S232900

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **LAURA REYNOSO VALENZUELA,** **Defendant and Appellant.**	Case No. S232900

Fourth Appellate District, Division One, Case No. D066907
Imperial County Superior Court, Case No. JCF32712
The Honorable Christopher J. Plourd, Judge

ANSWER BRIEF ON MERITS

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Deputy Solicitor Attorney General
CHARLES C. RAGLAND
Supervising Deputy Attorney General
MEREDITH S. WHITE
Deputy Attorney General
MARVIN E. MIZELL
Deputy Attorney General
State Bar No. 190786
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9139
Fax: (619) 645-2191
Email: Marvin.Mizell@doj.ca.gov
Attorneys for Plaintiff and Respondent

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ISSUE PRESENTED

Was it the intent of the voters who passed Proposition 47 that California Penal Code[1] section 1170.18 have retroactive effect and thus preclude the imposition of section 667.5, subdivision (b) prior prison term enhancements at the time of resentencing in cases where the prior was reduced to a misdemeanor?

INTRODUCTION

Appellant Laura Reynoso Valenzuela was convicted of receiving stolen property in 2012 and served a prison term for the offense. That felony conviction and resulting prison term were the basis for a one-year prior prison term enhancement imposed at sentencing in 2014 in the instant case. After sentencing, the voters enacted Proposition 47. Pursuant to its terms, appellant petitioned for the reduction of her 2012 conviction to a misdemeanor. The petition was granted.

Now, appellant argues she is entitled to additional relief. She contends the reduction of her 2012 felony conviction to a misdemeanor necessarily invalidates her one-year prior prison term enhancement in the current case because the underlying conviction is no longer a felony. Because all of the elements of the prison prior were met at the time appellant was sentenced, the enhancement was lawful and valid. Nothing in Proposition 47 indicates an intent to extend this additional remedy to appellant, or other defendants like her.

Appellant also contends that a portion of Proposition 47 that declares the reduced crimes will be "misdemeanors for all purposes," section

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

1170.18, subdivision (k),[2] should be retroactively applied to her enhancement so that the enhancement may not stand. But statutes are presumed to be prospective, not retroactive, and nothing in the language or history of Proposition 47 indicates that voters intended subdivision (k) to operate retroactively in this manner.

Finally, the prospective application of subdivision (k) does not violate appellant's right to equal protection, and nothing in Proposition 47 requires a remand for the trial court to exercise its discretion under section 1385 whether to strike a prior prison term enhancement.

STATEMENT OF THE CASE

On October 1, 2012, in case number JCF28616, appellant was convicted of receiving stolen property under section 496 (hereafter referred to as the "2012 conviction"). (1 CT 42,[3] 209-221; 13 RT 803.)

On September 23, 2014, in case number JCF32712, an Imperial County jury found appellant guilty of carjacking (§ 215, subd. (a); count 1), reckless evasion of a peace officer (Veh. Code, § 2800.2, subd. (a); count 2), and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 3). (1 CT 39-41; 156-159, 165-167.) The next day, appellant waived her right to a jury trial regarding two bifurcated prior prison term enhancement allegations (§ 667.5, subd. (b)), and the trial court found one of those alleged prior prison term enhancements, based on the 2012 conviction, to be true. (1 CT 40-42, 207-208; 6 RT 135-136.)

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[2] Section 1170.18, subdivision (k), is hereinafter referred to as "subdivision (k)."

[3] It appears that the date of this conviction was mistakenly and inconsequentially listed as October 1, 2010, in the first amended information. (CT 42.)

On October 24, 2014, the trial court imposed a total term of six years eight months in state prison, including a one-year consecutive term for the prior prison term enhancement. (2 CT 276, 282-284.)

On November 4, 2014, the voters approved Proposition 47, the "Safe Neighborhoods and Schools Act." (*People v. Morales* (2016) 63 Cal.4th 399, 404.) It went into effect on November 5, 2014. (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328.) Proposition 47 reduced certain drug and theft-related felonies and wobblers to misdemeanors, unless the defendant who committed the crime was ineligible. (*People v. Morales, supra,* 63 Cal.4th at p. 404.) An eligible defendant currently serving a felony sentence for a Proposition 47 qualifying crime had to file a petition for recall of sentence under section 1170.18, subdivision (a), to have the crime reduced to a misdemeanor, and an eligible person who had completed a felony sentence for a Proposition 47 qualifying crime had to file an application to have that crime reduced to a misdemeanor. (*People v. Diaz, supra,* 238 Cal.App.4th at pp. 1328-1329; *People v. Shabazz* (2015) 237 Cal.App.4th 303, 310-311.) One of the theft-related crimes reducible to a misdemeanor under Proposition 47 is receiving stolen property under section 496, so long as the value of the stolen property does not exceed $950. (*Id.* at pp. 303, 307, 309.)

On November 17, 2014, appellant filed a petition for recall of sentence under section 1170.18, subdivision (a), in the 2012 case. (Supp. CT 1-2.) On December 4, 2014, the trial court granted the petition in that case, reduced the receiving stolen property conviction to a misdemeanor, and gave appellant credit for time served. (Supp. CT 7, 10; Reporters Augmented Transcript (RAT) [Dec. 4, 2014] 4-5.) On appeal, appellant argued the trial court should have also resentenced her on the 2014 case because it included a one-year term for her 2012 prior prison term

enhancement, which no longer qualified as a prior prison term because it was no longer a felony.

On February 3, 2016, the Fourth District Court of Appeal, Division One, rejected appellant's argument and found that when appellant was sentenced in the 2014 case, the 2012 conviction underlying the prior prison term enhancement was still a felony. The court held that nothing in the language of Proposition 47, and in particular nothing in the language of subdivision (k), provided any procedure for striking a prior prison term enhancement if the felony underlying the enhancement was subsequently reduced to a misdemeanor. (D066907; Slip. opn. at pp. 21-24.) The court also stated that, as respondent had pointed out, prior prison term enhancements were based on a defendant's status as a recidivist, and not on the underlying criminal conduct. (Slip. opn. at p. 24.) Finally, the court held that appellant's equal protection claim had no merit. (Slip. opn. at pp. 24-25.)

Appellant petitioned for review, and this court granted her petition.

ARGUMENT

I. WHEN A PRIOR PRISON TERM ENHANCEMENT IS IMPOSED BEFORE ITS UNDERLYING FELONY IS REDUCED TO A MISDEMEANOR, THAT ENHANCEMENT CANNOT BE RETROACTIVELY STRICKEN UNDER PROPOSITION 47

Appellant asserts she is eligible for Proposition 47 resentencing on her prior prison term enhancement after the trial court reclassified the underlying felony to a misdemeanor under Proposition 47. (OBM[4] 5.) This court should reject that argument. When a prior prison term enhancement is imposed before its underlying felony is reduced to a misdemeanor, that enhancement cannot be retroactively stricken under Proposition 47. This

[4] "OBM" refers to appellant's opening brief on the merits.

conclusion is consistent with the express language of Proposition 47 and the general presumption of prospective application and comports with the declared purpose of Proposition 47.

A. Overview of Proposition 47

Under section 1170.18, subdivision (a), a person "currently serving" a felony sentence for an offense that is eligible for reduction to a misdemeanor under Proposition 47 may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (*People v. Morales, supra,* 63 Cal.4th at p. 404; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092.) Under section 1170.18, subdivision (b), if the court finds that the person meets the criteria in section 1170.18, subdivision (a), it must recall the sentence and resentence the person to a misdemeanor unless the court determines, in its discretion, that resentencing the petitioner would pose an unreasonable risk of danger to public safety. (*People v. Morales, supra,* 63 Cal.4th at p. 404; *People v. Rivera, supra,* 233 Cal.App.4th at p. 1092.) Alternatively, under section 1170.18, subdivision (f), if a person has completed a felony sentence for an offense eligible for reduction to a misdemeanor under Proposition 47, he or she must file an application to have the felony reduced to a misdemeanor. (*People v. Shabazz, supra,* 237 Cal.App.4th at p. 310.) Under section 1170.18, subdivision (g), if the application satisfies the criteria in section 1170.18, subdivision (f), the court must reduce the felony to a misdemeanor. (*Id.* at pp. 310-311.) Trial courts have no discretion to deny applications as they do with petitions for defendants who are currently serving a sentence.

With the exception of the right to own or possess firearms, "[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated a misdemeanor under subdivision (g) shall be considered a

misdemeanor for all purposes." (§ 1170.18, subd. (k); *People v. Diaz, supra,* 238 Cal.App.4th at p. 1329.)

B. Overview of Prior Prison Term Enhancements

The Legislature enacted section 667.5 as part of the Determinate Sentencing Act of 1976, and it became effective on July 1, 1977. (*People v. Baird* (1995) 12 Cal.4th 126, 130.) Section 667.5, subdivision (b), provides for an enhancement of one year for any sentence to state prison or, under section 1170, subdivision (h), "for each prior separate prison term or county jail term imposed under subdivision (h) of section 1170 or when sentence is not suspended for any felony. . . ." (§ 667.5, subd. (b).) "Imposition of a sentence enhancement under Penal Code section 667.5[(b)] requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) Once the prior prison term is found true within the meaning of section 667.5, subdivision (b), it cannot be stayed and the one-year enhancement is mandatory unless stricken. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) A prior prison term enhancement may be stricken under section 1385, subdivision (a). (*People v. Bonnetta* (2009) 46 Cal.4th 143, 145; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561.)

C. Interpretation of Ballot Initiatives

Issues of statutory interpretation are reviewed de novo. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) The interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. (*People v. Morales, supra,* 63 Cal.4th at p. 135.) First, the language of the statute is given its ordinary and plain meaning.

(*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) Second, the statutory language is construed in the context of the statute as a whole and within the overall statutory scheme to effectuate the voters' intent. (*Ibid.*) A construction that most closely comports with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, should be selected, and an interpretation that would lead to absurd results should be avoided. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 328.) If a provision is included in one part of a statue, but excluded from another, a court should not imply the omitted provision in the part of the statute that does not contain it. (*People v. Gardeley* (1996) 14 Cal.4th 605, 621-622, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) 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*, at p. 900; *People v. Floyd* (2003) 31 Cal.4th 179, 187-188 [ballot pamphlet information a is valuable aid in construing the intent of voters].) 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.*, at p. 900.)

D. Proposition 47 Does Not Operate to Invalidate Appellant's Previously Imposed Prior Prison Term Enhancement

Appellant argues that because Proposition 47 reduced her 2012 conviction to a misdemeanor, the prior prison term enhancement imposed in 2014 is no longer valid because the required element of a felony conviction no longer exists. (OBM 6-9, 17, 24.) Further, she argues subdivision (k) should apply retroactively because: (1) it is an amendatory statute lessening punishment; (2) her judgment is not yet final, and; (3) retroactive application is consistent with the voters' intent. (OBM 5, 9-25.)

Appellant's first argument should be rejected because the plain language of Proposition 47 does not include provisions warranting relief in the circumstances of this case—i.e., where the sentence enhancement was imposed *before* the underlying felony was reduced to a misdemeanor, and because the enhancement was lawfully and validly imposed at the time of sentencing. Appellant's retroactivity argument should be rejected because nothing in the history or language of Proposition 47 indicates an intent to rebut the presumption of prospective application that applies to subdivision (k) of the newly enacted statute.

1. Because appellant's 2012 conviction was still a felony when the prior prison term enhancement was imposed, the enhancement is valid and lawful

Appellant's first argument can be disposed of quickly. She argues the elements of her prison prior are no longer met under section 667.5, subdivision (b), because her 2012 conviction is no longer a felony. Because her 2012 conviction was a felony when the court imposed the enhancement, the enhancement was lawful and valid.

As noted, to impose an enhancement for a prior prison term pursuant to section 667.5, subdivision (b), the trial court must find that the defendant meets the following four criteria: 1) she was previously convicted of a felony, 2) she was imprisoned for that conviction, 3) she completed a term of imprisonment therefor, and 4) she did not remain free from custody and the commission of a new felony offense for five years. (*People v. Tenner, supra,* 6 Cal.4th at p. 563.) Appellant's prior prison term enhancement was imposed on October 24, 2014, and the underlying 2012 felony to that enhancement was reduced to a misdemeanor on December 4, 2014, following enactment of Proposition 47 on November 4, 2014.

There is no dispute that, at the time the trial court imposed the one-year enhancement for appellant's prior prison term, she met all four of the

necessary qualifications for imposition of a sentence enhancement under section 667.5, subdivision (b). Because the sentence was lawfully imposed at the time of the hearing, the trial court had no authority to resentence appellant on the 2014 case unless such authority is included in Proposition 47. "Under the general common law rule, a trial court is deprived of jurisdiction to resentence a criminal defendant once execution of the sentence has commenced." (*People v. Karaman* (1992) 4 Cal.4th 335, 344.) Accordingly, appellant's argument that by its plain terms, section 667.5, subdivision (b), is inapplicable, mischaracterizes the pertinent issue. Section 667.5, subdivision (b), was plainly applicable at the time appellant's 2014 sentence was imposed. If the enhancement must now be undone, it is not because section 667.5, subdivision (b), is inapplicable, but rather because Proposition 47 was subsequently enacted and requires resentencing appellant on an enhancement which was, by all accounts, valid and lawful at the time it was imposed in October 2014. As explained below, Proposition 47 includes no such requirement and should not be read to require striking a previously lawfully imposed prison prior enhancement.

The timing of what occurred here is critical and the cases bear that out. For example, because this case deals with the retroactive and *not* prospective application of subdivision (k) appellant's reliance on *People v. Abdallah* (2016) 246 Cal.App.4th 736 is misplaced. (OBM 18-20.) In that case, unlike this case, the Court of Appeal struck a prior prison term enhancement imposed by the trial court because the prison prior sentence was imposed *after* the underlying conviction had been reduced to a misdemeanor. (*Id.* at pp. 739-748.) Indeed, the *Abdallah* court expressly distinguished its case on that basis from cases published at that time where the prior prison term enhancement was imposed at sentencing *before* the underlying felony was reduced to a misdemeanor. (*Id.* at pp. 746-747.) Thus, *Abdallah* is distinguishable from the present case.

Similarly, appellant's reliance on *People v. Park* (2013) 56 Cal.4th 782 and *People v. Flores* (1979) 92 Cal.App.3d 461 fails to appreciate the legal significance of the sequence of events. Appellant argues that interpreting the phrase "for all purposes" in subdivision (k) to include striking sentencing enhancements such as section 667.5, subdivision (b), where the underlying conviction is no longer a felony, is consistent with this court's reasoning in *People v. Park, supra,* 56 Cal.4th at page 799 ["we conclude that when a wobbler has been reduced to a misdemeanor the prior conviction does not constitute a prior felony conviction with the meaning of section 667(a)"].) (OBM 23-25.)

In *Park,* the defendant's sentence for his current crimes was enhanced by five years under section 667, subdivision (a), based on his prior conviction of a serious felony. *Prior* to the defendant's commission of his current crimes, however, the trial court had reduced the prior offense to a misdemeanor under section 17, subdivision (b)(3), and then dismissed it pursuant to section 1203.4, subdivision (a)(1). (*People v. Park, supra,* 56 Cal.4th at p. 787.) *Park* concluded that once the conviction had been reduced to a misdemeanor, it could no longer serve as the basis for the enhancement under section 667, subdivision (a). (*Id.* at pp. 787, 799.) The court noted, however, that "there is no dispute that . . . defendant would be subject to the section 667 (a) enhancement had he committed and been convicted of the present crimes *before* the court reduced the earlier offense to a misdemeanor." (*Id.* at p. 802.)

Like *Abdallah, Park* is distinguishable from the present case because the reduction and dismissal of the prior conviction occurred before the defendant's commission of her current crimes and thus, before use of the prior conviction to enhance his sentence. Indeed, under the logic of *Park,* because appellant's 2012 conviction for receiving stolen property was still a felony when she was sentenced on October 24, 2014, the conviction

properly served as the basis for the trial court's imposition of a one-year prison prior enhancement. Thus, appellant's reliance on *Park* is misplaced.

Appellant also argues that the phrase "for all purposes" in subdivision (k) is equivalent to the specific statutory restriction against the use of a past marijuana conviction in *People v. Flores, supra,* 92 Cal.App.3d 461. (OBM 22-23.) In *Flores,* the Legislature reduced the crime of marijuana possession, which served as the basis for the defendant's prior prison term enhancement, to a misdemeanor *before* the defendant committed, and was convicted, of the later offense that was the subject of appeal. (*People v. Flores, supra,* 92 Cal.App.3d at pp. 464, 470.) In *Flores*, as in *Park* and *Abdallah,* the current offense was committed *after* the earlier offense had already been reduced to a misdemeanor, in contrast with the present case. Here, as stated above, the 2012 conviction for receiving stolen property was still a felony when appellant was sentenced on the one-year prior prison term enhancement on October 24, 2014. Thus, as with *Park* and *Abdallah,* appellant's reliance on *Flores* is misplaced.

As explained above, the sequence of events is critical to the analysis. When sentence was imposed in appellant's 2014 case, the requirements of section 667.5, subdivision (b), were met. The fact that her 2012 felony conviction has since been reduced to a misdemeanor does not alter the lawful imposition of her sentence in 2014 unless the voters, in passing Proposition 47, intended the reduction of her 2012 conviction to a misdemeanor to also operate to require resentencing in her 2014 case. The voters could have signaled this intent by making subdivision (k) retroactive since that would necessarily call for application of subdivision (k)'s "misdemeanor for all purposes" language to past events. But, as explained

below, the voters had no such intention and expressed no desire that subdivision (k) operate retroactively.

2. The voters did not intend for subdivision (k) to operate retroactively

No part of the Penal Code is retroactive unless expressly so declared. (§ 3.) Section 3 establishes a strong presumption of prospective operation and codifies a principle that absent an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature [or electorate] must have intended a retroactive application. (*People v. Brown* (2012) 54 Cal.4th 314, 324.) A statute that is ambiguous with respect to retroactive application is construed to be unambiguously prospective. (*Ibid.*)

Subdivision (k) states:

> Any felony conviction that is recalled and resentenced under subdivision (b) or designated a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

Nothing in the plain language of subdivision (k) speaks to retroactive application. There is no express retroactivity provision in subdivision (k). It states, as noted, that a felony reduced to a misdemeanor under subdivision (b) or (g) is a misdemeanor for all purposes, without ever stating whether the misdemeanor for all purposes language can be applied retroactively. Thus, nothing in the plain language of subdivision (k) rebuts the presumption under section 3 that the statute operates prospectively, not retroactively.

In an attempt to rebut this presumption, appellant relies on *In re Estrada* (1965) 63 Cal.2d 740. (OBM 9-11.) In *Estrada*, the court concluded that where the Legislature (or electorate) amends a statute to

reduce the punishment for a particular criminal offense, it is assumed, absent a savings clause or contrary evidence of legislative (or voter) intent, that the Legislature (or electorate) intended the amended statute apply to all defendants whose judgments are not yet final on the statute's operative date. (*People v. Conley* (2016) 63 Cal.4th 646, 656-657; *Brown, supra,* 54 Cal.4th at p. 323; *People v. Nasalga* (1996) 12 Cal.4th 784, 793; *In re Estrada, supra,* 63 Cal.2d at pp. 742-748.) The statute at issue in *Estrada* was silent on the issue of retroactivity. The court drew the inference that the Legislature must have intended retroactive application of the reduced punishment because, "there is ordinarily no reason to continue imposing the more severe penalty, beyond simply 'satisfy[ing] a desire for vengeance.'" (*People v. Conley, supra*, 63 Cal.4th at p. 656, citing *In re Estrada, supra*, 63 Cal.2d at p. 745.) But, the *Estrada* court itself recognized that the Legislature could have selected prospective or retroactive application—"either ... would have been legal and constitutional." (*In re Estrada, supra*, 63 Cal.2d at p. 744.) *Estrada* does not weaken or modify the default rule of prospective operation in section 3, but instead articulates a tool to discern contrary intent, i.e., the reasonable presumption that a legislative act mitigating punishment for a crime is intended to apply to all non-final judgments. (*People v. Brown, supra*, 54 Cal.4th at p. 324; *People v. Conley, supra*, 63 Cal.4th 656.)

This court has recognized *Estrada's* "limited role" in the "jurisprudence of prospective versus retrospective operation," and has warned that "[a]pply[ing] broadly and literally, *Estrada's* remarks about section 3 would ... endanger the default rule of prospective operation." (*People v. Brown, supra*, 54 Cal.4th at p. 324.) Relying on *Estrada* here to find subdivision (k) retroactive would constitute the very expansion of *Estrada* of which this court warned in *Brown.*

At the outset, *Estrada* does not apply in this case because the felony judgment underlying the prior prison term enhancement is presumed to be final because it occurred in 2012 and there is no record that appellant ever appealed that judgment. A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari has expired. (*People v. Kemp* (1974) 10 Cal.3d 611, 614.) Appellant asserts that *Estrada* applies because her *current* case, number JCF32712, is still on appeal. (OBM 9-11.) Appellant, however, looks to the finality of the wrong case. *Estrada* applies to a particular judgment so that if the penalty is lessened for a crime before it is final, the defendant receives the benefit of that reduction in penalty. So, there had to be a lesser penalty for receiving stolen property in the 2012 case before the judgment was final in that case for *Estrada* to apply. Put another way, the judgment in the 2012 case was reduced to a misdemeanor under Proposition 47 *after* the judgment in that case was final, and there is no authority for *Estrada* being used to reach past a final judgment in one case and into a judgment in a subsequent case.

The presumption of retroactivity established in *Estrada* also does not apply to subdivision (k) because it does not constitute mitigation of a penalty for a specific crime. In *Brown,* the defendant was sentenced and committed to prison in 2007 and awarded two days of conduct credit under section 4019 for every four days spent in local custody. (*People v. Brown, supra,* 54 Cal.4th at p. 318.) The Court of Appeal affirmed the defendant's conviction on January 13, 2010. (*Ibid.*) A new version of section 4019 became operative on January 25, 2010, which increased conduct credits to two days for every two days spent in local custody. (*Id.* at p. 318.) On January 29, 2010, the defendant filed a petition for rehearing claiming additional conduct credits under the newly effective section 4019. (*Id.* at pp. 318-319.) The Court of Appeal granted the petition, vacated its

decision, and in a new decision, retroactively awarded the defendant additional conduct credits. (*Id.* at p. 319.) This court granted review to decide whether the version of section 4019 effective on January 25, 2010, retroactively benefitted prisoners who served time in local custody before that effective date.[5] (*People v. Brown, supra,* 54 Cal.4th at p. 317.)

This court first interpreted the language of section 4019 effective January 25, 2010, as operating prospectively. (*Id.* at pp. 319-323.) This court then analyzed *Estrada* and noted that the *Estrada* rule was based on the premise that "[a] *legislative mitigation of the penalty of a particular crime* represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law" (citation omitted), and the corollary inference that the Legislature intended the lesser penalty to crimes already committed. (*Id.* at p. 325, italics in original.) This court found that *Estrada* did not apply to section 4019 effective on January 25, 2010, because it did not alter the penalty for any crime; a prisoner who earns no conduct credits serves the full sentence originally imposed. (*Ibid.*) This court further reasoned that instead of addressing punishment for past criminal conduct, the statute addressed *future conduct* in a custodial setting by providing increased incentives for good behavior. (*Ibid.*) Having concluded, among other things, that the language of the statute was prospective, and that *Estrada* did not apply, this court held the statute only applied prospectively. (*Id.* at p. 318.)

Analogous to the statute in *Brown,* the language of subdivision (k) does not mitigate the punishment for any particular crime; it only states that

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[5] The relevant language of section 4019 effective on January 25, 2010, provided: "It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody." (*Brown, supra,* 54 Cal.4th at p. 318, fn. 5.)

a felony reduced to a misdemeanor under Proposition 47 is a "misdemeanor for all purposes." The actual reduction of the punishment for the qualifying offenses in Proposition 47 is included not in subdivision (k), but in subdivisions (a), (b), (g), & (f)—provisions made expressly retroactive through establishment of a petition procedure. Also analogous to the statute in *Brown,* subdivision (k) does not address punishment for past criminal conduct.

These distinctions are significant. Because subdivision (k) does not mitigate the punishment for a particular crime, this is not a situation in which there is a clear and unambiguous expression of the electorate's intent to reduce punishment in this specific context. The *Estrada* rule is predicated on the notion that where there is such an unambiguous expression, it is "'inevitable'" that the Legislature intended the lesser punishment to apply to every case in which it could constitutionally apply. (*People v. Brown, supra,* 54 Cal.4th at p. 323, quoting *In re Estrada, supra,* 63 Cal.2d at p. 745.) Here, there is no such clear expression and accordingly, it cannot be said that the electorate inevitably would have applied the reductions to the wholly separate situation of a person who has failed to reform notwithstanding a prior prison term. Unlike in *Estrada,* a decision not to apply the reductions in this context is not simply a matter of "vengeance"; instead, there are legitimate policy rationales involving the need to punish recidivist offenders. Similarly, because subdivision (k) does not address punishment for past criminal conduct, there is no reason not to apply the "strong presumption" of prospective operation contained in section 3. (*People v. Brown, supra,* 54 Cal.4th at p. 324.) Because there is nothing to suggest that the electorate "intended to depart from the general rule that statutory changes operate prospectively, prospective application is required." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1218 [declining to apply the *Estrada* rule in the context of Proposition 51].)

Therefore, similar to the statute in *Brown, Estrada* does not apply to subdivision (k) because it does not constitute mitigation of a penalty for a specific crime.

As noted above, *Estrada* is simply an articulation of a tool to discern legislative intent. Thus, even if *Estrada's* reasoning could extend to final judgments, and even if subdivision (k) can be interpreted as an amendatory statute lessening punishment for a specific crime, the other evidence here demonstrates that the voters did not intend for retroactive application of subdivision (k).

In *People v Conley, supra*, 63 Cal.4th 646, this court concluded that *Estrada* was not applicable to Proposition 36 (The Three Strikes Reform Act), which lessened punishment for three strike offenders whose third offense was non-violent and non-serious. There, the defendant argued that he was entitled to resentencing under the provisions of the Act directly through his appeal, and that because *Estrada* applied, he did not need to file a petition for resentencing with the superior court, as the provisions of the Act called for. In finding *Estrada* inapplicable, the *Conley* court concluded that the express retroactivity of certain provisions of the Reform Act demonstrated the voters' intent to "create[] a special mechanism" which allowed for extension of the Act's benefits to those defendants who had been sentenced under the older, more severe punishment scheme. By establishing this "special procedural mechanism" the voters "prescribed the scope and manner of the Act's retroactive application." (*Conley, supra*, 63 Cal.4th at p. 658.)

The same is true here. With Proposition 47, the voters took a very similar approach and delineated the "scope and manner" of retroactive application by making certain portions of the law expressly retroactive and establishing a procedure by which defendants can petition for reduction of any qualifying convictions to misdemeanors. (§ 1170.18, subds. (a), (b),

(f), and (g).) But, tellingly, subdivision (k) includes no express language calling for its retroactive application, and nothing in Proposition 47 establishes a mechanism to achieve retroactive application of the "misdemeanor for all purposes" language. Like the electorate with respect to Proposition 36, the electorate here established the scope and mechanism for the limited retroactive application it sought to achieve. As this court pointed out in *Conley*, the voters' decision to enact some provisions with explicit retroactivity language and some provisions with no such language cuts against the inference drawn in *Estrada* that the legislative body must have intended retroactive application of all of the new law's provisions. (*People v. Conley, supra*, 63 Cal.4th at pp. 657-658.) This same principle is echoed in a familiar cannon of statutory construction. If a provision is included in one part of a statute, but excluded from another, a court should not imply the omitted provision in the part of the statute that does not contain it. (*People v. Gardeley, supra,* 14 Cal.4th at pp. 621-622.) By making certain portions of Proposition 47 expressly retroactive, the voters indicated an intent to select the specific scope and manner of the new law's retroactive application, just as the voters did with Proposition 36. *Estrada's* presumption of retroactivity is inapplicable where there is evidence of a contrary intent.

Further, the presumption of retroactivity created by *Estrada* rested on the notion that there was no discernible reason to continue punishing defendants under the more severe law once the Legislature had determined a lesser punishment was sufficient. (*In re Estrada, supra*, 63 Cal.2d at p. 745; *People v. Conley, supra*, 63 Cal.4th at p. 656.) Following similar reasoning to discern the voters' intent with respect to Proposition 36, this court looked to what reasons the voters may have had to select the mechanism they did, i.e., to select the limited retroactivity provisions at issue in *Conley*. Just like in *Conley*, the voters who enacted Proposition 47

had a multitude of reasons for refusing to extend the benefits of subdivision (k) retroactively to past events. One such reason is on display here—applying subdivision (k) retroactively would require undoing previously lawfully imposed prior prison term enhancements. Appellant's argument would extend not just to those imposed two weeks prior to enactment of the law (as is the case here), but to all prior prison term enhancements imposed before the date Proposition 47 went into effect.

In addition, retroactive application of subdivision (k)'s "misdemeanor for all purposes" language would theoretically apply to other past events which would be analyzed differently had the prior conviction been a misdemeanor at the time of the event. For example, the fact of a prior felony conviction can be used to impeach a testifying witness, but the fact of a prior misdemeanor conviction may not be admitted as impeachment. (See Evid. Code §§ 787, 788; *People v. Wheeler* (1992) 4 Cal.4th 284, 288.) If subdivision (k)'s "misdemeanor for all purposes" language applies to past events, would trials be subject to reversal because the impeachment evidence presented at the time would no longer qualify for admission once the crime had been reduced to a misdemeanor? Defendants must pay fines and fees following convictions for criminal offenses. Some of these fines and fees differ depending on whether the conviction was for a felony or a misdemeanor. (See e.g., § 1202.4, subd. (b)(1) [minimum restitution fine for a felony is $240, minimum restitution fine for a misdemeanor is $120].) Undoubtedly, there are other consequences that flow from felony convictions, but do not flow from misdemeanor convictions. Had the electorate sought to undo every previously imposed consequence (which was lawful and valid at the time imposed) it could have done so, and likely would have written a procedural mechanism into the law to address those concerns. It did not do so. Electing not to extend the benefits of Proposition 47 backwards to past events is supported by justifiable

reasons—namely, the initiative was a cost-saving measure. To do as appellant asks and apply subdivision (k) retroactively to undo all prior consequences which flowed from felony convictions for crimes now reduced to misdemeanors would impose a great financial burden on the electorate. Given that the initiative sought to save money, the voters drew a reasonable line in the sand by extending some benefits to defendants where it would achieve a cost savings, but refusing to extend benefits that would increase the cost.

Thus, unlike the statute at issue in *Estrada*, there are discernible legitimate reasons the voters would have enacted subdivision (k) with the intent it operate prospectively only, in accordance with the presumption in section 3. As this court concluded with respect to Proposition 36 in *Conley*, "we can no longer say with confidence, as we did in *Estrada*, that the enacting body lacked any discernible reason to limit application of the law with respect to cases pending on direct review." (*People v. Conley, supra*, 63 Cal.4th at pp. 658-659.)

Appellant also asserts that Proposition 47's stated goals, in particular the goal "to stop wasting money on petty offenses," demonstrate the voters intended retroactive application of subdivision (k). (OBM 11-13, 16-17.) Appellant is mistaken. As explained above, it is not clear that retroactive application of subdivision (k) would save money—as it would necessarily also cost money. Further, the declared purpose of Proposition 47 shows the voters took a balanced and measured approach to save money while still protecting public safety. The balance inherent in Proposition 47's stated goals should not be read out of it so as to achieve the maximum monetary savings even where such a reading conflicts with the intent of the voters.

Proposition 47's declared purpose "is to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the saving generated . . . into

prevention and support programs in K-12 schools, victim services, and mental health and drug treatment" while at the same time "ensur[ing] that sentences for people convicted of dangerous crimes . . . are not changed." (*People v. Diaz, supra,* 238 Cal.App.4th at p. 1328, citing Deerings Cal. Codes Annotated, § 1170.18.) The initiative seeks to accomplish its declared purpose by, among other things: (1) reducing certain felonies for [certain] nonserious, nonviolent crimes like petty theft and drug possession to misdemeanors; and (2) providing separate procedures for people serving a sentence and those who have completed a sentence to have their eligible felony reduced to a misdemeanor. (*People v. Diaz, supra,* 238 Cal.App.4th at p. 1328.) However, appellant's specific assertion that the goal "to stop wasting money on petty offenses," requires that a defendant's sentence not be enhanced by one year as a result of a prior prison term enhancement, lacks merit because the "purpose of saving money does not mean [this court] should interpret the statute every way that might maximize any monetary savings." (*People v. Morales, supra,* 63 Cal.4th at p. 408.)[6]

There is also nothing in the November 2014 Voter Information Guide regarding Proposition 47 that states that subdivision (k) should be applied retroactively to prior prison term enhancements. As noted, the fact that the voters generally sought to reduce the costs of incarceration by permitting

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[6] Appellant also cites section 1170.18, subdivision (m), to briefly argue that section 1170.18 can work in tandem with other procedures to afford defendants complete relief. (OBM 16.) Subdivision (m) states: "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant." Appellant's argument overstates the value of subdivision (m) because that subdivision simply protects a person "from being forced to choose between filing a petition for recall of sentence and pursuing other legal remedies to which they might be entitled." (*People v. Morales, supra,* 63 Cal.4th at p. 408, quoting *People v. Yearwood* (2013) 213 Cal.App.4th 161, 178 [discussing section 1170.126, subd. (k)].)

some crimes to be reduced to misdemeanors does not lead to the inexorable conclusion that the voters wanted to reduce the costs of incarceration in every conceivable manner. The voters took a measured approach, and sought to reduce spending only by the amount associated with the specific changes made by Proposition 47. This is evidenced in section 1170.18, subdivision (a), where the voters refused to extend Proposition 47 relief to those defendants found ineligible by virtue of their dangerousness. Had maximum monetary savings been the sole intent of the voters, they would have extended Proposition 47 relief to every possible defendant. They did not. When interpreting a ballot initiative, courts should avoid "interpret[ing] the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

Further, appellant argues the voters must have intended retroactive application of subdivision (k) because defendants with convictions reduced to misdemeanors under Proposition 47 are no longer the "hardened criminals" section 667.5, subdivision (b), seeks to punish. (OBM 8.) This argument should be rejected. As the Court of Appeal noted, "having served a prior prison term for a felony conviction is the qualifying criterion for the enhancement that Valenzuela received under section 667.5, subdivision (b)." (Slip opn. at p. 24.) And, as the Court of Appeal further noted,

> [A] section 667.5 enhancement is based primarily on the defendant's status as a recidivist, not on the severity of the underlying criminal conduct for the current conviction. (See *People v. Gokey* (1998) 62 Cal.App.4th 932, 936 ["Sentence enhancements for prior prison terms are based on the defendant's status as a recidivist, and not on the underlying criminal conduct, or the act or omission, giving rise to the current conviction"].) At the time Valenzuela was sentenced, the 2012 conviction was a felony and she had served a prison

sentence for that conviction. The latter fact is not altered by Proposition 47. (Slip opn. at p. 24.)[7]

Thus, nothing about the voter's intent in passing Proposition 47 undermines the intent underlying section 667.5. Read together, Proposition 47 sought to reduce certain criminal convictions to misdemeanors, but did not address, and thus had no impact on, the previous electorate's intent to punish recidivists more harshly than first-time offenders. Thus, the declared purpose of Proposition 47 does not compel retroactive application of subdivision (k).

In addition to the composition of Proposition 47, the complications which would flow from retroactive application, and the voters' intent to take a measured approach at reducing prison and jail populations, the voters' intent is also evidenced through this court's previous interpretation of the phrase "misdemeanor for all purposes," of which the electorate is presumed aware. The phrase "misdemeanor for all purposes" also appears in section 17, subdivision (b), and this court previously held that the phrase applied prospectively only. The voters are presumed to be aware of this judicial interpretation, and to have intended the same result here by using the same language.

Section 17, subdivision (b), in relevant part, states:

When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or

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[7] The aim of section 667.5 is to punish a defendant for recidivism primarily because the defendant was convicted of a prior felony, and secondarily because the defendant served a term in prison as a result of that felony conviction. (*People v. Jones* (1993) 5 Cal.4th 1142, 1148; *People v Prather* (1990) 50 Cal.3d 428, 440; see also *People v. Coronado* (1995) 12 Cal.4th 145, 156 ["Prior prison term enhancements, such as those authorized by section 667.5(b), . . . are attributable to the *defendants status* as a repeat offender"; italics in original].)

> by fine or imprisonment in the county jail, it is a *misdemeanor for all purposes* under the following circumstances: [¶] (1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. (Italics added.)

This court has held that if a misdemeanor sentence is imposed under section 17, subdivision (b), the offense is a misdemeanor from that point on, but not retroactively. (*People v. Feyrer* (2010) 48 Cal.4th 426, 439.) This court concluded the same in regard to an earlier version of section 17. (*People v. Banks* (1959) 53 Cal.2d 370, 381-382 [if the judgment is for a misdemeanor, it is deemed a misdemeanor for all purposes thereafter—the judgment does not have a retroactive effect].) "In other words, a court's declaration of misdemeanor status renders an offense a misdemeanor for *all purposes*, not at *all times*." (*In re C.H.* (2016) ___ Cal.App.5th ___, 206 Cal.Rptr.3d 775, 780; italics in original.) "[A] declaration that a wobbler is a misdemeanor does not 'relate back' and alter that offense's original status as wobbler that is by definition to be treated as a felony unless declared otherwise." (*Ibid.*)

"[I]dentical language in separate statutory provisions should receive the same interpretation when the statutes cover the same or analogous subject matter." (*People v. Cornett* (2012) 53 Cal.4th 1261, 1269, fn. 6; *People v. Lamas* (2007) 42 Cal.4th 516, 525.) Because subdivision (k) and section 17 both deal with the effect of recalling and resentencing of a felony or wobbler to a misdemeanor, the phrase "misdemeanor for all purposes" is construed to mean the same thing in both statutes. (*People v. Rivera, supra,* 233 Cal.App.4th at p. 1100; *People v. Abdallah, supra,* 246 Cal.App.4th at p. 745; *In re C.H., supra,* 206 Cal.Rptr.3d at p. 780.) And when enacting initiative measures, voters are presumed to know the law. (*People v. Shabazz* (2006) 38 Cal.4th 55, 65, fn. 8.) Thus, because it must

be presumed that the voters knew that the phrase "misdemeanor for all purposes" in section 17, subdivision (b), had been interpreted to be prospective only, the voters also intended for the phrase "misdemeanor for all purposes" in subdivision (k) to be prospective only.

Therefore, because there is strong evidence the voters did not intend subdivision (k), to operate retroactively, *Estrada* does not compel retroactive application. Subdivision (k) should be applied prospectively, consistent with the standard presumption of prospectivity in section 3. In sum, when a prior prison term enhancement is imposed before its underlying felony is reduced to a misdemeanor, that enhancement cannot be retroactively stricken under Proposition 47.

II. PROSPECTIVE APPLICATION OF SUBDIVISION (K) DOES NOT VIOLATE APPELLANT'S RIGHT TO EQUAL PROTECTION

Appellant asserts that the failure to apply Proposition 47 to her case would deny her equal protection under the Fourteenth Amendment. (OBM 25-27.) Appellant did not include this issue in her petition for review, so, unless this court finds it was fairly included in the petition, it has been forfeited. (Cal. Rules of Court, rule 8.516(b)(2); *People v. Perez* (2005) 35 Cal.4th 1219, 1228.)

If the issue is preserved, it lacks merit. Prospective application of subdivision (k) does not violate appellant's right to equal protection because she is not similarly situated to defendants whose crimes were reduced to misdemeanors before imposition of a prior prison term enhancement.

The Fourteenth Amendment of the United States Constitution and Article I, section 7, of the California Constitution entitle all persons to equal protection under the laws. (*People v. Ranscht* (2009) 173 Cal.App.4th 1369, 1372, disapproved on another ground in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888.) A person challenging a

statute on equal protection grounds must first show that the state has adopted a classification that affects two or more similarly situated groups, for purposes of the law challenged, in an unequal manner. (*People v. Morales, supra,* 63 Cal.4th at p. 408.) If that showing is made, a court must then determine which level of judicial scrutiny applies. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201, disapproved on another ground in *Johnson v. Department of Justice, supra,* 60 Cal.4th at p. 888.) In an ordinary equal protection case that does not involve a suspect classification or the alleged infringement of a fundamental interest, the challenged classification is upheld unless it bears no rational relationship to a legitimate state purpose. (*People v. Hofsheier, supra,* 37 Cal.4th at p. 1200; *People v. Ranscht, supra*, 173 Cal.App.4th at p. 1372.) In other words, the statutory classification should be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. (*People v. Hofsheier, supra*, 37 Cal.4th at pp. 1200-1202.)

Appellant's exact equal protection argument is difficult to discern, but when appellant made a similar argument in her opening brief filed in the Court of Appeal (AOB [Appellant's Opening Brief] 42-43), that court interpreted appellant's argument as asserting "that no rational basis justifies excluding her from the benefit that she would have received if she had committed, and been sentenced for, the present offenses after her 2012 receipt of stolen property conviction was reduced to a misdemeanor under Proposition 47." (Slip opn. at p. 24.)

This court has repeatedly rejected claims that the equal protection clause is violated where classes of criminal defendants are treated differently based on the effective date of a statute lessening the punishment of a criminal offense. (*People v. Floyd* (2003) 31 Cal.4th 179, 188-189.) Indeed, this court has stated that "[a] refusal to apply a statute retroactively does not violate the Fourteenth Amendment." (*People v. Aranda* (1965) 63

Cal.2d 518, 532.) And this court has further noted, "The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired effect by carrying out the original prescribed punishment as written." (*In re Kapperman* (1974) 11 Cal.3d 542, 546.) Moreover, the Supreme Court of the United States has stated that equal protection principles do "not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time." (*Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505 [31 S.Ct. 490, 55 L.Ed. 561]; see also *People v. Willis* (1978) 84 Cal.App.3d 952, 956 [acknowledging that "all effective dates of statutes are somewhat arbitrary" when rejecting an equal protection claim].) In addition, applying a statute prospectively but not retroactively bears a rational relationship to the legitimate state interest of transitioning from the old sentencing scheme to the new sentencing scheme. (*People v. Jones* (2016) 1 Cal.App.5th 221, 232, review granted Sept. 14, 2016, S235901, citing *People v. Floyd, supra,* 31 Cal.4th at p. 191.)

Based on the authority above, appellant has failed at the outset to demonstrate that she is similarly situated to another class of defendants. Her argument appears to be that she is similarly situated to defendants whose previous convictions were reduced before their sentencing on a new felony. But as the cases make clear, statutes must have a beginning point. If the Legislature is to effectively change the law, it must be permitted to do so without necessarily unraveling the finality of all previous judgments. Thus, defendants whose felony convictions were reduced to misdemeanors *after* their sentencing for a new felony offense are not similarly situated to those defendants whose convictions were reduced *before* their sentencing on a new felony offense. Even if similarly situated, for the same reason that a change in the law must start on some date, the distinction between appellant and defendants with a different sequence of events is rationally

related to a legitimate government interest. Respondent recognizes that the attachment of the change in the law to a particular date can feel arbitrary and unfair, but again, changes in the law must begin at some point, and whatever that point is, those on either side of it will feel the date was arbitrarily selected. Accordingly, prospective application of subdivision (k) does not violate appellant's constitutional right to equal protection.

III. NOTHING IN PROPOSITION 47 REQUIRES A REMAND FOR THE TRIAL COURT TO EXERCISE ITS DISCRETION UNDER SECTION 1385 WHETHER TO STRIKE A PRIOR PRISON TERM ENHANCEMENT

Appellant briefly asserts that if this court finds that the striking of her prior prison term enhancement was not required under Proposition 47, the case should still be remanded so the trial court can exercise its discretion whether to strike the enhancement. (OBM 27.) Respondent disagrees. A prior prison term enhancement may be stricken under section 1385, subdivision (a). (*People v. Bonnetta, supra,* 46 Cal.4th at p. 145; *People v. Garcia, supra,* 167 Cal.App.4th at p. 1561.) However, no part of Proposition 47 authorizes a remand for the sole purpose of allowing the trial court to exercise its discretion to strike, or not strike, a prior prison term enhancement under section 1385, subdivision (a).

The trial court had the option to strike the prior prison term allegation at the initial sentencing, but chose not to. There is nothing in Proposition 47 that suggests a trial court ought to exercise that discretion a second time following reduction of the underlying conviction to a misdemeanor. If the voters wanted to afford this additional relief to defendants with reducible crimes, they would have included provisions in Proposition 47 to that effect. They did not and this court should not grant defendants relief above and beyond the relief afforded in the enacted statute. Accordingly, appellant's request for a remand should be rejected.

CONCLUSION

Based on the aforementioned arguments, respondent respectfully requests this court affirm the Court of Appeal's judgment.

Dated: September 26, 2016 Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Deputy Solicitor Attorney General
CHARLES C. RAGLAND
Supervising Deputy Attorney General
MEREDITH S. WHITE
Deputy Attorney General

MARVIN E. MIZELL
Deputy Attorney General
Attorneys for Plaintiff and Respondent

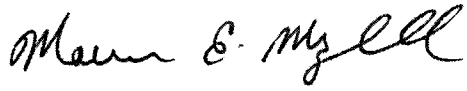
MEM:sam
SD2016700674
71236523.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON MERITS uses a 13 point Times New Roman font and contains 8444 words.

Dated: September 26, 2016

KAMALA D. HARRIS
Attorney General of California



MARVIN E. MIZELL
Deputy Attorney General
Attorneys for Plaintiff and Respondent

MEM:sam
SD2016700674
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DECLARATION OF SERVICE

Case Name: ***People v. Valenzuela***
No.: **S232900**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On **September 26, 2016**, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope 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:

The Honorable Gilbert G. Otero District Attorney Imperial County District Attorney's Office 940 West Main Street, Suite 103 El Centro, CA 92243	Tammy L. Grimm Court Executive Officer Imperial County Superior Court El Centro Courthouse 939 West Main Street El Centro, CA 92243-2843

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 from Office of the Attorney General's electronic service address ADIEService@doj.ca.gov on **September 26, 2016**, to **Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to Attorney Steven J. Carroll, counsel for Appellant, electronic service address sjcarrollesq@gmail.com** by 5:00 p.m. on the close of business day.

On **September 26, 2016**, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be served electronically on the **California Court of Appeal, Fourth Appellate District, Division One** by using the Court's TrueFiling System.

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 **September 26, 2016**, at San Diego, California.

S. McBrearty
Declarant

S. McBrearty
Signature

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