In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **VERONICA L. DE HOYOS, ET AL,** **Defendant and Appellant.**	Case No. S228230

Fourth Appellate District, Division One, Case No. D065961
San Diego County Superior Court, Case No. SCD252670
The Honorable Peter C. Deddeh, Gale E. Kaneshiro, and
The Honorable Lisa C. Schall, Judges Presiding

ANSWERING BRIEF ON THE MERITS

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INTRODUCTION

In November 2014, the voters passed Proposition 47 (the Act). In addition to reducing specified drug and theft offenses to misdemeanors, the Act provides procedures for individuals who are currently serving a sentence for convictions that would have been misdemeanors under the Act to petition for relief. (Pen. Code,[1] § 1170.18, subd. (a).) Under this petitioning procedure, if the superior court determines that a petitioner is eligible for relief and does not pose an unreasonable risk of danger to public safety, it will recall the petitioner's felony sentence and resentence the petitioner to a misdemeanor. (§ 1170.18, subd. (a).)

Appellant was convicted of possession of methamphetamine and sentenced to three years' probation in May 2014. Although she was currently serving her sentence at the time Proposition 47 was enacted, she argues that she is entitled to a remand and automatic reduction of her sentence because her conviction is not yet final. However, the language of Proposition 47 is clear—appellant may only be resentenced after she petitions the trial court to determine whether she is eligible and whether she poses an unreasonable danger to public safety. She may not frustrate the intent of the voters by circumventing the plain language of the Act.

STATEMENT OF THE CASE AND FACTS

On December 9, 2013, during a consensual search, police officers discovered a bag of methamphetamine in appellant's pocket. (2 RT 165–166.) An Orange County jury found appellant guilty of possession of a controlled substance (methamphetamine). (Health & Saf. Code, § 11377, subd. (a).) (CT 130–131.) On May 8, 2014, the trial court sentenced her to three years' probation. (CT 132, 214.)

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[1] All further unspecified statutory references will be to the Penal Code.

On direct appeal, appellant argued that recent amendments to Health and Safety Code section 11377 required that the Court of Appeal reduce her conviction to a misdemeanor and remand the matter for resentencing. In a published opinion, the court rejected her argument and held that, to be considered for resentencing, appellant must utilize Proposition 47's petitioning procedure, as specified in section 1170.18. (*People v. DeHoyos* (June 30, 2015) D065961, slip op. at p. 12 (*DeHoyos*).)

Appellant petitioned for review, raising four issues. This Court granted the petition without limiting the issues. However, in her Opening Brief on the Merits she only addresses one: whether she must file a petition for resentencing in the trial court, as required by section 1170.18, subdivision (a), or whether she is entitled to automatic resentencing on appeal. (See ABOM 1.)

ARGUMENT

UNDER THE PLAIN LANGUAGE OF PROPOSITION 47, INDIVIDUALS CURRENTLY SERVING A SENTENCE FOR ELIGIBLE OFFENSES MUST FILE A PETITION FOR RECALL OF SENTENCE SO THE TRIAL COURT CAN DETERMINE IF THEY ARE ELIGIBLE FOR RELIEF AND IF THEY POSE AN UNREASONABLE RISK OF DANGER TO THE PUBLIC

Appellant contends that Proposition 47 must be interpreted in light of this Court's decisions in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and *In re Kirk* (1965) 63 Cal.2d 761 (*Kirk*), which held that statutes reducing punishment may be presumed to apply retroactively to non-final judgments, unless there is evidence of contrary legislative intent. (ABOM 17–22.) Appellant's argument ignores that the plain language of Proposition 47 indicates such contrary intent by defining two categories of individuals who may be eligible for retroactive relief: those "currently serving a sentence" and those who have completed a sentence for offenses that would have been misdemeanors under Proposition 47. The Act then provides a

procedure by which those two categories of individuals may seek resentencing relief. The Act does not further classify an individual based on whether his or her judgment of conviction is final. Thus, the plain and unambiguous language of the Act indicates that the only relevant classification is whether a person is currently serving a sentence for an offense that would have been a misdemeanor and that all individuals within that category may seek relief by filing a petition in the trial court.

Since Proposition 47 provides this petitioning procedure for those who are currently serving a sentence, *Estrada* and *Kirk* do not apply. Those cases do not overrule the statutory presumption that new statutes operate prospectively. Instead, this Court has only presumed that a statute reducing punishment applies retroactively when the statute is silent as to how the change should be applied. However, Proposition 47 did not merely reduce the punishment for enumerated offenses; it also provided a comprehensive statutory scheme defining its applicability. For this reason, a "saving clause" analysis does not apply, and even if it did apply, section 1170.18's petitioning procedure is the functional equivalent of a saving clause. Moreover, this interpretation of Proposition 47 is consistent with the voters' explicit public safety goals. Although the Act reduced punishment for certain offenses, the ballot materials assured the voters that no prisoners would be automatically released. To ensure public safety, the Act required that all individuals currently serving a sentence be evaluated for dangerousness before permitting them to be resentenced.

This petitioning procedure provides appellant a remedy, and she may be eligible for relief. However, under the plain language of Proposition 47, this procedure is the only way she may receive misdemeanor resentencing, and she must avail herself of that procedure. Nothing in the Act authorizes automatic resentencing on appeal. Moreover, since the language of the Act is unambiguous, the rule of lenity does not apply.

A. The Safe Neighborhoods and Schools Act

On November 4, 2014, the voters approved Proposition 47, the "Safe Neighborhoods and Schools Act," and it became effective the next day. (Cal. Const., art. II, § 10 (a) ["An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise"]; *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328 (*Diaz*).) The declared purposes of Proposition 47 included the following: "ensur[ing] that people convicted of murder, rape, and child molestation will not benefit;" "reduc[ing] felonies for [certain] nonserious, nonviolent crimes like petty theft and drug possession" to misdemeanors; "authoriz[ing] consideration of resentencing for anyone who is currently serving a sentence" for the listed offenses; and "requir[ing] a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70; *Diaz*, *supra*, 238 Cal.App.4th at p. 1328.)

To achieve those purposes, Proposition 47 first reduced specified nonserious, nonviolent felonies to misdemeanors. (*Diaz*, *supra*, 238 Cal.App.4th at p. 1325.) Among these specified offenses was Health and Safety Code section 11377.

Second, Proposition 47 provided a process by which those already convicted of these specified offenses can petition to have those convictions reduced to misdemeanors. Specifically, "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . . ." (§ 1170.18, subd. (a).) This procedure further requires that the trial court determine

whether the prior conviction would be a misdemeanor. If so, "the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

Finally, Proposition 47 provided a process by which those who have completed their sentence for a crime reduced by Proposition 47 can apply for relief. Pursuant to section 1170.18, subdivision (f), "[a] person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor." (§ 1170.18, subd. (g).) These procedures are not available to individuals who have a prior conviction for an offense specified by section 667, subdivision (e)(2)(C)(iv), or an offense requiring registration pursuant to section 290, subdivision (c). (§ 1170.18, subd. (i).)

Appellant's conviction under section 11377 constitutes a felony offense that may qualify her for resentencing under Proposition 47. At issue, however, is whether she must file a petition for resentencing in the trial court, as required by section 1170.18, subdivision (a), or whether she is entitled to automatic resentencing on appeal under the newly modified Health and Safety Code section 11377 without having to file a petition in the superior court.

B. General Principles of Statutory Construction

The interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. (*People v.*

Park (2013) 56 Cal.4th 782, 796.) First, the language of the statute is given its ordinary and plain meaning. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901 (*Robert L.*).) Second, the statutory language is construed in the context of the statute as a whole and within the framework of the overall statutory scheme to effectuate the voters' intent. (*Ibid.*) In this regard, statutes addressing the same subject matter and enacted at the same time should be construed together. (*People v. Honig* (1996) 48 Cal.App.4th 289, 327; *Stickel v. Harris* (1987) 196 Cal.App.3d 575, 590.) Third, where the language is ambiguous, the court will look to "other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Robert L.*, *supra*, 30 Cal.4th at p. 900; *People v. Floyd* (2003) 31 Cal.4th 179, 187–188 (*Floyd*) [The ballot pamphlet information is a valuable aid in construing the intent of voters].) Any ambiguities in an initiative statute are "not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent [electorate] intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782, internal citation and quotation omitted.) Ultimately, the court's duty is to interpret and apply the language of the initiative "so as to effectuate the electorate's intent." (*Robert L.*, *supra*, 30 Cal.4th at p. 900.)

C. "Currently Serving a Sentence" Is Not Ambiguous and Does Not Indicate That Finality of Judgment Is Relevant

Appellant encourages this Court to find ambiguities in the plain language of Proposition 47 where none exist. (ABOM 11–14.) Section 1170.18, subdivision (a), states that "[a] person currently serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction." The

ordinary and plain meaning of these words, and in particular the phrase "a person currently serving a sentence for a conviction" is that section 1170.18, subdivision (a), extends relief to a defined category of individuals—those serving a sentence for a Proposition 47-qualifying offense when the initiative became effective. Further, as discussed, section 1170.18, subdivision (f), extends relief to another defined category of individuals—those who have completed their sentence for a Proposition 47-qualifying offense. Both categories are defined by whether the individual is serving a sentence. (*People v. Shabazz* (2015) 237 Cal.App.4th 303, 307–315 (*Shabazz*) ["Section 1170.18 identifies two ways a defendant sentenced or placed on probation prior to Proposition 47's effective date can have his or her sentence for an enumerated felony reduced to a misdemeanor"].) Section 1170.18 does not further subdivide these two categories, and it makes no reference to whether a defendant's judgment of conviction is final. (*Id.* at p. 313 [stating that Proposition 47 "expressly, specifically and clearly address[es] the application of the reduced punishment provisions to convicted felons who were sentenced or placed on probation prior to Proposition 47's effective date . . . without regard to the finality of the judgment"].) Thus, the plain language of this section does not support appellant's creation of additional categories of individuals ("*Estrada*-defendants" and "*Kirk*-defendants") based on whether their judgments are final.[2] (See ABOM 12–13, 29.)

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[2] Appellant's primary critique of the Court of Appeal's opinion in this case is that the court did not distinguish between these additional classifications that she proposes. (ABOM 28–32.) As discussed, however, the plain language of section 1170.18 makes a different classification—based on whether an individual is currently serving a sentence—and explicitly does not classify individuals based on finality of judgment. Therefore, the text does not support appellant's critiques of the Court of Appeal's opinion.

That Proposition 47 makes no distinction between final and non-final judgments of conviction, instead only drawing a distinction between those currently serving a sentence and those who are not, plainly indicates that finality of judgment is irrelevant to a defendant's status under Proposition 47. (*Shabazz*, *supra*, 237 Cal.App.4th at p. 313.) Section 1170.18 could have been drafted so that it only applied to defendants whose judgments were final before Proposition's 47's effective date.[3] (See ABOM 27 [stating that the electorate could "have used language to the effect the petition process applies to all defendants 'regardless of their conviction status'"].) It was not. There is no ambiguity in the words used in the statute, and appellant's distinction between prisoners whose judgments are final and those whose are not simply attempts to create ambiguities where none exist. The plain language of the statute unambiguously indicates that finality of judgment status is irrelevant.

Appellant also attempts to create ambiguity by stating that "the only way to construe 'currently serving a sentence' . . . is to mean those defendants currently [serving] a sentence whose judgments are final." (ABOM 28.) To the contrary, however, Proposition 47 does not include that qualification. Indeed, appellant's interpretation violates the statutory cannon that "'[w]here the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of

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[3] This is particularly true given that a similar retroactivity debate regarding section 1170.126 of Proposition 36, the Three Strikes Reform Act of 2012, was in full swing long before Proposition 47 was enacted. (See e.g., *People v. Yearwood*, (2013) 213 Cal.App.4th 161 (*Yearwood*); *People v. Lester*, previously published at 220 Cal.App.4th 291, review granted January 15, 2014, S214648; *People v. Contreras*, previously published at 221 Cal.App.4th 558, review granted January 29, 2014, S215516; *People v. Lewis*, previously published at 216 Cal.App.4th 468, review granted August 14, 2013, S211494.)

the statute or from its legislative history.' " (*In re Jennings* (2004) 34 Cal.4th 254, 265.) By not including language about finality of judgment, it follows that "currently serving a sentence" refers to *all* persons who are currently serving a sentence, regardless of whether their judgments are final.

Appellant is currently serving a sentence for violation of Health and Safety Code section 11377. Because section 1170.18, subdivision (a), explicitly applies to all persons currently serving a sentence for an enumerated offense, the petitioning procedures therein apply to her. That section requires that she seek resentencing relief through a petition for recall of sentence in the superior court.

D. *Estrada* and *Kirk* Do Not Apply Because the Act Is a Comprehensive Scheme Rather Than a Simple Reduction of Punishment

Contrary to appellant's position (ABOM 17–22), this Court's prior decisions in *Estrada* and *Kirk* do not apply to Proposition 47. Those cases narrowly assume that a statute reducing punishment for a particular crime applies to all defendants whose judgments are not final, absent evidence to the contrary, but they preserve the statutory presumption under section 3 that statutes operate prospectively. In addition, this Court has consistently limited the applicability of *Estrada* and *Kirk* to cases in which statutory amendments simply reduce the punishment for a particular offense without further defining the intent or applicability of the change. Thus, since Proposition 47 provides a comprehensive statutory scheme defining its intent and applicability, *Estrada* and *Kirk* do not apply.

1. *Estrada* and *Kirk* do not overrule the statutory presumption that new statutes operate prospectively

Section 3 of the Penal Code provides that when a statute does not have an express retroactivity provision, it will be presumed that the

Legislature intended the statute to operate prospectively and not retroactively unless there is clear extrinsic evidence demonstrating otherwise. (*People v. Brown III* (2012) 54 Cal.4th 314, 319 (*Brown*); *Floyd*, *supra*, 31 Cal.4th at p. 184.)

In *Estrada*, this Court addressed a situation in which an amendatory act lessened the punishment for escape, but the new statute was unclear as to whether it applied prospectively or retroactively. (*Estrada*, *supra*, 63 Cal.2d at pp. 743–744.) This Court acknowledged that statutes are presumed to operate prospectively, but it determined that the Legislature did not make clear whether the old or new statute would apply to individuals whose convictions were not yet final. (*Id.* at p. 744.) Therefore, it was necessary to ascertain legislative intent. (*Ibid.*) Since the statute had lessened the punishment for escape, this Court concluded that the Legislature "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 pp. 744–745.) Accordingly, this Court established what is known as the *Estrada* rule: a statute reducing punishment for a particular criminal offense is assumed, absent evidence to the contrary, to apply to all defendants whose judgments are not yet final at the operative date.[4] (*Id.* at pp. 744, 748; *Brown*, *supra*, 54 Cal.4th at p. 323.) This rule applies equally to amendments enacted through the initiative process. (*Floyd*, *supra*, 31 Cal.4th at p. 182.)

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[4] A judgment becomes final once there are no available remedies on direct review. (*In re Pine* (1977) 66 Cal.App.3d 593, 594.)

Kirk, in turn, specifically applied the *Estrada* rule to defendants who had already been sentenced, but whose judgments were not final, when a statutory amendment lessened the punishment for their offenses. (*Kirk*, *supra*, 63 Cal.2d at p. 761.) There, the defendant was convicted of issuing checks totaling $75 (§ 476a). (*Kirk*, *supra*, 63 Cal.2d at pp. 762–763.) At the time he was convicted and sentenced, the penalty for issuing checks of $50 or more could include imprisonment in county jail or state prison. (*Ibid.*) While his appeal was pending, that amount increased from $50 to $100. (*Id.* at p. 763.) As a result, issuing checks totaling $75 would be subject only to imprisonment in county jail. (*Ibid.*) This Court held that the defendant was entitled to benefit from the amendment. (*Ibid.*)

Neither *Estrada* nor *Kirk*, however, provides a defendant whose judgment is not final with an independent right to relief anytime a statute is amended to provide a reduced punishment. Appellant's argument reverses the analysis by applying *Estrada* and *Kirk* before considering the entire statutory scheme. (See ABOM 23–25, 39–40.) *Estrada* and *Kirk* did not overrule the codified common-law presumption that lawmakers intend new statutes to operate prospectively. (§ 3; *Estrada*, *supra*, 63 Cal.2d at p. 746; *Kirk*, *supra*, 63 Cal.2d at pp. 761–763; *Brown*, *supra*, 54 Cal.4th at p. 319.) Instead, "[t]he basis of [the California Supreme Court's] decision in *Estrada* was [a] quest for legislative intent." (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1045 (*Pedro T.*).) Legislative intent is determined through a review of the statutory scheme as a whole with any ambiguities presumed to be prospective. (*Brown*, *supra*, 54 Cal.4th at pp. 319–320 ["[A] statute that is ambiguous with respect to retroactivity application is construed . . . to be unambiguously prospective"]; *People v. Nasalga* (1996) 12 Cal.4th 784, 793 (*Nasalga*).) Thus, rather than providing for automatic application of any new punishment-reducing statute to all pending appeals, as appellant suggests, *Estrada* simply provided guidance in statutory interpretation to

cases where, unlike here, the scope of the new punishment scheme is unclear.

2. This Court has consistently limited the applicability of *Estrada* and *Kirk* to cases in which statutory amendments simply reduce the punishment for a particular offense without further defining the intent or applicability of the change

This Court has applied *Estrada* and *Kirk* to statutory amendments that, as in those two cases, simply reduce the punishment for a particular offense. In *Nasalga*, *supra*, 12 Cal.4th 784, this Court addressed financial thresholds to a grand theft enhancement (§ 12022.6, subd. (b)). (*Nasalga*, *supra*, 12 Cal.4th at p. 794.) Similar to the defendant in *Kirk*, the defendant in *Nasalga* originally met the threshold level for harsher punishment, but before her conviction was final, an amendment increased the threshold beyond the amount she had stolen. (*Nasalga*, *supra*, 12 Cal.4th at p. 788.) On appeal, she sought the benefit of the amendment and a reduced sentence. (*Ibid.*) Noting that the amendment was merely "intended to account for the effects of inflation since 1977 when the tiers were first set," and finding nothing to indicate that the Legislature did not intend the amendment to apply to the defendant, this Court held that she was entitled to benefit from the change. (*Id.* at pp. 794–798.) Likewise, in *People v. Hajek* (2014) 58 Cal.4th 1144, 1196 (*Hajek*), this Court applied the *Estrada* rule to strike the defendant's firearm use enhancements involving the use of a pellet gun following amendments that made the enhancement inapplicable to pellet guns. Although this Court applied the *Estrada* rule in *Hajek*, it was careful to emphasize section 3's "default rule of prospective operation." (*Ibid.*) The Court "emphasized [the *Estrada* rule's] narrowness" and reiterated that " 'language in *Estrada* . . . should not be interpreted as modifying this well-established legislatively-mandated

principle[.]'" (*Ibid.*, quoting *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188.)

By contrast, this Court has consistently declined to apply *Estrada* to statutory amendments that do more than simply reduce the punishment for a particular offense. In *Pedro T.*, this Court addressed the applicability of *Estrada* to a statute that temporarily increased the punishment for a crime. There, the Legislature had amended Vehicle Code section 10851 in 1989 to increase the maximum punishment for taking a vehicle from three to four years. (*Pedro T.*, *supra*, 8 Cal.4th at p. 1041.) The amendment further provided that, three years later, the original, lesser punishment would be reinstated. (*Ibid.*) The minor at issue had violated Vehicle Code section 10851 during the period of increased punishment, but his conviction was not yet final when the "sunset" provision expired, and he argued on appeal that, per *Estrada*, he was entitled to the lesser punishment. (*Ibid.*) This Court held that *Estrada* did not apply. (*Ibid.*) The Court explained that the temporary increase in punishment followed by a "sunset" provision was not equivalent to the decreased punishment in *Estrada*. (*Id.* at p. 1046.) Instead, the stated purpose of the temporary increased punishment was to impose stricter punishment for such crimes because motor vehicle theft had "reached crisis proportions." (*Ibid.*) Since the Legislature had expressly declared that increased penalties were necessary during that period of time, *Estrada* was not implicated. (*Ibid.*)

In *Floyd*, *supra*, 31 Cal.4th 179, this Court addressed a statute that expressly stated the electorate's intent that a reduced punishment be applied only prospectively. (*Id.* at p. 183.) There, two days before the defendant was sentenced, California voters passed the Substance Abuse and Crime Prevention Act of 2000, which required that certain adult drug offenders receive probation and drug treatment. (*Ibid.*) An uncodified portion of the initiave stated that "its provision shall be applied prospectively." (*Ibid.*)

Because of that language, this Court held that the electorate clearly stated its intent and that the defendant could not benefit from the change to the law. (*Id.* at p. 185.)

In *Brown, supra*, 54 Cal.4th 314, this Court confined "the rule and logic of *Estrada*" to statutes mitigating punishment for a particular crime and declined to extend it to custody credits that reward good behavior in prison. (*Id.* at p. 325.)

As these cases illustrate, this Court has consistently limited the applicability of *Estrada* and *Kirk* to cases in which statutory amendments simply reduce the punishment for a particular offense without further defining the intent or applicability of the change. These cases do not support appellant's argument that *Estrada* and *Kirk* broadly apply to any statutes reducing punishment unless they explicitly mention conviction status. (ABOM 27–28.) To the contrary, none of these cases indicates that a statute must use specific language to avoid being retroactive. Instead of requiring any particular words or phrases, these cases acknowledge the variety of ways that a statute may demonstrate its intent and applicability.

3. *Estrada* and *Kirk* do not apply to this case because Proposition 47 does not simply reduce punishment; it provides a comprehensive statutory scheme defining its intent and applicability

Estrada and *Kirk* do not apply in this case because Proposition 47 does not simply reduce the punishment for specified offenses. Unlike *Estrada*, in which the Court decided between an obsolete punishment scheme and the amended law, Proposition 47 creates a new section within a comprehensive scheme that addresses both prospective and retroactive application.

In addition to reducing certain offenses to misdemeanors, Proposition 47 included section 1170.18, which expressly grants its benefits to many individuals already sentenced for qualifying offenses and prescribes a

procedure by which those individuals may petition for relief. Thus, when read as a whole, Proposition 47 addresses the concerns at issue in *Estrada*, *Kirk*, and *Nasalga*. The court is not deciding between an old punishment scheme and a new and more lenient scheme. The question instead is which section of the new sentencing scheme applies to appellant. The plain language of the Act demonstrates an unequivocal intent that section 1170.18, not amended Health and Safety Code section 11377, apply to all prisoners currently serving a sentence, regardless of the finality of judgment. Because appellant is "currently serving a sentence for a conviction," section 1170.18 governs. By providing the circumstances under which defendants who have been sentenced may be eligible for relief and providing a petitioning procedure, the electorate left no ambiguity regarding its applicability to defendants whose convictions were not final.

Moreover, the rationale that compelled the result in *Estrada* is wholly absent here. The *Estrada* court was concerned that applying an old punishment scheme to a defendant whose judgment was not yet final, even after lawmakers enacted a new punishment scheme designed to reduce punishment for that defendant's particular crime, would contravene the lawmakers' goals in reducing that punishment. (See *Estrada*, *supra*, 63 Cal.2d at pp. 745–746 ["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."].) Here, unlike in *Estrada*, the Act lays out a comprehensive statutory scheme to ameliorate the punishments of *all* qualifying persons who fall under the purview of the Act. Thus, here it is not a question of whether this Court should permit the imposition of an *old* punishment scheme even after it has

been rejected by lawmakers, but rather a question of which of two *new* punishment schemes applies to appellant.

E. The *Estrada* "Saving Clause" Analysis Does Not Apply; to the Extent a Saving Clause Is Required, Section 1170.18 Is Its Functional Equivalent

Although *Estrada* discussed the importance of a "saving clause" to ascertain the intent of the Legislature, that analysis does not apply in this context. (See ABOM 24, 35.) The saving clause analysis derives from cases involving an outright repeal of a criminal statute where there is no new statute under which an offender may be punished. That is not the situation here. Moreover, even under the saving clause analysis, section 1170.18 is the functional equivalent of a saving clause, because it defines the criteria and process for retroactively applying Proposition 47. This interpretation of Proposition 47 is also consistent with the voters' goal of ensuring public safety. The ballot materials assured the voters that prisoners would not be automatically released but would instead be screened by the trial court to determine the prisoner's risk of dangerousness or conviction for a disqualifying offense.

1. The *Estrada* "saving clause" analysis does not apply

Because Proposition 47 is a comprehensive statutory scheme that provides the conditions under which those currently serving a sentence may seek relief, the *Estrada* "saving clause" analysis is inapt. *Estrada* stated that "[i]f there is no saving clause [an appellant] can and should be punished under the *new* law," rather than the old law. (*Estrada*, *supra*, 63 Cal.2d at p. 747 [emphasis added].) However, *Estrada* derived this rule from *Sekt v. Justice's Court of San Rafael Township* (1945) 26 Cal.2d 297 (*Sekt*), where the court explained that "the outright repeal of a criminal statute without a saving clause bars prosecution for violations of the statute

committed before the repeal." (*Sekt*, *supra*, 26 Cal.2d at p. 304.) As a consequence, "[t]his rule results, of course, in permitting a person who has admittedly committed a crime to go free, it being assumed that the Legislature, by repealing the law making the act a crime, did not desire anyone in the future whose conviction had not been reduced to final judgment to be punished under it." (*Ibid.*) However, the court clarified, "this rule only applies in its full force where there is an outright repeal, and where there is no other new or old law under which the offender may be punished." (*Id.* at pp. 304–305.)

This analysis does not apply here. Proposition 47 is not an "outright repeal" but rather an amendment of the law; and, moreover, it is not the case that there is "no other new or old law under which the offender may be punished" because section 1170.18 is a new law under which the offender may be punished. Indeed, unlike in *Estrada*, there is no need to "assume[]" what the Legislature intended because the Act is comprehensive—addressing not only future defendants (under the amended sections) but also persons "currently serving a sentence for a conviction" of a felony that would have been a misdemeanor under the Act—and therefore covers *all* sentencing scenarios. Therefore, the *Estrada* saving clause analysis does not apply in this case.

2. Section 1170.18 is the functional equivalent of a saving clause

Regardless, even under the *Estrada* saving clause analysis, section 1170.18 operates as the functional equivalent of a saving clause. A saving clause need not be explicit. (*Pedro T.*, *supra*, 8 Cal.4th at p. 1048.) "The rule in *Estrada* . . . is not implicated where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent." (*Nasalga*, *supra*, 12 Cal.4th at p. 793.) "[W]hat is required is that the Legislature demonstrate its intention

with sufficient clarity that a reviewing court can discern and effectuate it." (*Ibid.*, quoting *Pedro T.*, *supra*, 8 Cal.4th at p. 1046.)

Here, the electorate demonstrated its intent with sufficient clarity that appellant and other currently incarcerated individuals are required to petition for recall of sentence if they wish to benefit from Proposition 47. As discussed above, section 1170.18, subdivision (a), refers to individuals "currently serving a sentence," extends to them the possibility of relief, and provides a petitioning procedure. Thus, because those who are "currently serving a sentence" must file a petition for relief, the amended sections under Proposition 47, including Health and Safety Code section 11377, apply only prospectively to those who had not been sentenced before the Act's effective date. (See *Floyd*, *supra*, 31 Cal.4th at pp. 184–185; *Nasalga*, *supra*, 12 Cal.4th at p. 793; *Estrada*, *supra*, 63 Cal.2d at p. 747; *Yearwood*, *supra*, 213 Cal.App.4th at pp. 173–174.) By defining the applicability of Proposition 47 and providing a process for seeking relief, section 1170.18 is the functional equivalent of a saving clause.

3. This interpretation of section 1170.18 is consistent with the voters' public safety goal

Even if appellant were correct that the language of section 1170.18 is ambiguous (ABOM 32), application of section 1170.18 to all individuals currently serving a sentence is consistent with the voters' public safety goal. Although appellant states that the purpose of Proposition 47 was to broadly reduce punishment and save taxpayer money (ABOM 16, 22, 33–35, 40–43), these were not the only goals of the Act. In addition to reducing punishment for specified offenses and saving taxpayer money, as the Court of Appeal in this case recognized, Proposition 47 sought to promote public safety by not authorizing misdemeanor resentencing without first requiring that the trial court assess the defendant's risk of dangerousness and determine whether he or she has any "super strike" or

qualifying sex offense convictions.[5] (*DeHoyos*, *supra*, slip op. at p. 11 [acknowledging "a legislative intent *not* to permit the automatic application of Proposition 47 to anyone currently serving a sentence for a listed offense [but instead] to authorize and allow resentencing only for those individuals whose criminal history and risk assessment warrant it"].)

The General Election Voter Information Guide for November 4, 2014 ("voter guide") stated on page 34 that Proposition 47 "[r]equires resentencing for persons serving felony sentences for these offenses unless [the] court finds [an] unreasonable public safety risk." In addition, under the title "Resentencing of Previously Convicted Offenders," the voter guide stated at page 36 that "[t]his measure allows offenders currently serving felony sentences for the above crimes to apply to have their felony sentences reduced to misdemeanor sentences." The guide continued that "a court is not required to resentence an offender currently serving a felony sentence if the court finds it likely that the offender will commit a specified severe crime." Under the title "State Effects of Reduced Penalties," the guide explained at page 36 in the fourth sentence of the second paragraph that "the resentencing of inmates currently in state prison *could* result in the release of several thousand inmates." (Emphasis added.)

In the official argument against Proposition 47 on page 39 of the voter guide, opponents of the measure argued:

> *Prop. 47 will require the release of thousands of dangerous inmates*. Felons with prior convictions for armed robbery, kidnapping, carjacking, child abuse, residential burglary, arson, assault with a deadly weapon, and many other serious crimes will be eligible for early release under Prop. 47. These early releases will be virtually mandated by Proposition 47. While Prop. 47's backers say judges will be able to keep dangerous

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[5] Section 1170.18 specifically mandates that this finding be made by the trial court. (§ 1170.18, subd. (l).)

> offenders from being released early, this is simply not true. Prop. 47 prevents judges from blocking the early release of prisoners except in very rare cases. For example, even if the judge finds that the inmate poses a risk of committing crimes like kidnapping, robbery, assault, spousal abuse, torture of small animals, carjacking or felonies committed on behalf of a criminal street gang, Proposition 47 requires their release.

(Italics in original.) In the official rebuttal argument on page 39 of the voter guide, the proposition's proponents responded:

> *Proposition 47 does not require automatic release of anyone.* There is no automatic release. It includes strict protections to protect public safety and make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit.

(Italics in original.)

The analysis and arguments from the voter guide demonstrate that a major issue before the voters in deciding whether to approve Proposition 47 was whether the proposition's passage would result in the release of dangerous criminals. The proposition's proponents repeatedly reassured the voters that dangerous criminals would not be released from incarceration, and that the trial court would operate as a safeguard, preventing the release of those criminals deemed to pose an unreasonable risk to the public safety. Most specifically, voters were flatly told there would be "no automatic release." By using those words, the proposition's proponents guaranteed the public that those who were already incarcerated would not be granted automatic misdemeanor resentencing and released from incarceration. To the contrary, the voters were promised that resentencing would occur on a case-by-case basis. When the voters passed Proposition 47, they did so after having been informed that a particular defendant could only be granted resentencing after the trial court considered whether the defendant had committed any "super strike" offenses or offenses requiring sex offender registration, and after the court

determined that the defendant would not pose an unreasonable risk of danger to public safety.

In addition, because an incarcerated defendant's potential dangerousness has nothing to do with whether his appeal is still pending, it is unlikely that the average voter believed or desired that those already sentenced would receive automatic misdemeanor resentencing simply where their cases were not final. And while the average voter might not know what the finality of judgment specifically entails, the average voter would know that certain defendants will pose a danger to society if released.

F. Proposition 47 Provides Appellant a Process for Obtaining Resentencing Relief, but It Is the Only Way She Can Obtain Misdemeanor Resentencing, and She Must Avail Herself of That Process

Proposition 47 extends possible relief to those "currently serving a sentence" and those who have completed a sentence for offenses that were reduced from felonies to misdemeanors by the Act. (§ 1170.18, subds. (a) & (f).) This petitioning procedure is the only way appellant may be resentenced to a misdemeanor, and she must avail herself of this procedure in order to seek relief. As discussed above, the voters did not intend automatic release of any defendant who was already serving a sentence. Instead, the voters implemented a procedure whereby the trial court evaluates each offender on a case-by-case basis, evaluating his or her criminal background, custodial history, and dangerousness.

There are two components to this analysis. First, section 1170.18, subdivision (i), prohibits Proposition 47 resentencing where a defendant has committed a prior "super strike" offense, or a prior offense that requires registration under section 290. Similarly, Health and Safety Code section 11377, as amended by Proposition 47, provides that individuals with such prior convictions "may instead" receive felony sentences rather than

misdemeanor sentences. This analysis of a prisoner's record is not possible if the defendant does not file a petition in the trial court. As appellant recognizes in arguing for a remand, the appellate record alone does not provide the trial court with sufficient information to conduct this analysis. (See ABOM 33.) Prior to the passage of Proposition 47, the prosecution may have declined to present the entirety of a defendant's criminal record for a variety of reasons—for example, because it had already presented evidence of multiple other (non-"super strike") convictions, or because the defendant received multiple strike convictions in a single proceeding, and a five-year enhancement could not be imposed on each. (See *In re Harris* (1989) 49 Cal.3d 131, 136–137.) The prosecution also would have had no reason to present evidence of a defendant's conviction for a misdemeanor offense requiring sex offender registration, such as indecent exposure, sexual battery, or annoyance of a child. (§§ 290, subd. (c); 314, subd. (1); 243.4, subd. (d)(1); 647.6.) Following Proposition 47's passage, however, the district attorney's office and the probation department have an additional incentive to investigate and present all relevant information regarding a defendant's criminal history, including qualifying misdemeanor convictions or harder to prove out-of-state convictions that were not previously included—information that would otherwise be omitted from the record on appeal. For these reasons, the petitioning process enacted under section 1170.18 provides the mechanism by which a court may ensure that such relevant information is before it when it rules on a defendant's eligibility for resentencing. (See § 1170.18, subds. (a) & (b).)

Second, section 1170.18, subdivision (b), instructs the trial court to consider whether the prisoner is unreasonably dangerous by evaluating a prisoner's entire criminal conviction history, disciplinary record, and record of rehabilitation. This makes sense, since one of the stated purposes of Proposition 47 was to "require a thorough review of criminal history and

risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70; *Diaz*, *supra*, 238 Cal.App.4th at p. 1328.) This safeguard, however, only becomes applicable when the court "receive[es] a petition under [section 1170.18,] subdivision (a)." (§ 1170.18, subd. (b).) As a result, if a prisoner were to be automatically resentenced on remand under amended Health and Safety Code section 11377, rather than having to file a petition under section 1170.18, that person would be screened for potential disqualifying convictions but would not be screened for whether he or she poses a danger to public safety.

In effect, appellant seeks a "loophole" allowing automatic resentencing without full application of the Act's safeguards and, in particular, the dangerousness determination of section 1170.18, subdivision (b). (See ABOM 13–14 [stating that, because the dangerousness determination could render her ineligible for relief, she "should be not required to utilize the less effective remedy"]; ABOM 36 [arguing that "section 1170.18 provides disparate treatment and a less complete remedy than the revised statutes" because of the dangerousness determination].) She argues that cases on appeal should be remanded to the superior court, where "the District Attorney can run a thorough background check on each defendant" for disqualifying convictions, pursuant to Health and Safety Code section 11377. (ABOM 33.) This approach however, ignores and seeks to avoid the dangerousness determination that is explicitly required by section 1170.18, subdivision (b), for those "currently serving a sentence."

Although appellant does not seem to dispute that she is a "person currently serving a sentence for a conviction" that would have been a misdemeanor under the Act as described in section 1170.18, she nonetheless suggests that she can *also* seek the benefit of amended Health

and Safety Code section 11377. (ABOM 35–37.) She is mistaken. That a defendant should have a choice as to which sentencing scheme applies to him or her is a novel theory of criminal punishment and appellant notably cites no authority to support this theory. Indeed, implicit in the *Estrada* court's decision is the notion that one of two sentencing regimes applies, but not both. (See *Estrada*, *supra*, 63 Cal.2d at p. 744 [attempting to determine "*which* statute should apply"] [emphasis added] and at pp. 747–748 [analyzing "whether [petitioner] should be punished under the old law *or* the new one"] [emphasis added].) Here, section 1170.18 explicitly covers persons who, like appellant, are "currently serving a sentence for a conviction" that would have been a misdemeanor under the Act. It is therefore that provision, and none other, that applies to appellant.

Indeed, the Court of Appeal has consistently required that defendants file a petition in the trial court in order to receive Proposition 47 relief. (See *Shabazz*, *supra*, 237 Cal.App.4th at pp. 307–315 [Proposition 47 does not apply retroactively on appeal; rather, a defendant must file a petition in the trial court]; *People v. Noyan* (2014) 232 Cal.App.4th 657, 672 [the sole basis for seeking resentencing is through filing a petition for recall of sentence in the trial court]; *Diaz*, *supra*, 238 Cal.App.4th at p. 1323 [Proposition 47 is not retroactive on appeal, and a defendant must file an application under section 1170.18, subdivision (f), in order to have a conviction considered a misdemeanor for all purposes under section 1170.18, subdivision (k)]; *People v. Awad* (2015) 238 Cal.App.4th 215, 218–225 (*Awad*) [when an appeal includes both Proposition 47 issues and non-Proposition 47 issues, the appellate court may order a limited remand without a remittitur to allow a defendant to file a petition for recall of sentence in the trial court].)

G. Section 1170.18, Subdivision (m), Does Not Authorize Automatic Resentencing on Appeal

Appellant suggests that section 1170.18, subdivision (m), "makes it clear that a petition for recall of sentence is not the sole avenue available" for her to seek relief under Proposition 47 and that she is entitled to automatic resentencing under amended Health and Safety Code section 11377. (ABOM 35–36.) However, section 1170.18, subdivision (m), does not alter the analysis. Section 1170.18, subdivision (m), states:

> Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.

Subdivision (m) merely protects defendants who have already been sentenced from being forced to choose between filing a petition for recall of sentence and pursuing other remedies to which they might be entitled, such as filing an appeal of other issues[6] or a petition for writ of habeas corpus. (Cf. *Yearwood*, *supra*, 213 Cal.App.4th at p. 178 [finding that section 1170.126, subdivision (k), of the Three Strikes Reform Act of 2012, which contains the exact language of subdivision (m), has no impact in determining if sections 667 and 1170.12 operate retroactively].)

To interpret section 1170.18, subdivision (m), as allowing automatic resentencing on appeal would defy the basic principle of statutory construction that language should be construed in the context of the overall statutory scheme as a whole, and that significance should be given to every

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[6] In *Awad*, the court addressed the jurisdictional issues that arise in filing a Proposition 47 petition in the trial court while a case is pending on appeal. (*Awad*, *supra*, 238 Cal.App.4th at pp. 218–225.) The court concluded that when an appeal includes both Proposition 47 issues and non-Proposition 47 issues, the appellate court may order a limited remand without a remittitur to allow a defendant to file a petition for recall of sentence in the trial court. (*Awad*, *supra*, 238 Cal.App.4th at pp. 218–225.)

word, phrase, sentence, and part of an act pursuant to its overarching purpose. (*People v. Canty* (2004) 32 Cal.4th 1266, 1276–1277.) Such an interpretation would also expressly contradict the clear, unambiguous language used in the Official Title and Summary on page 47 of the voter guide, which told the voters that Proposition 47 "[r]equires resentencing for persons serving felony sentences for these offenses *unless* court finds unreasonable public safety risk." (Emphasis added; see also Ballot Pamp., Gen. Elec. (Nov. 4, 2014),), rebuttal to argument in favor of Prop. 47, p. 39 ["*Proposition 47 does not require automatic release of anyone*"].)

Section 1170.18, subdivision (m), does not have any impact on whether the sections amended by Proposition 47, including Health and Safety Code section 11377, allow convicted felons to bypass section 1170.18—a provision that, by its plain language, directly applies to them. Indeed, it makes little sense to assume that the drafters would intend to include automatic relief not by specific language, but rather by a generic catch-all provision. (See *Citizens Ass'n. of Sunset Beach v. Orange County Local Agency Formation Com'n.* (2012) 209 Cal.App.4th 1182, 1189 [when the language of an initiative is construed, courts "consider not only the ordinary meaning of the bare words, but how those words fit into the initiative as a whole"].)

H. The Rule of Lenity Does Not Apply

Appellant contends any ambiguity regarding applicability of section 1170.18 should be resolved in her favor under the rule of lenity. (ABOM 43–50.) As discussed above, however, there is no ambiguity in section 1170.18, therefore the rule of lenity does not apply. The rule of lenity is invoked when a penal statute is susceptible to two reasonable interpretations, and then "' "only if the court can do no more than guess what the legislative body intended; there must be an *egregious* ambiguity and uncertainty to justify invoking the rule." ' [Citation.] In other words,

'the rule of lenity is a tie-breaking principle, of relevance when " 'two reasonable interpretations of the same provision stand in relative equipoise....' " ' [Citation.]" (*People v. Manzo* (2012) 53 Cal.4th 880, 889 (*Manzo*).) "Although true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." (*People v. Nuckles* (2013) 56 Cal.4th 601, 611–612.)

Here, for the reasons discussed above, there are not "two reasonable interpretations of the same provision [that] stand in relative equipoise." (*Manzo*, *supra*, 53 Cal.4th at p. 889.) The purpose of section 1170.18 is explicit, and there is no ambiguity.[7] Those who are currently serving a sentence may be eligible for relief, but they must file a petition so that the trial court may evaluate their eligibility and risk of dangerousness to public safety. Since there is no ambiguity in the language of the statute, the rule of lenity does not apply.

[7] Thus, appellant's discussion of the word "egregious" and why this Court should disregard it (ABOM 44–49) is immaterial.

CONCLUSION

The Court of Appeal's decision should be affirmed because Proposition 47 extends relief to those individuals currently serving a sentence only if they file a petition for resentencing under section 1170.18.

Dated: February 17, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answering Brief on the Merits, uses a 13 point Times New Roman font and contains 9,287 words.

Dated: February 17, 2016

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

Case Name: **People v. Veronica L. De Hoyos, et al.** Case No.: **S228230**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. The Office of the Attorney General's eService address is AGSD.DAService@doj.ca.gov.

On February 18, 2016, I served the attached: **ANSWERING BRIEF ON THE MERITS,** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document on February 18, 2016, by 5:00 p.m., on the close of business day to the following.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 18, 2016, at San Diego, California.

L. Blume
Declarant

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Signature

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