arbitrary or intended to harass. (See *People v. Bravo* (1987) 43 Cal.3d 600, 607, 610.)

That DeGraff was not actually on probation and under a search condition when Officer Ruiz searched him is not dispositive. When a defendant tells an officer he is under a search condition, the officer may reasonably rely on the defendant's statement and evidence found during the search will not be suppressed if it later turns out the defendant was not under a search condition. (*In re Jeremy G.* (1998) 65 Cal.App.4th 553, 556 (*Jeremy G.*); see, e.g., *People v. Tellez* (1982) 128 Cal.App.3d 876, 879-880 [the court properly denied a suppression motion where officers conducted the challenged search based in part on a mistaken representation by defendant that defendant was on parole at the time of the search].)

That Officer Ruiz may have had the technological means to readily verify DeGraff's probation status or that the police department may have had a procedure

requiring such verification does not persuade us to disregard the holding in *Jeremy G.*, *supra*, 65 Cal.App.4th at page 556. As the trial court pointed out, DeGraff was in the best position to know whether he was on probation and under a search condition. We, therefore, cannot conclude it was objectively unreasonable for Officer Ruiz to rely on DeGraff's representation without verifying it.

II

DeHoyos's Appeal

A

1

On November 4, 2014, while this appeal was pending, California voters approved The Safe Neighborhoods and Schools Act (Proposition 47). (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 1, p. 70.) It became effective the next day. (Cal. Const., art. II, § 10, subd. (a).) Among its provisions, Proposition 47 amended Health and Safety Code section 11377. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 13, p. 73.) Prior to the amendment, possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a), was punishable as either a felony or a misdemeanor. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) As a result of the amendment, the offense is now punishable as a misdemeanor "unless the defendant 'has one or more prior convictions' for an offense specified in [section 667], subdivision (e)(2)(C)(iv)—which lists serious and violent felonies that are sometimes referred to as ' "super strike" offenses'—or for an offense that requires the defendant to

register as a sex offender under section 290, subdivision (c)." (*People v. Lynall, supra*, at pp. 1108-1109.)

"Proposition 47 also created a new resentencing provision—section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition to recall that sentence and request resentencing. (§ 1170.18, subd. (a).) A person who satisfies the statutory criteria shall have his or her sentence recalled and be '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.' (*Id.*, subd. (b).)" (*People v. Lynall, supra*, 233 Cal.App.4th at p. 1109.)

2

DeHoyos contends Proposition 47 applies retroactively to her because her case was not final when Proposition 47 became effective. Consequently, she contends she is automatically entitled to resentencing under amended Health and Safety Code section 11377 and is not required to utilize the resentencing procedure established in section 1170.18.[4]

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4 The California Supreme Court is currently reviewing the analogous issue: Does the Three Strikes Reform Act of 2012 (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C)), which reduces punishment for certain non-violent third-strike offenders, apply retroactively to a defendant who was sentenced before the Act's effective date but whose judgment was not final until after that date? (*People v. Conley*, review granted Aug. 14, 2013, S211275.)

The People do not dispute DeHoyos may be eligible for resentencing, but contend her remedy is limited to the procedure established in section 1170.18. We agree with the People.

B

1

DeHoyos relies on the rule of retroactivity expressed in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). "Under that rule, a legislative amendment that lessens criminal punishment is presumed to apply to all cases *not yet final* (the Legislature deeming its former penalty too severe), unless there is a 'saving clause' providing for prospective application." (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1464-1465; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1195-1196 [courts will assume, absent contrary evidence, the Legislature intended for an amended statute reducing punishment for a particular offense to apply to all defendants whose judgments are not yet final on the amended statute's operative date]; *People v. Brown* (2012) 54 Cal.4th 314, 323 [same].)

In this case, the parties do not dispute Proposition 47 lessens punishment and does not contain an express savings clause. However, our inquiry does not end here. (*People v. Nasalga* (1996) 12 Cal.4th 784, 793.) We must also consider whether there are any other indicia of a legislative intent for Proposition 47 to apply prospectively, rather than retroactively. (*Id.* at pp. 793-794.) " '[W]hat is required is that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.' " (*Id.* at p. 793.)

We believe the language of Proposition 47 states the Legislature's intent for prospective, not retroactive, application with the requisite clarity. Section 3 of the initiative measure, which is labeled "Purpose and Intent," states: "In enacting this act, it is the purpose and intent of the people of the State of California to: [¶] . . . [¶] (4) Authorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors. [¶] (5) Require 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." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70.) Collectively, these two paragraphs indicate a legislative intent *not* to permit the automatic application of Proposition 47 to anyone currently serving a sentence for a listed offense. Instead, they indicate a legislative intent to authorize and allow resentencing only for those individuals whose criminal history and risk assessment warrant it.

Our interpretation of the legislative intent is consistent with the Legislative Analyst's analysis of Proposition 47. In describing the initiative measure, the analysis stated, "This measure allows offenders currently serving felony sentences for the above crimes *to apply* to have their felony sentences reduced to misdemeanor sentences. ... However, no offender who has committed a specified severe crime could be resentenced or have their conviction changed. In addition, the measure states that a court is not required to resentence an offender currently serving a felony sentence if the court finds it

likely that the offender will commit a specified severe crime." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legislative Analyst, p. 36, italics added.)

Our interpretation of the legislative intent is also consistent with the ballot arguments. The opponents of the initiative measure argued the measure was "an invitation for disaster" in part because it would "make 10,000 felons eligible for early release." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) rebuttal to argument in favor of Prop. 47, p. 38; see also argument against Prop. 47, p. 39.) The proponents of the initiative countered by arguing, "*Proposition 47 does not require automatic release of anyone.* There is no automatic release. It includes strict protections to protect public safety and make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) rebuttal to argument against Prop. 47, p. 39.)

Given the legislative intent not to automatically apply Proposition 47 to persons currently serving sentences for listed offenses, DeHoyos has not established Proposition 47 applies retroactively to her. Instead, to be considered for resentencing, she must utilize the procedure specified in section 1170.18. (*People v. Noyan* (2014) 232 Cal.App.4th 657, 672.)

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

HALLER, J.

I, KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that this preceding and annexed is a true and correct copy of the original on file in my office.

WITNESS, my hand and the Seal of the Court this June 30, 2015

KEVIN J. LANE, CLERK

By Jonathan Newton Deputy Clerk

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case: *People v. Veronica L. DeHoyos et al.*, Court of Appeal Case No. D065961

I, Valerie G. Wass, certify:

I am an active member of the State Bar of California and am not a party to this cause. My business address is 556 S. Fair Oaks Ave., Suite 9, Pasadena, California 91105. On July 30, 2015, I deposited in a mailbox regularly maintained by the United States Postal Service at Santa Barbara, California, in the County in which I reside, a copy of the attached PETITION FOR REVIEW, in a sealed envelope with postage fully prepaid, addressed to each of the following:

Honorable Lisa C. Schall
San Diego County Sup. Ct.
Post Office Box 122724
San Diego, CA 92112-2724

Veronica L. DeHoyos
53620 Avenida Velasco
La Quinta, CA 92253

My electronic service address is wass100445@gmail.com. On July 30, 2015, I transmitted a PDF version of the same document described above by electronic mail to the parties identified below using the e-mail service addresses indicated:

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Additionally, on this date I electronically filed a copy of this document to the Court of Appeal on its website at *http://www.courts.ca.gov/4dca-efile.htm*, in compliance with the court's Terms of Use.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed this 30th day of July, 2015.

VALERIE G. WASS