IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S223825

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **DAVID J. VALENCIA,** Defendant and Appellant.	Court Of Appeal, Fifth District No. F067946 Superior Court of California, Tuolumne County No. CRF30714

OPENING BRIEF ON THE MERITS

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ISSUES

1. Does the plain meaning of Penal Code[1] section 1170.18, subdivision (c), which states: "as used throughout this code, "unreasonable risk of danger to public safety" means an unreasonable risk that the petitioner will commit a new felony within the meaning of clause (iv), of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667" apply to resentencing under section 1170.126?
2. Alternatively, does it "frustrate, rather than promote" the "purpose and intent of the electorate in enacting ... [Propositions 36 of 2012 and 47 of 2014]"[2] to arrive at the plain reading interpretation of section 1170.18, subdivision (c) as added in 2014 by Proposition 47?"
3. Does the definition of "unreasonable risk of danger to public safety" (§ 1170.18, subd. (c)) merely clarify the resentencing provisions under the Three Strikes Reform Act of 2012 (§ 1170.126), so as not to invoke the presumption against retroactivity?

STATEMENT OF THE CASE

On October 5, 2009, felony Information, CRF30714, was filed alleging corporal injury upon a spouse or cohabitant in violation of section 273.5, subdivision (a). (CT 14.) Section 273.5 is not a serious or violent offense pursuant to section 667.5 or subdivision

1. Unless otherwise specified, all further provisions are to the Penal Code.
2. The Opinion of the Fifth District Court of Appeal was attached to appellant's petition for review.

(c) of Section 1192.7.[3] It was further alleged that appellant had been convicted of the following prior "Strike" convictions as described in sections 667.5 and subdivision (c) of 1192.7:

1. In 1996, criminal threats under section 422; and
2. In 1995, kidnapping under section 207.

(CT 14.)

Sections 422 and 207 are not described in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of section 667[4] or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of section 1170.12.

On December 2, 2009, after appellant was found guilty of section 273.5, he admitted the "Strike" priors and was sentenced to 25 years to life. (CT 38-39, 84-85, 88.)

On April 15, 2013, appellant filed a petition to recall his sentence pursuant to section 1170.126 of Three Strikes Reform Act of 2012. (CT 127-135.) On August 9, 2013, the trial court denied the resentencing petition. (2 RT 502.)

The Court of Appeal affirmed the trial court's denial of appellant's petition for resentencing. His petition for rehearing in the Fifth District Court of Appeal was denied on January 8, 2015. On February 18, 2015, this Court granted appellant's petition for review.

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3. Offenses pursuant to section 667.5 or subdivision (c) of Section 1192.7 are hereafter referred to as "Strikes"
4. Offenses described in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 are hereafter referred to as "Super Strikes."

STATEMENT OF FACTS

In appellant's petition for resentencing pursuant to section 1170.126, appellant established that he was eligible because his sentence was for an offense "not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7" and he had no previous convictions for offenses "appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subds. (e)(2) and (3).) At the resentencing hearing on August 9, 2013, the trial court did not state that it believed that appellant was likely to commit an offense described in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of section 667.

On December 16, 2014, the Fifth District Court of Appeal held that the trial courts discretion to grant or deny a resentencing petition under section 1170.126 is reviewed under the deferential abuse of discretion standard and that the trial court in this case did not abuse its discretion. (Opinion, p. 11.)

ARGUMENT

I.

THE DEFINITION OF UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY UNDER SECTION 1170.18, SUBDIVISION (C) APPLIES TO RESENTENCING PETITIONS UNDER SECTION 1170.126

A. Overall Summary of the Legislative History of Propositions 36 and 47

There is significant evidence in the Proposition 36 and 47 ballot materials that strongly supports the plain reading interpretation of section 1170.18, subdivision (c).

Additionally, the official Proposition 47 ballot materials are silent with respect to the intent to mean something other than what is plainly stated in 1170.18, subdivision (c). Nowhere does the official Proposition 47 ballot material state that the voters intended to *exclude* the previously enacted section 1170.126, subdivision (c) petitions from the terms "[a]s used throughout this Code." In a nutshell, both sets of ballot material reveal a strong compatibility of purpose and intent with one another. In particular, they both share the singular goal of assuring life sentences for dangerous criminals, for the protection of the public, and the resentencing of low risk inmates convicted of "nonviolent, nonserious" crimes. Under both propositions, these combined public policies were expected to assure essential protections for the public while triggering substantial savings in tax dollars.

The legislative history of Proposition 36 reveals that it was offered to clarify the intent of the original Three Strikes law to focus prison spending upon dangerous criminals for the protection of the public. This intent was primarily accomplished, through amendments to section 667 which clarified what constituted a "serious and/or violent" felony for sentencing purposes, and the adoption of a new resentencing procedure under section 1170.126. In pertinent part, section 1170.126 allows persons who had *not been convicted* of "violent/and or violent felonies" as defined in section 667 to petition for shorter, determinate sentences, and prohibits petitioners who pose an "unreasonable risk of danger to the public safety" from receiving reduced sentences.

As detailed below, the Proposition 36 ballot materials reveal that the intent of the risk assessment under section 1170.126 was to exclude "dangerous criminals like rapists,

murderers, and child molesters" and to only allow the resentencing of persons convicted of "nonserious, nonviolent crimes." Also, as detailed below, the Proposition 47 ballot materials reveal this intent in Proposition 36 was affirmed and clarified in Proposition 47 because Proposition 47 essentially restated the existing law's focus in that subject area. This was accomplished, in part, via the amendment of section 1170.18, subdivision (c) which stated that "... '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."

By prefacing that clarifying definition with the terms "[a]s used throughout this Code," Proposition 47 was merely recognizing that Proposition 36 had already spoken with the same intent in section 1170.126. The intent was not to adopt a new risk assessment tool, but rather, it was to restate and clarify the obvious intent which had previously been adopted by Proposition 36.

B. The Plain Meaning of *As Used Throughout This Code* Unambiguously Means That the Definition of Dangerousness in Section 1170.18, Subdivision (c) Applies to Petitions for Resentencing under Section 1170.126

The Fifth District Court of Appeal conceded that the plain meaning of the statue was clear and unambiguous. "On its face, "[a]s 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."[5] (Opinion p. 27.) Nevertheless, the appellate court concluded that the "literal meaning" of section 1170.18 subdivision (c)" does not *comport* with the purpose of the Act, and

5. See Petition for Review, Appendix A, hereafter referred to as "Opinion."

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." (Opinion p. 29, emphasis added.)

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." (*Consumer Product Safety Commission v. GTE Sylvania, Inc.* (1980) 447 U.S. 102, 108 [100 S. Ct. 2051, 2056, 64 L.Ed.2d 766].) "In interpreting a voter initiative ... we apply the same principles that govern statutory construction. [Citation.] Thus, 'we turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.]" (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) When " 'statutory language is ... clear and unambiguous there is no need for construction, and courts should not indulge in it.' " (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 73, quoting *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198; see also *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 802 and *People v. Hendrix* (1997) 16 Cal.4th 508, 512.)

Under the plain meaning rule of statutory construction, the first step is to read the words using their usual and ordinary meaning. This done under the presumption that the legislation meant what it said and said what it meant. "Because statutory language generally provides the most reliable indicator of that intent (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871), we turn to the words themselves, giving them their "usual and ordinary meanings" and construing them in context. (*People v. Loeun* (1997) 17 Cal.4th 1, 9.). " 'If there is no ambiguity in the language of the statute, "... the Legislature is presumed to

have meant what it said, and the plain meaning of the statute governs." ' " (*Ibid.*)" (*People v. Lawrence* (2000) 24 Cal.4th 219, 230-31.)

Phrases that set the parameters of the applicability of definitions are commonly used tools in drafting legislation. Either under the plain meaning rule, or by imputing a special meaning as a term of art[6], the result is the same. *As used throughout this code* means what is says and says what it means: petitions under section 1170.126 are to be measured by the standard provided in section 1170.18, subdivision (c).

The phrase *as used in this section*, or *as used in this paragraph* can be found in section 261. ("[A]s used in this section, "duress" means . . . ;" "[a]s used in this section, "menace" means . . .;" "[a]s used in this paragraph, "public official" means . . .;" and "[a]s used in this paragraph, "threatening to retaliate," means . . ." § 261, subds. (6),(7)(b) & (c).) The phrase *as used in this section* is also found in the California Code of Civil Procedure section 425.115. *As used in this title* is found in section 14215. *As used in this article* is found in Government Code section 54236. *As used in this chapter* is found in California Civil Code section 731.03. *As used (fill in the blank)* is a basic statutory means of identifying the reach of a statute. Whether the phrase as *used throughout this code* is a term of art or simply the most plain and direct way of defining the reach of the definition, the intent is clear. The definition of "unreasonable risk of danger to public safety" is to be used where ever else it is found in the Penal Code. Accordingly, the plain

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6. If *as used (fill in the blank)* is a term of art, "a cardinal rule of statutory construction" is that when the Legislature employs a "term of art, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in a body of learning from which it was taken." " (*F.A.A. v. Cooper* (2012) 132 S.CT. 1441, 1449 [182 L. Ed. 2d 497, 80 USLW 4289].)

meaning of section 1170.18, subdivision (c) unequivocally reveals that the people of the State of California intended that the definition of "unreasonable risk of danger to public safety" as provided in section 1170.18 would apply to resentencing petitions under section 1170.126.

A plain reading of the terms *as used throughout this Code* in section 1170.18, subdivision (c) requires one to apply the stated definition *anywhere it appears in the Penal Code*. In particular, the definition of "unreasonable risk of danger to public safety" must be understood as applying to the only two Penal Code sections utilizing those terms: the resentencing proceedings specified under both section 1170.18, subdivision (b), as added by Proposition 47 of 2014; and section 1170.126, subdivision (f), as added by Proposition 36 in 2012.

> 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))

Thus, "the petitioner" addressed in 1170.18, subdivision (c) is a person who seeks resentencing under either section 1170.18 (Proposition 47) or section 1170.126 (Proposition (36) and who is not at risk of committing a new "violent felony" as specified.

C. The Official Ballot Material and Other Extrinsic Aids Strengthen and Fortify the Plain Meaning Interpretation that the Phrase *As Used Throughout This Code* Means that the Definition of Dangerousness in Section 1170.18, Subdivision (c) Applies to Section 1170.126 Petitions

If "the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [citation] We also " 'refer to other indicia of the voters' intent, *particularly* the analyses and arguments contained in the official ballot pamphlet.' [citations.]" (*People v. Osuna* (2014) 225 Cal. App. 4th 1020, 1034, emphasis added.) Although the language is susceptible of only one reasonable interpretation, which is the plain meaning, as will be shown the official ballot material bolsters and supports that plain meaning. " "Extrinsic aids" to statutory construction are sources outside of the statutory text itself. (2A Singer, Statutes and Statutory Construction, (6th ed. 2000) § 48:01, p. 407.)" (*Maclsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal. App. 4th 1076, fn. 5.)

As detailed below, significant evidence of the legislative intent and purpose provided in the Proposition 36 and 47 ballot materials strongly supports the plain reading interpretation of Penal Code Section 1170.18, subdivision (c). Additionally, the Proposition 47 ballot materials are silent with respect to intend something other than what is plainly stated in 1170.18, subdivision (c), which would result in excluding the

previously enacted section 1170.126 petitions from the terms "[a]s used throughout this Code."

> SEC. 2. Findings and Declarations.
>
> The people of the State of California find and declare as follows:
>
> The people enact the Safe Neighborhoods and Schools Act to ***ensure that prison spending is focused on violent and serious offenses***, to ***maximize alternatives for nonserious, nonviolent crime***, and to invest the savings generated from this act into prevention and support programs in K–12 schools, victim services, and mental health and drug treatment. This act ensures that ***sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.***
>
> (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of proposed law, § 2, p. 70, emphasis added.)

Section 2 of Proposition 47 sets forth the legislative "Findings and Declarations" which are applicable to the entire act including, but not limited to, section 1170.18, subdivision (c) which was added by Proposition 47. Section 2, is critical because, not only is it part and parcel of the 2014 enacted law, but it supplies the essential intent for all of section 1170.18, especially the terms at issue in subdivision (c). That intent cannot be ignored. Section 2 informed the electorate that Proposition 47 – including section 1170.18, subdivision (c) – was aimed at focusing the State's "prison spending" upon "violent and serious offenses," maximizing non-prison "alternatives" for "nonserious, nonviolent crimes" and that the resulting savings would be invested in the specified programs. It also assured the voters that the sentencing laws affecting all "people convicted" of the cited "dangerous crimes" "are not changed."

Notably, the stated goals are expressed in *broad* terms revealing the intent to apply to *all* convictions for "violent and serious offenses" and "nonserious, nonviolent" offenses – including, but not limited to, all prior convictions that are relevant for Proposition 36 resentencing petitions. In like manner, Section 2 *broadly* assures that essentially *all* "people convicted" of the cited "dangerous crimes" will not benefit from any of the changes adopted in Proposition 47. This expansive and essential protection of the public necessarily includes any such persons petitioning for resentencing under Proposition 36 who are covered under a plain reading of section 1170.18, subdivision (c). This broad intent is further confirmed and amplified in section 3:

> SEC. 3. Purpose and Intent.
>
> In enacting this act, it is the purpose and intent of the people of the State of California to: (1) Ensure that ***people convicted of murder, rape, and child molestation will not benefit from this act.***

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of proposed law, § 3, p. 70, emphasis added.)

This expansive and essential protection of the public necessarily includes any such persons petitioning for resentencing under Proposition 36 who are covered under a plain reading of 1170.18, subdivision (c). It provides the same broad assurances that *all* persons convicted of the cited dangerous crimes will not benefit from any of the changes adopted in Proposition 47. Overall, section 3 of the act, coupled with section 2, more than adequately supports a plain reading interpretation of section 1170.18, subdivision (c) for the reasons provided above. The obvious application to Proposition 36 resentencing petitions conforms to a plain reading.

SEC. 3. Purpose and Intent.

> In enacting this act, it is the purpose and intent of the people of the State of California to: ... (3) ***Require 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.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of proposed law, § 3, p. 70, emphasis added.)

Subdivision (3) elaborates upon Proposition 47's intended impact on "nonserious, nonviolent crimes like petty theft and drug possession." Notably, it too is drafted in a broad manner. Essentially, the voters were advised that *all* such crimes would be treated as misdemeanors instead of felonies, unless the defendant "has prior convictions for specified violent or serious crimes." This necessarily includes "nonserious, nonviolent crimes" that are the subject of a Proposition 36 resentencing petition, in conformity with a plain reading interpretation of section 1170.18, subdivision (c).

SEC. 3. Purpose and Intent.

> In enacting this act, it is the purpose and intent of the people of the State of California to: ...***(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.***

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of proposed law, § 3, p. 70, emphasis added.)

Subdivision (5) describes, at minimum, the requirement in section 1170.18, subdivision (c) for 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." On its face, subdivision (5) does not solely address "individuals" who petition for

resentencing under the new process established by Proposition 47 in section 1170.18. Rather, it unambiguously subjects the Proposition 47 section 1170.18, subdivision (c) requirement for a "thorough review of criminal history and risk assessment to *any* individuals before resentencing" (emphasis added). As such, it must be understood as applying to "any individuals" who are engaged in the only two resentencing petition processes that are available: those set forth in sections 1170.18 and 1170.126.

> SEC. 3. Purpose and Intent.
>
> In enacting this act, it is the purpose and intent of the people of the State of California to: ... (6) ***This measure will save significant state corrections dollars on an annual basis. Preliminary estimates range from $150 million to $250 million per year.*** This measure will ***increase investments*** in programs that reduce crime and improve public safety, such as prevention programs in K–12 schools, victim services, and mental health and drug treatment, which will reduce future expenditures for corrections.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of proposed law, § 3, p. 70, emphasis added.)

Subdivision (6) described the "significant" "state fiscal savings that would flow from the policies adopted in Proposition 47. By only incarcerating people who commit "violent," "serious," or "dangerous" felonies; and resentencing people who had been convicted of "nonserious, nonviolent crimes," the State would redirect "$150 million to $250 million per year" which to the specified, far wiser uses.

In light of the dispositive evidence of legislative intent embodied in sections 2 and 3 of the act itself as addressed above, it is not surprising that there is no evidence in the remaining ballot materials to support the understanding that a plain reading interpretation of 1170.18, subdivision (c) was not intended. Rather, there is consistent evidence of the

intent to apply section 1170.18, subdivision (c) to *all* petitions for resentencing. For example, the "Analysis by Legislative Analyst" provides broadly applicable statements that should also be understood as applying to the resentencing of *all* previously convicted offenders applying for resentencing. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) official title and summary, pp. 36-37.)

Many of the above referenced points echo the intent originally laid out in the official ballot material for Proposition 36.

> SEC. 1. Findings and Declarations:
>
> The People enact the Three Strikes Reform Act of 2012 to restore the original intent of California's Three Strikes law— imposing life sentences for dangerous criminals like rapists, murderers, and child molesters. This act will:
>
> (1) Require that murderers, rapists, and child molesters serve their full sentences—they will receive life sentences, even if they are convicted of a new minor third strike crime.
>
> (2) Restore the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime.
>
> (3) Maintain that repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession will receive twice the normal sentence instead of a life sentence.
>
> (4) Save hundreds of millions of taxpayer dollars every year for at least 10 years. The state will no longer pay for housing or long-term health care for elderly, low-risk, non-violent inmates serving life sentences for minor crimes.
>
> (5) Prevent the early release of dangerous criminals who are currently being released early because jails and prisons are overcrowded with low-risk, non-violent inmates serving life sentences for petty crimes.

(Voter Information Guide, Gen. Elec. (Nov 4, 2012) text of proposed laws, p. 105, emphasis added.)

Section 1 informed the electorate that Proposition 36 – including 1170.126, subdivision (f) – was aimed at restoring the original intent of the Three Strikes law by focusing prison spending upon "dangerous criminals" who deserved life sentences and reducing sentences for "repeat offenders convicted of nonviolent, nonserious crimes."

Section 1 also notified the electorate that reduced sentences for "low *risk*, nonviolent inmates" would prevent overcrowding resulting in "early release of dangerous criminals." This summary should be understood as applying to the terms "unreasonable risk of danger to public safety" appearing in 1170.126, subdivisions (f) and (g) (1) though (3). That is because the term "risk" only appears *twice* in Proposition 36, both times in 1170.126 – once in subdivision (f) and the other in subdivision (g) (3). Both times the term "risk" appears in instructions given to the court for determining whether or not the person petitioning for resentencing poses an "unreasonable risk of danger to public safety." Thus the term, "risk" appearing in section 1170.126 should be understood as equating with "low risk, nonviolent" convictions. That is precisely what Proposition 47 later clarified in section 1170.18, subdivision (c).

Section 1 reveals a strong compatibility of purpose and intent with that of Proposition 47. Both Propositions 36 and 47 share the singular goal of assuring life sentences for dangerous criminals for the protection of the public and the resentencing of "low risk," inmates convicted of "nonviolent, nonserious" crimes. Under both

propositions, these combined public policies were expected to assure essential protections to the public while triggering substantial savings in tax dollars.

As detailed below, proponents' arguments in support of Proposition 36 reiterate and underscore the "Findings and Declarations" set forth under Section 1 of the act:

> • MAKE THE PUNISHMENT FIT THE CRIME
> ***Precious financial and law enforcement resources should not be improperly diverted to impose life sentences for some non-violent offenses. Prop. 36 will assure that violent repeat offenders are punished and not released early.***
>
> • SAVE CALIFORNIA OVER $100 MILLION EVERY YEAR
> Taxpayers could save over $100 million per year—money that can be used to fund schools, fight crime and reduce the state's deficit. ***The Three Strikes law will continue to punish dangerous career criminals who commit serious violent crimes—keeping them off the streets for 25 years to life.***
>
> • MAKE ROOM IN PRISON FOR DANGEROUS FELONS
> Prop. 36 will help ***stop clogging overcrowded prisons with non-violent offenders, so we have room to keep violent felons off the streets.***
>
> • LAW ENFORCEMENT SUPPORT
> Prosecutors, judges and police officers support Prop. 36 ***because Prop. 36 helps ensure that prisons can keep dangerous criminals behind bars for life. Prop. 36 will keep dangerous criminals off the streets.***
>
> • TOUGH AND SMART ON CRIME
> Criminal justice experts and law enforcement leaders carefully crafted Prop. 36 so that ***truly dangerous criminals will receive no benefits whatsoever from the reform. Repeat criminals will get life in prison for serious or violent third strike crimes. Repeat offenders of non-violent crimes will get more than double the ordinary sentence. Any defendant who has ever been convicted of an extremely violent crime—such as rape, murder, or child***

molestation—will receive a 25 to life sentence, no matter how minor their third strike offense.

Don't believe the scare tactics used by opponents of Prop. 36. Here are the facts:
• ***Prop. 36 requires that murderers, rapists, child molesters, and other dangerous criminals serve their full sentences.***
• ***Prop. 36 saves taxpayers hundreds of millions of dollars.***
• ***Prop. 36 still punishes repeat offenders of nonviolent crimes by doubling their state prison sentences.***
Today, dangerous criminals are being released early from prison because jails are overcrowded with nonviolent offenders who pose no risk to the public. Prop. 36 prevents dangerous criminals from being released early. People convicted of shoplifting a pair of socks, stealing bread or baby formula don't deserve life sentences.

(Voter Information Guide, Gen. Elec. (Nov. 6, 20 12), argument and rebuttal for and against Prop. 36, pp. 52-53, emphasis added.)

Clearly, based upon the above review of the "Findings and Declarations" embedded in the act itself, as well as the arguments offered to the voters by supporters, Proposition 36 was intended to provide early release for "nonviolent offenders who pose no risk to the public." This requires one to conclude that the risk assessment procedure adopted in Proposition 36 under section 1170.126 was aimed at prohibiting the "dangerous criminals" specified in section 667 from qualifying for reduced sentencing. Further, as revealed in the Proposition 47 ballot materials, that pre-existing intent was merely reiterated and clarified in section 1170.18, subdivision (c).

In addition to the official ballot material described above, in April 2013, David Mills and Michael Romano, who were both authors of Proposition 36 and 47, published "The Passage and Implementation of the Three Strikes Reform Act of 2102 (Proposition

36)" Federal Sentencing Reporter, Vl. 25, No 4, pp. 265.[7] Well before Proposition 47 was on the ballot, the drafters of Proposition 36 envisioned that a judicial finding of dangerousness for a Proposition 36 petitioner would rarely occur. "Although . . . not every inmate will be resentenced, the *intent* of the Prop. 36 is that inmates will be entitled to new sentences *in all but the rarest outlier* cases involving true risk to public safety." ("The Passage and Implementation of the Three Strikes Reform Act of 2102 (Proposition 36)" Federal Sentencing Reporter, Vl. 25, No 4, p. 268, emphasis added.) The authors added that "courts will generally be required to issue shorter sentences under the resentencing procedure . . . unless the . . . case presents extraordinary circumstances." (*Ibid.*) The authors anticipated that "all but the most extraordinary defendants are afforded the relief that Prop. 36 contemplates." (*Id.* at p. 269.)

As such, it does not "frustrate, rather than promote" the "purpose and intent of the electorate in enacting ... [Propositions 36 of 2012 and 47 of 2014]" to apply a plain reading interpretation of section 1170.18, subdivision (c) as added in 2014 by Proposition 47 which states: "***As used throughout this Code***, [i.e., in 1170.126 (f) and (g)] '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"? (Emphasis added.)

7. Appellant will file a separate request for judicial notice pursuant to Evidence Code section 452 of "The Passage and Implementation of the Three Strikes Reform Act of 2102 (Proposition 36)" Federal Sentencing Reporter, Vl. 25, No 4, 365.

D. Applying the Definition of Dangerousness in 1170.18, Subdivision (c) to Petitions Under Section 1170.126 Does Not Lead to Absurd Results or Otherwise Frustrate the Purpose of the Legislation

The appellate court erred in finding that the plain meaning of section 1170.18, subdivision (c) frustrated the intent of the People of the State of California, and lead to absurd and unintended results:

> Nowhere, however, do the ballot materials for the Act suggest voters intended essentially to open the prison doors to existing third strike offenders in all but the most egregious cases, as would be the result if the definition of "'unreasonable risk of danger to public safety'" contained in section 1170.18, subdivision (c) were engrafted onto resentencing proceedings under section 1170.126, subdivision (f). That voters did *not* intend such a result is amply demonstrated by the fact an indeterminate life term remains mandatory under the Act for a wide range of current offenses even if the offender does not have a prior conviction for a "super strike" offense (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)), and that an inmate is rendered ineligible for resentencing under section 1170.126 for an array of reasons beyond his or her having suffered such a prior conviction (§ 1170.126, subd. (e)(2)).

(Opinion 30-31.)

"The plain meaning of words in a statute may be disregarded only when that meaning is " 'repugnant to the general purview of the act,' or for some other compelling reason...." " (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 219, quoting 2A Sutherland, Statutory Construction (4th ed. 1973) § 46.01, p. 49; see also *People v. Broussard* (1993) 5 Cal.4th 1067, 1136-1137.) "This exception should be used most sparingly by the judiciary and only in extreme cases else we violate the separation of powers principle of government. (Cal. Const., art III, § 3.) We do not sit as a "super-Legislature." (*Daybrite Lighting, Inc. v. Missouri* (1952) 342 U.S. 421, 423 [72 S. Ct. 405, 407, 96 L. Ed. 469, 472].)" (*Unzueta v. Ocean View School Dist.* (1992) 6

Cal.App.4th 1689, 1698.) "We "must presume that a legislature says in a statute what it means and means in a statute what it says there." (*Conn. Nat'l Bank v. Germain* (1992) 503 U.S. 249, 253–54 [112 S. Ct. 1146, 117 L.Ed.2d 391].)" (*U.S. v. Sardariani* (9th Cir. 2014) 754 F.3d 1118, 1122.) These principles apply as much to initiative statutes as to those enacted by the Legislature. (See, e.g., *In re Lance W.* (1985) 37 Cal.3d 873, 886,.)" (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.)

Only when the plain meaning of a statute leads to absurd or unintended results may the courts employ this exception to the plain meaning rule. An absurd result is one that is "clearly contrary to legislative intent." (See *Cassell v. Superior Court* (2011) 51 Cal. 4th 113, 136.) An absurd result is one that leads to unintended or unreasonable results or would frustrate the manifest purpose of the legislation. (See *People v. Broussard, supra*, 5 Cal.4th 1067 and *People v. Belluci* (1979) 24 Cal. 3d. 879.)

In *Broussard*, the defendant appealed an order for victim restitution after he was sentenced to prison and the only injury to his victim was economic opposed to a physical injury. (*People v Broussard, supra*, 5 Cal. 4th 1067, 1075.) He argued that section 13960 defined a victim as "a "person who sustains injury or death as a direct result of a crime," and further states that a victim does not suffer an "injury" unless he or she suffers a "physical injury." " (*Id.*at p. 1070-71.) In stark opposition of defendant's position, the passage of Proposition 8, amended the California Constitution to add article I, section 28, which required the "courts to order defendants found guilty of criminal acts to pay restitution to *all* victims, not simply those who suffered a physical injury." (*People v. Broussard*, supra, 5 Cal.4th at p. 1072.) The California Supreme Court reviewed the

legislative history and concluded that it "shows that the Legislature intended to implement, not violate, its constitutional mandate. (*People v. Broussard*, supra, 5 Cal.4th at p. 1072.) This Court characterized the discrepancy as an "omission" and an "oversight." (*Id.* at p. 1073.) This Court affirmed the restitution order in large part because the "[i]nitial legislative efforts to comply with this constitutional mandate were incomplete." (*Id.* at p. 1077.) *Broussard* was a case of legislative neglect and inattention.

In *In re Michelle D.* (2002) 29 Cal. 4th 600, this Court was asked to determine the amount of force necessary to kidnap an unresisting infant. (*Id.* at p. 603.) The defendant argued that "the word "force," as used in the kidnapping statute (Pen. Code, § 207 (hereafter section 207)), means a forcible seizure and this, in turn, requires something more than the mere quantum of physical force necessary to effect movement." (*Id.* at p. 605.) This Court agreed that the element of force "requires something more than the quantum of physical force necessary to effect movement of the victim from one location to another." (*Ibid.*) Notwithstanding, it held that "[e]ven if force, as conventionally understood, was not used to effect Cameron's kidnapping, the minor's intent in carrying off the infant still renders her conduct kidnapping." (*Id.* at p. 606.)

Unlike *Broussard*, here there was no negligent omission, or failure on the part of the drafters. The language of section 1170.18, subdivision (c) says what it means and means what is said: *as used throughout this code*, means that this definition shall be applied anywhere else this term may be found in the Penal Code. There can be no doubt

that the plain meaning of the statute means that the definition provided in section 1170.18, subdivision (c) shall be applied to petitions pursuant to section 1170.126.

In *Michelle D.*, this Court applied the principals of statutory construction and found that despite the plain meaning of the statute, "[t]he fact that the Legislature may not have considered every factual permutation of kidnapping, including the carrying off of an unresisting infant, does not mean the Legislature did not intend for the statute to reach that conduct." (*In re Michelle D.*, *supra*, 29 Cal. 4th, at p. 606.) This Court added that "a literal construction of the statute might result in the absurd consequence of finding that a kidnapping did not occur where it is clear a kidnapping was intended." (*Id.* at p. 608.)

Here the drafters' choice of words *as used throughout this code* cannot be excused as not anticipating that it might be applied to the only other statute in the Code that uses the term "unreasonable risk of danger to public safety." As demonstrated above, limiting phrases like *as used in this section* are commonly used in drafting legislation. This is not a scenario like *Michelle D.* where the drafters did not contemplate every possible permutation. In 2014, there was only one other possible permutation, that the definition of dangerousness would be used in section 1170.126 petitions as well as section 1170.18 petitions.

Here, the Court of Appeal misinterpreted the voter's intent in concluding "[n]owhere, however, do the ballot materials for the Act suggest voters intended essentially to open the prison doors to existing third strike offenders in all but the most egregious cases, as would be the result if the definition of "'unreasonable risk of danger

to public safety'" contained in section 1170.18, subdivision (c) were engrafted onto resentencing proceedings under section 1170.126, subdivision (f)." (Opinion pp. 31-30.) This is starkly contradicted by section 1, of the text of proposed laws, findings and declarations, "[t]he People enact the Three Strikes Reform Act of 2012 to restore the original intent of California's Three Strikes law," "by requiring life sentences *only* when a defendant's current conviction is a violent or serious offense." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), text of proposed law, p. 105, emphasis added.) While the voters did in fact put other restrictions on the inmates who pursue resentencing, that does not override their general expressed intent of restoring the law to the original intent of "requiring life sentences *only* when a defendant's current conviction is a violent or serious offense." (*Ibid.*, emphasis added.).

The Court of Appeal further erred in concluding, "[t]hat voters did *not* intend such a result is amply demonstrated by the fact an indeterminate life term remains mandatory under the Act for a wide range of current offenses even if the offender does not have a prior conviction for a "super strike" offense (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2.)" (Opinion p. 31.) The court of appeal misconstrues the intent by characterizing the *exceptions* to the overall purpose of the Act as a "wide range of current offenses."

Although to the general intent of the Three Strikes Reform Act of 2012 was to restore the original intent of California's Three Strikes law," "by requiring life sentences *only* when a defendant's current conviction is a violent or serious offense," the fact that the voters carved out other specific exceptions does not negate that intent.

First of all an inmate is not eligible if he has a prior conviction for murder, rape or child molestation.[8] The second category of exclusions is for offenses resulting in sex offender registration, committed while armed or for excessive amounts of controlled substance.[9] These two categories are not a *wide range of offenses*, but rather very specific offenses that the people of the State of California deemed to be unworthy of the benefits of the Act.

Most troubling however is the appellate court's conclusion that, "an inmate is rendered ineligible for resentencing under section 1170.126 for *an array of reasons* beyond his or her having suffered such a prior conviction (§ 1170.126, subd. (e)(2))." (Opinion p. 31.) The *array of reasons* can only be the reasons stated in section 1170.126, subdivision (g) (1)-(3), which are also included in section 1170.18, subdivision (b) (1) - (3). The Court of Appeal suggests that this *array of reasons* can be considered by the trial court in exercising its everyday discretion, whereas these same factor can only be considered in Proposition 47 petitions to determine if released the petitioner would pose an "unreasonable risk of danger to public safety." (§ 1170.18, subd. (b). This is troubling not only because of the circular reasoning of using their conclusion to support

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8. Section 1170.126, subd. (e)(3) excludes inmates with "prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.the benefits exclude murders, rapists, child molesters."
9. Section1170.126, subd. (e)(2) excludes inmates whose current offenses was "for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12."

their conclusion, but also it flies in the face of the rule of in pari materia, as will be discussed infra.

Therefore, the Court of Appeal's conclusion that applying the definition of "unreasonable risk of danger to public safety" in section 1170.18, subdivision (c) to petitions under section 1170.126, *frustrates* rather than *promotes* the purpose and intent of the electorate is clearly incorrect. The purpose of Act was to restore the original intent of California's Three Strikes law," "by requiring life sentences *only* when a defendant's current conviction is a violent or serious offense." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of proposed law, p. 105, emphasis added.) The plain meaning rule trumps, unless and only unless, the plain meaning is *clearly contrary* to the voter's intent. (see *Cassell v. Superior Court*, supra, 51 Cal. 4th at p. 136.) Providing trial courts with *narrow* discretion to deny a section 1170.126 resentencing petition only when it believes that the petitioner poses an unreasonable risk of danger that he will commit a new "Super Strike" is entirely consistent with the voter's intent as described above. For this reason, the plain meaning of the statute controls and the appellate court's conclusion should be rejected.

E. The Conclusion that Section 1170.18 Does Not Apply to Petitions Under Section 1170.126 Constitutes Impermissible Repeal by Implication

One of the most important principles of statutory construction is that "all presumptions are against a repeal by implication." (*People v. Acosta* (2002) 29 Cal.4th 105, 122.)" (*People v. Park* (2013) 56 Cal.4th 782, 798.) To read section 1170.18, subdivision (c) as *not* "used throughout this code," would effectively repeal by

implication that section. There is no showing that in passing Proposition 47, the voters intended to repeal the very statute that they enacted. Even hypothetically, if the original intent of section 1170.126 was to afford trial judges broad discretion in denying resentencing petitions, there is no showing that Proposition 47 intended to repeal section 1170.126, subdivision (g) by providing the now narrow definition of dangerousness for the court's exercise of discretion.

"Notwithstanding the "presumption against repeals by implication," repeal may be found where (1) "the two acts are so inconsistent that there is no possibility of concurrent operation," or (2) "the later provision gives undebatable evidence of an intent to supersede the earlier" provision. (*Hays v. Wood* (1979) 25 Cal.3d 772, 784; accord, *Chatsky and Associates v. Superior Court* (2004) 117 Cal.App.4th 873, 877.) Because "the doctrine of implied repeal provides that the most recently enacted statute expresses the will of the Legislature" (*In re Thierry S.* (1977) 19 Cal.3d 727, 744), application of the doctrine is appropriate in those limited situations where it is necessary to effectuate the intent of drafters of the newly enacted statute. " 'In order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say it was intended to be a substitute for the first.' " (*Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 868, quoting *Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, 176,; see also Sutherland, Statutory Construction (6th ed.2002) § 23.9, p. 461 [Noting that courts "will infer the repeal of a statute only when ... a subsequent act of the Legislature clearly is intended to occupy the entire field covered by

a prior enactment"].)" (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1038-39.)

The presumption against repeal by implication compels this Court to reject the opinion of the Court of Appeal. The most important reason is that section 1170.18 does not "occupy the entire field covered by section 1170.126." (See *Professional Engineers in California Government v. Kempton, supra*, 40 Cal.4th at pp. 1038-39.) Nor does section 1170.18 "constitute a revision of the entire subject" of section 1170.126. (See *Board of Supervisors v. Lonergan*, supra, 27 Cal.3d at p. 868.) Therefore the Court of Appeal's conclusion that "unreasonable risk of danger to public safety" as defined in section 1170.18 shall not be used in section 1170.126 constitutes impermissible repeal by implication. Accordingly the Court of Appeal's conclusion that the phrase *as used throughout this Code* should be given its plain meaning interpretation, to avoid repeal by implication.

F. The Courts Should Interpret, and Not Endeavor to Rewrite, the Laws

There is a presumption that the legislature means what it says and says what it means. " 'If there is no ambiguity in the language of the statute, "... the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs." ' " (*People v. Lawrence, supra*, 24 Cal.4th at pp. 230-31.) In rejecting the plain meaning the Court of Appeal also infringed on the province of the Legislature to write the laws, and rewrite them if they are not implemented as intended.

> I think it is infinitely better, although an absurdity or an injustice or other objectionable result may be evolved as the consequence of your construction, to adhere to the words of an Act of Parliament and leave the legislature to set it right than to, alter those words according to one's notion of an absurdity.' *Lord Bramwell, in Hill v. East and West India Dock Co.*, 9 A.C. 448, 464–65 (House of Lords, 1884)." (Aldisert, The Judicial Process (West 1976) p. 176.)

(*Unzueta v. Ocean View School Dist.*, *supra*, 6 Cal.App.4th at p. 1698.)

"Each time the judiciary utilizes the "absurd result" rule, a little piece is stripped from the written rule of law and confidence in legislative enactments is lessened." (*Id.* at p. 1699.)

> We hold that except in the most extreme cases where legislative intent and the underlying purpose are at odds with the plain language of the statute, an appellate court should exercise judicial restraint, stay its hand, and refrain from rewriting a statute to find an intent not expressed by the Legislature. (*People v. Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261, 1271.) "Our function is not to judge the wisdom of statutes. [Citations.]" (*Wells Fargo Bank v. Superior Court, supra,* 53 Cal.3d at p. 1099, 282 Cal.Rptr. 841, 811 P.2d 1025.) While application of section 44940.5 to the present situation may be unwise, it does not lead to "absurd results" as a matter of law allowing for statutory construction. (*People v. Pieters* (1991) 52 Cal.3d 894, 898, 276 Cal.Rptr. 918, 802 P.2d 420.) Thus, as to the first dilemma, we answer Judge Hand's question by following the plain language of the statutes which sufficiently show the underlying purpose. This was and is a legislative choice. We are not free to enforce what we think best.

(Unzueta v. Ocean View School Dist., *supra*, 6 Cal.App.4th at p. 1700.)

"It is our task to construe, not to amend, the statute. 'In the construction of a statute ... the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted....' [Citation.] We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used."

(*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

In *People v. Harbison* (2014) 23 Cal. App. 4th 975, the appellate court was to construe the alternative sentencing provisions under the Substance Abuse and Crime Prevention Act of 2000 and determine what the intended sentence was for a person found unamendable for treatment. (*Id.* at p. 978.) The defendant was sentenced to 120 days, and appealed arguing that his sentence should have only been 30 days. (*Id.* at p. 979.) The defendant "was ineligible for Proposition 36 probation pursuant to subdivision (b)(5) of section 1210.1, . . . That statute instructs that as a consequence of such a finding, appellant was to be sentenced to 30 days in jail "*[n]otwithstanding any other provision of law.*" (§ 1210.1, subd. (b)(5), italics added.)" (*Id.* at p. 982.) The appellate court reversed the 120 day sentence because the clear and unambiguous intent was that the sentence should only be 30 days. (*Id.* at p. 985-986.)

In *Harbison*, respondent urged the appellate court to find the 30 days sentence to be a statutory minimum and that the plain reading of 30 day sentencing provision lead to absurd results. (*Id.* at p. 982.) The Court of Appeal refused to find the 30 day sentence to be a minimum, because "[d]oing so would " 'violate [ ] the cardinal rule of statutory construction that courts must not add provisions to statutes. [Citations.] This rule has been codified in California as [Code of Civil Procedure] section 1858, which provides that a court must not "insert what has been omitted" from a statute.' [Citation.]" (*Id.* at p. 982.)

> In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

(Code Civ. Proc., § 1858.)

To find that the definition in section 1170.18, subdivision (c) does not apply to section 1170.126 would be to omit the words "as used throughout this code" and insert the words, "as used in this section only." That is strictly prohibited. Therefore the definition of unreasonable risk of danger to public safety in section 1170.18, subdivision (c) shall be applied *throughout this code* including petitions under section 1170.126.

G. In Pari Materia Compels This Court to Give Effect to the Plain Meaning of Section 1170.18, Subdivision (C)

The fact that there is so much overlap of terms, procedures, purposes and intents between Proposition 36 and Proposition 47 leads to the rule of in pari materia. "It is a basic canon of statutory construction that statutes in pari materia should be construed together so that all parts of the statutory scheme are given effect. [citations] Two " '[s]tatutes are considered to be in pari materia when they relate to the same person or thing, to the same class of person[s or] things, or have the same purpose or object.' " ([citations], [in pari materia means " '[o]f the same matter' " or " 'on the same subject,' " quoting Black's Law Dict. (5th ed.1981) p. 1004].)" (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-91.)

In *Lexin*, the California Supreme Court held that " "Section 1090 and section 87100 of the [Political Reform Act] are two of the most important statutes in California

addressing the problem of conflict of interest by public officials and employees. They both deal with a relatively small class of people, public officers and employees, and share the same purpose or objective, the prevention of conflicts of interests, and hence can fairly be said to be in pari materia." (*[citations]*.) Accordingly, to the extent their language permits, we will read section 1090 et seq. and the Political Reform Act as consistent." (*Lexin v. Superior Court, supra*, 47 Cal.4th at p. 1091.)

Here, the Court of Appeal questioned whether or not the two statutes were in fact in pari materia and ultimately rejected this as merely an aid in ascertaining legislative intent. (Opinion p. 36.) These statutes are in pari materia because they share the *same purpose or object* (See *Lexin v. Superior Court, supra*, 47 Cal.4th at p. 1090-91), which is to deny resentencing to eligible petitions *only* when that petitioner poses an unreasonable risk of danger to public safety that he is likely to commit a new "Super Strike." (See § 1170.18, subd. (c).) The *array of reasons* that the courts can consider are listed in sections 1170.126, subdivision (g) (1)-(3) and 1170.18, subdivision (b) (1)-(3). The court may reject these petitions *only* if, in considering these reasons it determines that the inmate poses a danger of committing a new "Super Strike." The purpose of sections 1170.126, subdivision (g) and 1170.18 (b) are identical in that they guide the trial courts in determining if the petitioner poses an unreasonable risk of danger to public safety. For this reason in pari materia requires that all parts of these two statutes should be "construed together so that all parts of the statutory scheme are given effect." (See *Lexin v. Superior Court, supra*, 47 Cal.4th at pp. 1090-91.)

Additionally, sections 1170.126 and 1170.18 are two of the most important statutes in California addressing the problem of unfair sentences and prison overcrowding and overspending. They both deal with a similar class of people and share the same purpose or objective. For this reason, in pari materia commands that the statutes be read in harmony and consistent with each other. To apply the definition of unreasonable risk of danger to public safety to petitions under section 1170.126 was intended.

H. The Presumption That The Voters Know What They Are Doing Compels This Court To Give Effect To The Plain Meaning Of Section 1170.18, Subdivision (c)

The Court of Appeal incorrectly found that the voters were tricked into passing Proposition 47. "Nowhere in the ballot materials for Proposition 47 were voters given any indication that initiative, which dealt with offenders whose current convictions would now be misdemeanors rather than felonies, had any impact on the Act, which dealt with offenders whose current convictions *would still be felonies*, albeit not third strikes." (Opinion 32.) The court explained that "[h]idden in the lengthy, fairly abstruse text of the proposed law, as presented in the official ballot pamphlet — and nowhere called to voters' attention — is the provision at issue in the present appeal. Subdivision (c) of section 1170.18 provides: "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." (Opinion p. 25.)

This Court previously held that it should not "lightly presume that the voters did not know" what they were doing in passing a proposition. (See *Brosnahan v. Brown*

(1982) 32 Cal.3d 236, 252.) "[I]n 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]" (*Ibid.*, emphasis in original.) Here, the text of proposed laws clearly defined "unreasonable risk of danger to public safety," and included that definition would be *used throughout this code*. (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of proposed law, p. 74, emphasis added.) It should be noted that the text of proposed laws relative to Proposition 47 was less than 5 pages, whereas the provisions of Proposition 8, which were upheld, were "multifarious." (*Brosnahan v. Brown, supra*, 32 Cal.3d at p. 263.)

In *Day v. City of Fontana* (2001) 25 Cal. 4th 268, the plaintiff argued that the legislative material did not reflect an intent to overturn other well-established legal policies. (*Id.* at p. 282.) This Court disagreed finding that "the voters expressed their collective intent to legislatively overturn existing law and policy determinations" by approving The Personal Responsibility Act of 1996. (*Ibid.*) This Court explained 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. Such actions fall squarely within the terms of section 3333.4, and the statute's operation in such cases promotes rather than defeats the declared purpose of Proposition 213 to restore balance to the justice system with respect to violators of the financial responsibility law. No more was required." (*Ibid.*, emphasis added)

In 2012, the people enacted Proposition 36 to restore "the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of proposed law, p. 105.) The voter's further intended to "[m]aintain that repeat offenders convicted of nonviolent, non-serious crimes like shoplifting and simple drug possession, will receive twice the normal sentence instead of a life sentence." (*Id.*) In 2014, the people of the State of California took this reform one step further with low risk offenses to "require misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of proposed law, p. 70.)

The voters were adequately informed that Proposition 47 provided a definition to a term in Proposition 36 that was previously left undefined. The voters knew that the definition in section 1170.18 would be applied to petitions under section 1170.126 because the language of the text of proposed laws specified that the definition would be used *throughout this code*. "*[I]t is of no consequence here that the ballot materials did not specifically refer to the act's application*" of the definition to resentencing petitions under section 1170.126. (See *Day v. City of Fontana, supra*, 25 Cal. 4th 268.) For all of these reasons, the statutes should be read in harmony together to reflect the collective intent of the voters that only persons who pose an unreasonable risk of danger to public safety should be deprived of the benefits of Proposition 47 or 36 resentencing provisions.

II.

THE DEFINITION OF *UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY* IN SECTION 1170.18 APPLIES RETROSPECTIVELY TO PETITIONS FOR RESENTENCING UNDER SECTION 1170.126 BECAUSE IT *CLARIFIES* THE TERM INSTEAD OF CHANGES THE LAW

a. Clarifying Definitions do not Constitute a Substantive Change in The Law

As amply demonstrated supra, the definition of "unreasonable risk of danger to public safety" in section 1170.18, subdivision (c) applies to petitions for resentencing under section 1170.126. As such, the next issue is determining whether or not the definition of unreasonable risk of danger to public safety merely clarifies section 1170.126 or does it constitute a substantial change in the law. "Congress may amend a statute to establish new law, but it also may enact an amendment 'to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases.' " (*Brown v. Thompson* (4th Cir.2004) 374 F.3d 253, 259.) "Statutes may be passed purely to make what was intended all along even more unmistakably clear." (*United States v. Montgomery County* (4th Cir.1985) 761 F.2d 998, 1003.)

> [W]hen an amendment alters, even "significantly alters," the original statutory language, this does "not necessarily" indicate that the amendment institutes a change in the law. [Internal quotation marks and citation omitted.] (noting that "an amendment to a statute does not necessarily indicate that the previous version was the opposite of the amended version"). Certainly, Congress may amend a statute to establish new law, but it also may enact an amendment "to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases." [Internal quotation marks and citation omitted.]

(*Id.* at p. 1003.)

The first step is to determine if the legislation is merely clarifying or if it constitutes a substantive change. "[A] key threshold issue is whether the enactment was truly a "clarification" of the prior statute (as Congress said), or was instead a substantial change in the law." (*Beverly Community Hosp. Ass'n v. Belshe* (9th Cir. 1997) 132 F.3d 1259, 1265.) If the legislation constitutes a substantive change, retroactive application would pose serious potential constitutional problems; if it merely clarified prior law, then there would be no unconstitutional retroactive effect. (*Ibid.*) "We have long recognized that clarifying legislation is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of its enactment." (*ABKCO Music, Inc. v. LaVere* (9th Cir. 2000) 217 F.3d 684, 689.) In other words, clarifying legislation does not imply the constitutional presumption against retroactivity.

In *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, this Court examined whether a definition constitutes mere clarification or a substantive change in the law. This Court concluded that "[t]his pattern of Legislative action compels our conclusion that in 2000 the Legislature intended not to make a retroactive change, but only to clarify the degree of limitation required for physical disability under the FEHA." (*Id.* at p. 1028.) This Court reversed the matter concluding that in 1992, the amendment to FEHA defined a physical disability as one that "limits major life activities," and that the Poppink Act merely clarified the definition provided in FEHA. (*Id.* at p. 1030.)

Unlike the nearly three decades of legislative history in *Colmenare,* here the analysis is very simple. In 2012, section 1170.126 expressed that all eligible candidates shall be resentenced unless they pose an "unreasonable risk of danger to public safety."

That term was not defined until 2014, but the intent was clear that Proposition 36 enacted section 1170.126 and other statutes to "restore the original intent of California's Three Strikes law - imposing life sentences for dangerous criminals like rapists, murders and child molesters." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), text of proposed laws, p. 105, § 1.) The intent was further expressed that Proposition 36 would "restore the Three Strikes law to the public's original understanding requiring life sentences only when a defendant's current conviction is for a violent or serious crime." (*Id.* at p. 105, § 2.)

B. The Term *Unreasonable Risk Of Danger To Public Safety*, Without a Definition, Was Ambiguous

Another factor to consider in determining if the legislation is merely clarifying is whether an ambiguity existed in the prior legislation.

> Clarification, effective ab initio, is a well recognized principle. (*Red Lion Broadcasting Co. v. FCC* (1969) 395 U.S. 367; [89 S. Ct. 1794, 23 L.Ed.2d 371].) Determination of whether new legislative action is alteration, or merely clarification, may depend on a number of factors. One may be the fit in language. A significant one is the fact that the new enactment clarifies an ambiguity. (*United States v. Montgomery Cty* (4th Cir.1985) 761 F.2d 998, 1003.) Especially is this so when, as here, the enactment follows fast upon the ambiguity's discovery, (*Callejas v. McMahon* (9th Cir.1984) 750 F.2d 729, 731,) and the legislature affirms the agency.

(*Liquilux Gas Corporation v. Martin Gas Sales, et al.* (1st Cir. 1992) 979 F. 2d 887.) "As one court has noted, a "dispute or ambiguity, such as a split in the circuits, [is] an indication that a subsequent amendment is intended to clarify, rather than change, the existing law." (*Callejas v. McMahon* (9th Cir. 1984) 750 F.2d 729, 731.)

In *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, this Court held that the amending statute was merely clarifying, and that "such a legislative act has no retrospective effect because the true meaning of the statute remains the same." (*Id.* at p. 930.) In considering if the new law was substantive or merely clarifying, this Court also considered the prompt reaction of the legislature once the controversy in the former legislature was identified.

> "One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation[.]" (*Ibid.*) " ' "An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute.... [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act—a formal change—rebutting the presumption of substantial change." [Citation.]' " (*Ibid.*)

(*Id.* at p. 923.)

In *Carter*, the legislature introduced the amendment two months after the controversy was spelled out in *Salazar I.* (*Ibid.*) Not all ambiguities are discovered by the Legislature. Sometimes a latent ambiguity can be identified in an extrinsic source. (See *Coburn v. Sievert* (2005) 133 Cal. App. 4th 1483, 1495.) In this case the ambiguity was highlighted in the following newspaper article.

On May 5, 2013, about six months after Proposition 36 was passed, Paul Elias of the Associate Press published an AP Exclusive: New '3 Strikes' law varies by county.[10]

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10. Appellant will file a separate motion for judicial notice pursuant to Evidence Code section 452 of Paul Elias of the Associate Press, AP Exclusive: New '3 Strikes' law

Elias observed that whether a third striker "will gain freedom varies greatly depending upon the county that sent him away." For example, in San Bernardino 33% of petitioners are released, but in Los Angeles or San Diego Counties, only 6% are released. Proposition 36 author and director of the Three Strikes Project at Stanford Law School, Michael Romano stated, "[w]e are frustrated that some DAs are stubbornly refusing to follow the law." Elias opined that the contrast between counties is due "in large part because of the different philosophies among local prosecutors." (Paul Elias of the Associate Press, AP Exclusive: New '3 Strikes' law varies by county. 5/4/2013. http://www.mercurynews.com/ci_23172736/ap-exclusive-new-3-strikes-law-varies-by.)

At the time of the Romano and Mill's journal article, "The Passage and Implementation of the Three Strikes Reform Act of 2102 (Proposition 36)" Federal Sentencing Reporter, Vl. 25, No 4, pp. 265, "only two petitions have been denied on findings of continued dangerousness." (*Ibid.*) There are currently at least 10 cases pending review in the California Supreme Court because the defendant's petition was denied on a finding of dangerousness *not* as defined in section 1170.18, subdivision (c).[11]

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varies by county. 5/4/2013. http://www.mercurynews.com/ci_23172736/ap-exclusive-new-3-strikes-law-varies-by

11. Appellant will file a separate request for judicial notice pursuant to Evidence Code section 452, of the following petitions for reviewed granted since "The Passage and Implementation of the Three Strikes Reform Act of 2102 (Proposition 36)" Federal Sentencing Reporter, Vl. 25, No 4, was written: *People v. Guzman* (S226410); *People v. Davis* (S225603); *People v. Crockett* (S225198); *People v. Rodriguez* (S225047); *People v. Payne* (S223856); *People v. Chaney* (S223676); *People v. Aparicio* (S224317); *People v. Superior Court* (*Williams*) (S223807); and *People v. Superior Court* (*Burton*) (S223805).

Prior to 2014, the standard for determining dangerousness was not defined, resulting in ad hoc determinations by the courts. This lack of guidance resulted in non-uniform application of "unreasonable risk of danger to public safety." Proposition 47 could not have been passed quicker, short of an emergency election. For this reason, the definition in Proposition 47 is clearly a reaction and solution to the ambiguity created by Proposition 36. After the ambiguity was discovered, a definition of dangerousness was provided in Proposition 47. This definition embodied the original intent provided in the ballot material for Proposition 36.

C. Prospective Application Would Produce Absurd and Unconstitutional Results

Since the definition of dangerousness is to be applied to section 1170.126 petitions as well as section 1170.18 petitions, to only apply that definition prospectively would produce absurd and unconstitutional results. As stated earlier, an absurd result is one that is "clearly contrary to legislative intent." (See *Cassell v. Superior Court* (2011) 51 Cal. 4th 113, 136.) The absurd result exception should not be used when the courts do not like the laws, or to act as a Monday morning quarterback to second guess the wisdom of the legislation. "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. . . ." (Code Civ. Proc., § 1858.) It is not for the courts to write the laws, but rather to implement them. "Where competing policy concerns are present, it is for the Legislature [not the Courts] to resolve them." (*Id.* at p. 124.)

The most striking of the absurd results in applying the definition in section 1170.18 prospectively to petitions under section 1170.126 is that it would effectively create a two day window for Proposition 36 petitions. Section 1170.126 explicitly states that petitions shall be brought within "two years after the effective date of the act." (§ 1170.126, subd. (b).) The Act went into effect on November 7, 2012. The definition of dangerousness in section 1170.18, subdivision (c) did not go into effect until November 5, 2014. Prospective application would have produced a two day window for petitioners under section 1170.126 to avail themselves of the definition in section 1170.18, subdivision (c). Furthermore that would act to punish petitioners who filed their petitions promptly as encouraged by the two year sunset provision.

Lastly, this disparate treatment would also produce equal protection and due process concerns. When the constitutional validity of an act of Legislation is called into question "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question [of its constitutionality] may be avoided.' (*Crowell v. Benson* (1932) 285 U.S. 22, 62 [52 S. Ct. 285, 296, 76 L. Ed. 598])" (*U.S. v. Thirty-Seven (37) Photographs* (1971) 402 U.S. 363, 369 [91 S. Ct. 1400, 1404, 28 L. Ed.2d 822].)

The Fourteenth Amendment requires equal protection of the laws. '[T]the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination." (*Loving v. Virginia* (1967) 388 U.S. 1, 10 [87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010].)

The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*People v. Wilkerson* (2004) 33 Cal. 4th 821.) "Equal protection of the law "means simply 'that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." [Citation omitted.]" (*Warden v. State Bar* (1999) 21 Cal.4th 628, 660.) "[E]qual protection safeguards against the arbitrary denial of benefits to a certain defined class of individuals." (*People v. McKee* (2010) 47 Cal.4th 1172, 1207.)

Arguing without conceding that the appropriate test is the rational basis test, what could be the possible rational basis for treating differently those who filed their petition for resentencing between November 7, 2012 and November 4, 2014 from those who filed after the effective date of the new definition of dangerousness? This is the definition of arbitrary.

Although the California "Constitution does not speak in express terms of 'equal protection,' it does contain provisions requiring the uniform operation of laws and a prohibition against special legislation. (Cal. Const., art. I, s 7.) These provisions are substantially equivalent to the equal protection of the laws as prescribed by the Fourteenth Amendment of the Constitution of the United States. (*Abel v. Cory* (1977) 71 Cal.App.3d 589, 597.) The due process implication is that the intent of Proposition 36 was that only the extreme *outlier* case should be denied relief upon a finding of dangerousness, (See "The Passage and Implementation of the Three Strikes Reform Act of 2102 (Proposition 36)" Federal Sentencing Reporter, Vl. 25, No 4, at p. 368), and that

those findings are made in an ad hoc manner. (See Paul Elias of the Associate Press, AP Exclusive: New '3 Strikes' law varies by county. 5/4/2013. http://www.mercurynews.com/ci_23172736/ap-exclusive-new-3-strikes-law-varies-by.)

D. The *Estrada Rule* Mandates Retrospective Application

Because the Court of Appeal found that the definition of dangerousness did not apply to section 1170.126 petitions, it did not address this issue. Judge's Pena's concurring opinion urged that the electorate did not intend section 1170.18, subdivision (c) to apply retroactively, and the *Estrada* rule was not controlling because the Act does not reduce punishment. (Opinion, concurring pp. 1, 7-8.)

Retrospective application of the definition of unreasonable risk of danger to public safety is required. Proposition 47's new definition of "unreasonable risk of danger to public safety" governs this Court's disposition of this pending section 1170.126 appeal, because the matter was not yet final on the date of the initiative's adoption on November 5, 2014. "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. [Citations.]" (*Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489; *Kuykendall v. State Board of Equalization* (1994) 22 Cal.App.4th 1194, 1207.) "[T]he law as it exists" now is that "unreasonable risk of danger to public safety" is defined as a risk that the inmate will commit a "Super Strike" if resentenced. That is the standard the Court of Appeal should have applied in evaluating the trial court's denial of petitioner's section 1170.126 petition.

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, e.g., *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*, 22 Cal.App.4th at 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. [Citation.]" (*Johnston, supra,* 121 Cal.App.3d at 375.)

Legislation concerning *a remedial resentencing mechanism* is entitled to the fullest retroactive application. (See *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 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.*)

The resentencing provisions under section 1170.126 are not a change in the law to *affect future* behavior, but rather an expression of the people of the State of California to *restore* the Three Strikes laws to impose a life sentence only when the third felony is a strike. For this reason the *People v. Brown* (2012) 54 Cal. 4th 314 exception to the rule in *In re Estrada* (1965) 63 Cal.2d 740 is inapplicable.

In *Brown*, the California Supreme Court held that section 4019 was intended to act prospectively. (*People v. Brown, supra,* 54 Cal. 4th 323.) "Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent. When the Legislature has not made its intent on the matter clear with respect to a particular statute, the Legislature's generally applicable declaration in section 3 provides the default rule: "No part of [the Penal Code] is retroactive, unless expressly so declared." We have 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. [Citations omitted.]" (*People v. Brown, supra,* 54 Cal.4th at pp. 319-20.)

The holding in *Brown* was based largely upon the fact that custody credits are used as an incentive for inmates to behave themselves while in custody. If the statute were to operate retroactively, the practical effect would be to extend benefits to "those who did not expect to receive them, and whose behavior therefore could not have been motivated by the prospect of receiving them." (*Id.* at p. 329.)

Brown was an exception to the general rule announced in *Estrada*. "This court's decision in *Estrada, supra,* 63 Cal.2d 740, supports 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. (*People v. Brown, supra,* 54 Cal.4th at pp. 742–748.) 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." (*Id.,* at p. 745, italics added.) " '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' " (*ibid.*)—a motive we were unwilling to attribute to the Legislature. On this basis we concluded the inference was " inevitable ... 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." (*Ibid.*)" (*People v. Brown, supra,* 54 Cal.4th at p. 323.)

In *Estrada*, when the defendant escaped from the rehabilitation center the punishment was "at least a one-year period." (*In re Estrada, supra,* 63 Cal.2d. at p. 743.) Several months after the escape, the statute was amended to reduce the penalties to six months. (*Ibid.*) The minimum time necessary to be spent in prison before eligibility for parole had likewise been reduced. (*Ibid.*) The defendant brought a writ of habeas corpus.

(*In re Estrada, supra,* 63 Cal.2d. at p. 743.) The Court first concluded that "[w]hen 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." (*Id.* at p. 745.)

> 'This application of statutes reducing punishment accords with the best modern theories concerning the functions of punishment in criminal law. According to these theories, the punishment or treatment of criminal offenders is directed toward one or more of three ends: (1) to discourage and act as a deterrent upon future criminal activity, (2) to confine the offender so that he may not harm society and (3) to correct and rehabilitate the offender. There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution. [Citations omitted.] 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. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance. As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts.' [Citations omitted.]

(*In re Estrada, supra,* 63 Cal.2d at p. 745-46.)

The Court in *Estrada* also dismissed the presumption against retroactivity, stating that section 3 "is not a straightjacket," but rather merely a rule of construction to use when the legislation has not made clear its intent. (*In re Estrada, supra,* 63 Cal.2d at p. 746.) To use the definition of "unreasonable risk of danger to public safety" in section 1170.18, subdivision (c) to those pending appeal of a resentencing hearing under the Act

is the appropriate because Proposition 36 and 47 provided mitigation of penalty that is sufficient to meet the legitimate ends of the criminal law. Accordingly, it is "the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts.' (*In re Estrada*, *supra*, 63 Cal.2d at p. 746.)

To find that the definition provided in section 1170.18, subdivision (c) does not apply to those pending appeal of a resentencing petition under the Act, but applies to those who file their petition after the effective date of section 1170.18 (November 5, 2014) is completely illogical, a denial of due process and equal protection. That would affect only those who filed their petition within a two day period (between November 5, 2014 and November 7, 2014) because petitions under the Act were to be filed within 2 years of enactment of the Act. (§1170.126, subd. (b).)

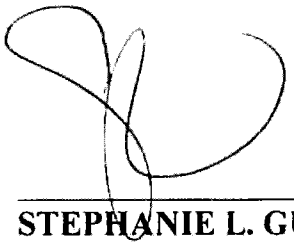
Most importantly Proposition 36 changed the punishment for third strikers. Proposition 36 added that "if the defendant has two or more prior serious and/or violent felony convictions . . . and the current offense is not a serious or violent felony . . . the defendant shall be sentenced" according to section 667, subdivision (e)(1) which provides for a doubled sentence only. Proposition also 36 provided resentencing procedures for persons who were not eligible for relief under the new sentencing procedures due to the timing of their conviction. Clearly the electorate intended that the mitigated sentencing schemes apply to as many people as possible. For these reasons, the rule in *Estrada* should be followed and the definition provided in section 1170.18, subdivision (c) should be applied to appellant's resentencing petition.

CONCLUSION

For the forgoing reasons, appellant respectfully requests this Court find that the definition of "unreasonable risk of danger" as provided in section 1170.18, subdivision (c) means an unreasonable risk that the petitioner will commit a new felony within the meaning of clause (iv), of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667," and that plain meaning does not frustrate the purpose or intent of the electorate in enacting Proposition 36 in 2012 and Proposition 47 in 2014. Furthermore, appellant respectfully requests that this Court find that the definition of dangerousness as provided in section 1170.18, subdivision (c) is clarifying and does not invoke the presumption against retroactivity. Lastly, that this Court reverse and remand the Court of Appeal to dispose of this appeal in accordance with that finding.

July 15, 2015

Respectfully submitted,



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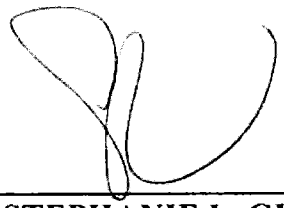
CERTIFICATE OF COMPLIANCE

I, Stephanie L. Gunther, certify that the following OPENING BRIEF ON THE MERITS uses 13-point Times New Roman font in Word, and contains 13,928 words, excluding the cover, tables, signature block and this certificate.

The Undersigned certifies that this brief complies with the form requirements set for by rule 8.520, and 8.204 and contains fewer words that specified in rule 8.520.



STEPHANIE L. GUNTHER

Re: *People v. Valencia*
No. S223825
5th DCA No. F067946
Tuolumne County No. CRF30714

ATTORNEY'S CERTIFICATE OF ELECTRONIC & MAIL SERVICE
(Code Civ. Proc., § 1013a (2); Cal. Rules of Court., rules 8.71(f) and 8.77)

I, *STEPHANIE L. GUNTHER*, certify:

I am an active member of the State Bar of California and am not a party to this cause. My electronic service address is *stephanielgunther@gmail.com* and my business address is *841 Mohawk Street, Suite 260, Bakersfield, CA 93309*. On *July 15, 2015,* 11:00 a.m., I transmitted a PDF version of *OPENING BRIEF ON THE MERITS* by electronic mail to the party(s) identified below using the e-mail service addresses indicated through TrueFiling or e-mail:

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And in a *MAILBOX* regularly maintained by the United States Postal Service at *Bakersfield, CA*, in a sealed envelope with postage fully prepaid, addressed to each the following:

Superior Court of California Tuolumne County 60 N. Washington Street Sonora, CA 95379 Attn: Hon. Eleanor Provost, Judge	David Valencia, AB9906 Corcoran State Prison P.O. Box 8800 Corcoran, CA 93212

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on *July 15, 2015*, at *Bakersfield*, California.

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