IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VERONICA LORRAINE DEHOYOS Defendant and Appellant.	Case No. S228230

Fourth District Court of Appeal, Case No. D065961
San Diego Superior Court, Case No. SCD 252670
The Honorable Peter C. Deddeh, Gale E. Kaneshiro, and Lisa C. Schall, Judges

APPELLANT'S SUPPLEMENTAL BRIEF (CAL. RULES OF COURT, RULE 8.520(d))

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California Rules of Court, rule 8.520(d), permits filing of a supplemental brief to discuss new authorities not available in time to be included in the party's brief on the merits. This court decided *People v. Valencia* (2017) 3 Cal.5th 347 (*Valencia*) (discussing *People v. Conley* (2016) (*Conley*) 63 Cal.4th 646)) as well as *People v. Page* (Nov. 30, 2017, No. 230793) __ Cal.5th __ [2017 WL 5895782] (*Page*) and *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*), all after conclusion of

briefing. *Valencia, Romanowski,* and *Page* are relevant to the analysis and support appellant's position.

ARGUMENT

I.

VALENCIA SUPPORTS APPELLANT'S ANALYSIS THAT THE VOTERS' INTENT IN ENACTING THE WHOLE SCHEME OF PROPOSITION 47 – A SWEEPING AMELIORATION OF PUNITIVE LAW – IS CONSISTENT WITH THE APPLICATION OF *ESTRADA/KIRK* PRINCIPLES. *VALENCIA* ALSO DEMONSTRATES WHY *PEOPLE v. CONLEY* – A PROPOSITION WITH A WHOLLY DIFFERENT INTENT PASSED BY A DIFFERENT ELECTORATE – IS NOT DISPOSITIVE OF THIS CASE.

In *Valencia,* this court addressed Proposition 47, and in reaching its holding and conclusions, emphasized the differences between Proposition 47 defendants and Proposition 36 defendants, as well as addressed various rules and principles of statutory construction when the electorate enacts initiatives. When applied to this case, the court's conclusions favor defendant.

This court recognized that Penal Code[1] section 1170.18 was enacted as part of Proposition 47 "whose primary focus was reducing the punishment for a specifically designated category of low-level felonies from felony to misdemeanor sentences," or, stated otherwise, to "'[r]equire misdemeanors

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[1]All further statutory references shall be to the Penal Code; all references to subdivisions shall be those in section 1170.18, unless otherwise noted.

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.' (Citation.)" (*Valencia*, *supra*, 3 Cal.5th at p. 360.) In contrast, the express intent as stated in the Proposition 36 was, "The People enact the Three Strikes Reform Act of 2012 to restore the original intent of California's Three Strikes Law – . . . ." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), Text of Proposed Laws, p. 105.) Thus, there were two separate electorates in two propositions ("the electorate that enacted Proposition 47 in 2014 was obviously different from the one that had endorsed Proposition 36 in 2012," *Valencia*, *supra*, 3 Cal.5th at p. 376, fn. 15), who would have had two entirely different classes of defendants in mind. Or, as this court noted, the two propositions encompassed "two very different populations of offenders"; Proposition 47 focused upon low-level offenders, while Proposition 36 concerned recidivist offenders who had two prior violent or serious felony convictions, serving terms of 25 years to life. (*Id.* at p. 376.)

But *Valencia* is also instructive for its application of statutory construction. Here, the entire litigation centers on the meaning "currently serving." (§ 1170.18(a).) The Court of Appeal below had held, "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. (Citation.)" (*People v. DeHoyos* (2015) formerly 238 Cal.App.4th 363, 189 Cal.Rptr. 445, 448-449, emphasis added.)

In *In re Kirk* (1965) 63 Cal.2d 761, 762-763 (*Kirk*), a companion case to and decided the same day as *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), this court applied the *Estrada* holding to those defendants whose cases were on appeal and not yet final, finding those *Kirk*-defendants as being in "precisely" the same posture as *Estrada*-defendants, i.e., defendants whose judgments had not been rendered.[2] In essence, then, the conclusion of the Court of Appeal here, focusing solely upon "currently serving," served to divorce *Kirk*-defendants from *Estrada*-defendants.[3]

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[2]In *Estrada*, the amendment of the statute occurred after the offense, but before the sentence and conviction (*Estrada*, p. 453); in *Kirk*, the amendment of the statute occurred after rendition of judgment, but before affirmance by the appellate court (*Kirk*, pp. 762-763).

[3]Thus, this case does not affect the stereotypical *Estrada*-defendants: "If the crime was committed prior to November 5, 2014, but sentenced after that date, the new sentencing rules will apply to the case. This means that all persons charged with qualified crimes that have not been convicted or sentenced as of November 5th will be entitled to misdemeanor treatment without the need to request any kind of a resentencing under section 1170.18. The procedures authorized by section 1170.18 clearly apply only to persons either serving a sentence or who have completed a sentence – circumstances not applicable to persons who have not even been sentenced." (Couzens & Bigelow, Proposition 47 "The Safe Neighborhoods and Schools Act" (May 2017),[continued next page]

But *Valencia* cautioned "our courts have recognized that the meaning of isolated statutory language can be informed by and *indeed must be consistent with the provisions of the relevant statute as whole*." (*Valencia*, *supra*, 3 Cal.5th at p. 356, emphasis added.) Hence, the "currently serving" language of subdivision (a) cannot be read in a vacuum. Just as *Valencia* considered subdivision (c) "in the context of *both section 1170.18 and other provisions of Proposition 47 as a whole*" (*ibid.*, emphasis added), so should the court do so here. Again, "an initiative's ' "language must also be construed in the context of the statute *as a whole*" ' and its ' "*overall . . . scheme*." ' (Citations.)" (*Id.* at p. 358, emphasis added, and cases cited, *id.* at pp. 358-360.)

When both the entire scheme, i.e., Proposition 47, and the statute, i.e., section 1170.18, are considered as a whole, certain fundamentals become evident. First, the great bulk of the ballot materials and the actual text available to the electorate dealt with the reduction of low-grade theft-related and drug wobblers and felonies to misdemeanors and the cost-savings in both prosecutions and incarcerations for whatever time into the future. Second,

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<www.courts.ca.gov/documents/Prop-47-Information.pdf> [as of Dec. 12, 2017] p. 12.)

unlike an incremental ameliorative change in a statute or two, Proposition 47 cut a wide swath across our punitive codes.[4]

Third, even in the context of section 1170.18, the modifier "currently" does not standout as a phenomenon. In the context of section 1170.18, "currently" should be juxtaposed with "completed" in subdivision (f) so as to emphasize the difference in the regimes to gain a remedy, i.e., subdivisions (b) and (g). The greatest difference in the regimes is the requirement for the court to make a determination of dangerousness where a defendant is still currently serving a sentence (subds. (b), (c)) (but as appellant contends only if the judgment is final), whereas "dangerousness" has no relevance for a defendant who has completed her/his sentence (subds. (f), (g)).

Further, *Valencia* undercuts the argument that any resemblance of "currently serving" to any similar language in Proposition 36 (specifically section 1170.126) should bring this case within the analysis of *People v. Conley*, *supra*, 63 Cal.4th 646. While section 1170.126, subdivisions (a) and (c) are written in terms of "presently serving," section 1170.126, subdivision (b) – the analog of section 1170.18(a) – omits "presently." Assuming arguendo, that section 1170.126, subdivision (b) was interpreted to have meant

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[4]Expressly, various sections of the Penal and Health and Safety Code Codes, and by extension, the Vehicle Code (see *Page, supra,* 2017 WL 5895782).

"presently serving" (cf. *Conley*, *supra*, 63 Cal.4th at pp. 653, 655), any similarity between "presently serving" and "currently serving" does not assist the discussion.

Indeed, the *Valencia* court "reject[ed] application of the rule of statutory construction that when statutes are in pari materia similar phrases appearing in each should be given like meanings, because Proposition 47 and the Three Strikes Reform Act do not address the same subject. (Citation.) In addition, [the court] observe[d] that this doctrine might carry greater force concerning provisions enacted by the same initiative or initiatives on the same ballot. But here, the electorate that enacted Proposition 47 in 2014 was obviously different from the one that had endorsed Proposition 36 in 2012." (*Valencia*, *supra*, 3 Cal.4th at p. 376, fn. 15.) While this conclusion was reached in the context of an equal protection argument, still, the same underlying premise is the same: "These are two very different populations of offenders. As the text of Proposition 47 indicates, that measure focused on offenders convicted of a set of low-level, nonserious, nonviolent felonies and reduced them to misdemeanors. In contrast, Proposition 36 concerned the resentencing of recidivist offenders who had two prior violent or serious felony convictions and a third nonserious, nonviolent felony conviction, and who are serving terms of 25 years to life." (*Id.* at p. 376.)

The *Valencia* majority also addressed two standard rules of statutory interpretations applicable to initiatives, but gave reasons to reject their application to the issue then before the court. Each presumption, of course, is presumably applicable to Proposition 47 as each would be (unless rebutted) to all initiatives, but the reasons for the rejection of same in *Valencia* do not apply here.

The first presumption is "that voters who approve an initiative are presumed to ' "have voted intelligently upon an amendment to their organic law, the whole text of which was supplied [to] each of them prior to the election and which they must be assumed to have duly considered . . . ." ' (Citations.)" (*Valencia*, *supra*, 3 Cal.5th at p. 369.) In not applying this presumption, the majority cited past precedent in which voters simultaneously approved two overlapping ballot measures (*id.* at p. 370) – certainly not the circumstance here. The second reason given by the *Valencia* majority was that the average voter would not have known the impact or import of the phrase in question and even the professional bodies, e.g., Attorney General or Legislative Analyst, did not identify the need to make reference to the issue of whether the language in subdivision (c) – "this Code" – incorporated section 1170.126. (*Id.* at pp. 371-372.)

But for the resolution of our issue – whether the principles of *Kirk* apply to Proposition 47 – the foregoing presumption cannot be intelligently addressed without first acknowledging the second presumption: "the voters, in adopting an initiative, did so being 'aware of existing laws at the time the initiative was enacted.' (Citations.)" (*Valencia, supra*, 3 Cal.5th at p. 369.)

In rejecting this presumption, *Valencia* drew on its precedent where it had refused to presume the electorate understood the legal meaning of term "wobbler." (*Valencia, supra*, 3 Cal.5th at pp. 372-373.) But the question *here* would be whether the electorate is presumed to have been aware of existence of *Estrada/Kirk*.

People v. Floyd (2003) 31 Cal.4th 179 supplies that answer. In *Floyd*, this court decided that the Substance Abuse and Crime Prevention Act of 2000 was inapplicable to defendants sentenced prior to the act's effective date, but whose judgments were not yet final, concluding the act's express saving clause – "[e]xcept as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively" – indicated the act was not intended to apply retroactively. (*Id.* at p. 182.) This court further concluded, "defendant's proffered interpretation gives no effect to the statement that the act's provisions shall be applied prospectively. . . . If we were to agree with [defendant's argument], however, the statement that the

act's provisions 'shall be applied prospectively' would be drained of meaning, since the voters could have accomplished the same result by omitting the clause entirely. *That is, in the absence of the saving clause, we would have applied the Estrada rule and extended the benefits of [the Proposition] to all those whose convictions were not yet final as well as to those whose convictions postdated the act's effective date.*" (*Id.* at p. 186, emphasis added.)[5] This conclusion is only permissible if an electorate is presumed to be aware of the existence of *Estrada/Kirk*.

Floyd also illustrates that the drafters could have been more direct and less ambiguous as to whether the "currently serving" defendants included *Kirk* defendants. For clarity, the drafters could have added language such as, " 'currently serving' " includes any defendant who has already been sentenced whether or not an appeal has been taken, regardless of finality" – but they did not. In contrast, the distinction between "currently" and "completed" as to the two definitive regimes within section 1170.18, subdivisions (a)-(c) and (f)-(g), must be recognized.

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[5]See also *People v. Wright* (2006) 40 Cal.4th 81, 95, quoting *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1545 ["This authority [*Estrada* and progeny] makes clear that Proposition 215 may be applied retroactively to provide, if its terms and the applicable facts permit, a defense to appellant"]; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 300-301 [specific provisions of Proposition 115 favoring defendants applied retroactively based on *Estrada*].

The meaning of isolated statutory language ("currently") can be informed by and must be consistent with the provisions of the relevant statute as whole. (*Valencia, supra*, 3 Cal.5th at p. 356.) Had Proposition 47 been enacted without section 1170.18, then there would be little doubt but that *Kirk*-defendants would gain the ameliorative benefit of the wide swath reduction of so many wobblers and felonies. Given the far-reaching benevolent amendment of criminal law affecting current and future prosecutions as well as the potential amelioration of judgments long since final, including from decades in the distant past, it would not be reasonable to conclude that with this magnanimity the electorate would also have intended to lessen the historical, half-century benefit afforded *Kirk*-defendants.

II.
PROPOSITION 47 SHOULD BE BROADLY AND LIBERALLY CONSTRUED, WHICH SHOULD INURE TO THE BENEFIT OF *KIRK*-DEFENDANTS.

In both *Romanowski, supra*, 2 Cal.5th at page 909 and *Page, supra,* 2017 WL 5895782, page *6, this court addressed sections 15 and 18 of Proposition 47, which together provide that the proposition be both "broadly" and "liberally" construed, to, respectively, accomplish and

effectuate its purposes.[6] The *Romanowski* court noted that downgrading punishment for access cards "no doubt serves Proposition 47's purpose of '[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes.' (Citation.)" (*Romanowski*, *supra*, 2 Cal.5th at p. 909.) Under the *Page* analysis, to the extent there was any ambiguity as to proposition's inclusion of an auto theft charged under Vehicle Code section 10851, "these indicia of the voters' intent support an inclusive interpretation" (*Page, supra,* 2017 WL 5895782, page *6) – and the reference to "these indicia" is followed by a citation to the *Romanowski* discussion which includes its (*Romanowski*'s) mention of the proposition's mandate to a broad and liberal construction to effectuate its purposes.

The "primary focus [of Proposition 47] was reducing the punishment for a specifically designated category of low-level felonies from felony to misdemeanor sentences," i.e., to "'[r]equire 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.' (Citation.)" (*Valencia*, *supra*, 3 Cal.5th at p. 360.) To effectuate this primary purpose, the proposition should be broadly and

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[6]Appellant broached broad and liberal construction in her original brief, but respondent has never replied on this point.

liberally construed, which should mean the generally recognized inclusion of *Kirk*-defendants with *Estrada*-defendants.

CONCLUSION

In summary, *Valencia* acknowledges that as to Propositions 36 and 47, there were two separate electorates, having two entirely different populations of offenders in mind and, as such, did not address the same subject. Proposition 47 focused on low-level offenders, while Proposition 36 concentrated on recidivist offenders who had two prior violent or serious felony convictions. Here, the entire litigation centers on the meaning of "currently serving" of section 1170.18, subdivision (a) and cannot be read in a vacuum. Instead, the initiative's language must be construed in the context of the statute as a whole *and its overall scheme*, i.e., its great reduction in punishment, which is different than that in Proposition 36. And the proposition must be broadly and liberally construed to accomplish and effectuate its inclusive purposes. Based on this intent and usual presumptions attendant to the interpretation of initiatives, the most reasonable conclusion is that the electorate intended for *Kirk*-defendants to

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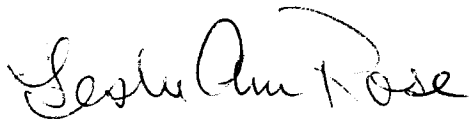
benefit, as they have for half a century, along with *Estrada*-defendants.

Dated:

Respectfully Submitted,

APPELLATE DEFENDERS, INC.



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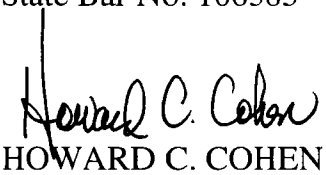

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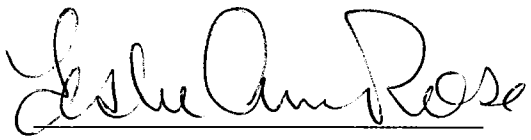

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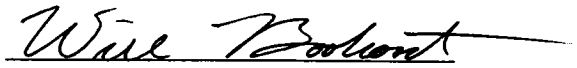
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