In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JAMES BELTON FRIERSON,** **Defendant and Appellant.**	Case No. S236728

Second Appellate District Division Four, Case No. B260774
Los Angeles County Superior Court, Case No. GA043389
The Honorable William C. Ryan, Judge

ANSWER BRIEF ON THE MERITS

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QUESTION PRESENTED

What is the standard of proof for a finding of ineligibility for resentencing under Proposition 36?

STATEMENT OF FACTS AND THE CASE

A. The Three Strikes Law and Proposition 36

California's three strikes law is codified in two places in the penal code—section 667 and section 1170.12.[1] (See generally *People v. Conley* (2016) 63 Cal.4th 646, 652.) On November 6, 2012, voters modified those provisions by approving Proposition 36, the Three Strikes Reform Act of 2012 (the Reform Act or Act). With respect to defendants sentenced after the Act's passage, the Act amended sections 667 and 1170.12 to "change[] the sentence prescribed for a third strike defendant whose current offense is not a serious or violent felony." (*People v. Conley*, *supra*, 63 Cal.4th at p. 652.)[2] Under the Act's revised penalty provisions, such defendants "are excepted from the provision imposing an indeterminate life sentence [citation] and are instead sentenced in the same way as second strike defendants [citation]." (*Id.*, at p. 653.)

The Act also added a new provision—section 1170.126—which "establishe[s] a procedure for 'persons presently serving an indeterminate term of imprisonment' under the prior version of the Three Strikes law to seek resentencing under the Reform Act's revised penalty structure." (*People v. Conley*, *supra*, 63 Cal.4th at p. 653.) The procedure works in two steps. First, under subdivision (e), an inmate whose current

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

[2] By "current" offense, the Act means the new offense for which the defendant is being sentenced, which courts also sometimes refer to as the "triggering" offense.

commitment is not for a serious or violent felony is "eligible for resentencing" only if neither the inmate's "current sentence" nor his "prior convictions" were for specified disqualifying offenses. (§ 1170.12, subd. (e).) Especially relevant here is subdivision (e)'s exclusion from eligibility of those whose third-strike sentence was imposed for a current offense during which he "intended to cause great bodily injury to another person." (§ 1170.126, subd. (e)(2), incorporating §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) Second, under subdivision (f), an inmate who is eligible for resentencing under subdivision (e) still will not be resentenced if "the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

B. Facts and Procedural History

This case concerns Defendant-Appellant James Belton Frierson's 2012 petition for resentencing on his 2001 conviction of two counts of stalking, in violation of section 646.9, subdivisions (a) and (b). (2Aug. CT[3] 1-5, 10-11.)

The stalking convictions arose from Frierson's conduct while he was incarcerated in state prison on a conviction for willful infliction of corporal injury on his wife, resulting in a traumatic condition. Frierson had written his wife multiple letters from prison, responding to her decision to end their relationship. He told her that he would follow her to work and to her son's school, "track her down," "com[e] looking" for her, and never let her have "another man or woman" in her life; that he would "get" her and "hurt" her because she had "hurt" him; and that he would do something "real bad" to

[3] The record contains two "Augmented Clerk's Transcripts." The first was created on April 1, 2015 and will be referred to as 1Aug CT. The second was created on October 2, 2015, and will be referred to as 2Aug. CT.

her because he could not live without her. (2Aug. CT 112-114, 116, 118-119, 122, 125).) He wrote that he would not let her leave him and would not let someone else take her from him. (2Aug. CT 126.) He called her attention to a news story about a woman who killed her husband and then committed suicide, observing that there "was nothing nobody could do about it." (2Aug. CT 122.) He told her that he would "get you for hurting me like this. Mark my word." (2Aug. CT 123.) Frierson was convicted of stalking, and the trial court found that two of his prior convictions—his 1981 and 1990 convictions for robbery—qualified as prior "strike" convictions within the meaning of sections 667, and 1170.12. (CT 20.) The court sentenced Frierson to 25 years to life on both section 646.9, counts, and stayed the subdivision (b) count under section 654. (2Aug. CT 1-4, 10-11, 15, 24-27.)

In 2012, after Proposition 36's passage, Frierson filed a petition in the superior court, seeking recall and resentencing under the Act. (1Aug. CT 1-2.) As relevant here, the prosecution argued that subdivision (e) made Frierson ineligible for resentencing because he had "intended to cause great bodily injury" during the commission of the stalking convictions. (1Aug. CT 50-52.) The prosecution also argued that Frierson was unsuitable for resentencing under subdivision (f) because his criminal history and record of prison misconduct established that he posed an "unreasonable risk of danger to public safety." (1CT 53-61.) The prosecution's opposition was supported by preliminary hearing and trial transcripts, along with prison records and other records. (1Aug. CT 57-60.) Frierson, in reply, argued that the stalking convictions by themselves did not establish an intent to cause great bodily injury because the offense contained no such intent requirement, and that he would not pose an unreasonable risk of danger to public safety. (1CT 64-66).

The court found that the prosecution had "amply met their burden of showing by a preponderance of evidence that [Frierson] is ineligible for resentencing because" he intended to cause great bodily injury to his wife during the commission of his stalking offenses. (CT 23.) The court's conclusion was based on his death threats to her in multiple letters, including his threat to follow her to work and to her son's school, as well as his threat to injure any new boyfriend she might have. The court supported its conclusion that Frierson intended to do the things he threatened to do during the commission of his current offense based upon Frierson's long history of violent crime, including two prior convictions for inflicting corporal injury on a cohabitant in the years leading up to the domestic abuse conviction that culminated in the stalking convictions. (CT 23.)

The court of appeal affirmed, concluding that the superior court correctly determined that Frierson was ineligible for resentencing under section 667, subdivision (e)(2)(C)(ii) because he "intended to cause great bodily injury to another person" during commission of the current offenses. The appellate court considered it "reasonable to infer ... that when [Frierson] told his wife that he was going to get her, hit her, hurt her, and do something 'real bad' to her to avenge what he perceived she had done to him, he meant what he said." (*People v. Frierson* (2016) 1 Cal.App.5th 788, 792.) The court rejected Frierson's supplemental argument that under *People v. Arevalo* (2016) 244 Cal.App.4th 836, the prosecution's burden of proof in ruling on an application for recall under Proposition 36 should be proof beyond a reasonable doubt:

> "Preponderance is the general standard under California law, and there is no showing that trial courts will be unable to apply it fairly and with due consideration. Nor is there a showing that they have failed to do so. We do not believe that a higher

standard, let alone proof beyond a reasonable doubt, the highest standard possible, is constitutionally required."

(*People v. Frierson*, *supra*, 1 Cal.App.5th at p. 794.)

This Court granted Frierson's petition for review.

SUMMARY OF ARGUMENT

Under the Act, courts should deem a defendant ineligible for resentencing if the prosecution establishes by a preponderance of the evidence that one of subdivision (e)'s disqualifying factors applies.

The Act does not explicitly state a standard of proof for determinations under subdivision (e). Evidence Code section 115, however, generally instructs courts to apply the preponderance standard to a party's burden of proof unless a different standard is set by law. Here, statutory law does not require a higher standard. Instead, the Act's structure reinforces the appropriateness of the preponderance standard. The Act imposes on the prosecution a "pleading and proof" requirement for allegations that a current offense enables the prospective application of three-strike punishment in a new case—a requirement that, by operation of law, involves the application of a beyond a reasonable doubt standard. That "pleading and proof" requirement, however, is conspicuously absent in the Act's resentencing provision—indicating that the voters did not intend to impose that high standard as part of the careful balance that the resentencing provision enacts between the goal of mitigating punishment for truly non-serious and non-violent offenders and that of protecting the public from dangerous offenders.

Case law likewise provides no reason to impose a higher standard. Frierson argues that, under *People v. Johnson* (2015) 61 Cal.4th 674, 687, the same standard of proof—beyond a reasonable doubt—must be employed in both new sentencings and resentencing proceedings, so that

offenders will serve "identical sentences in connection with identical criminal histories." (See ABM 17.) But *Johnson* concerned the very different issue of the *substantive* definitions of disqualifying crimes. In contrast, *procedural* differences that may cause differing outcomes are inherent in the statutory structure, such as in the retrospective provision's subdivision (f), which grants trial courts a discretion to deny resentencing to otherwise eligible offenders—a power with no counterpart in the Act's prospective provisions.

Finally, constitutional law provides no reason for a higher burden of proof. Frierson concedes that a preponderance standard does not implicate rights under *Apprendi v. New Jersey* (2000) 530 U.S. 466, and related cases. Indeed, the United States Supreme Court has held that those cases do not apply at all to the reduction of a properly imposed sentence. Nor do general principles of due process require a higher standard. Any liberty interest that an applicant for resentencing has is simply the interest in a procedure applying the standards that the statute has set. And both this Court and the United States Supreme Court have consistently held that due process does not require a beyond a reasonable doubt standard for analogous determinations about whether to grant or revoke parole and probation.

ARGUMENT

THE ACT'S RESENTENCING PROVISION REQUIRES THAT THRESHOLD DISQUALIFYING CRITERIA BE PROVED BY A PREPONDERANCE OF THE EVIDENCE STANDARD

The interpretation of a statute, whether enacted by the electorate or the Legislature, is a question of law, which courts review de novo. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) The court must begin with the language of the statute, reading it according to "its ordinary meaning," and construing it "in the context of the statutory scheme."

(*People v. Johnson*, *supra*, 61 Cal.4th at p. 682.) If the language is ambiguous, courts "look to other indicia of voter intent." (*Ibid.*) However, "we may neither *insert* language which has been *omitted* nor ignore language which has been inserted." (*Jones v. Superior Court* (2016) 246 Cal.App.4th 390, 397, italics added, internal quotation marks and citations omitted.)

A. Under Evidence Code Section 115, the Preponderance Standard Applies Unless Superseded by Other Law

Evidence Code section 115 provides that, "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." The other "law" can be statutory, decisional, or constitutional law. (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483.) Here, none of those sources of law override section 115's default; to the contrary, each reinforces the appropriateness of the beyond a reasonable doubt standard.

B. The Reform Act's Text and Structure Indicate an Intent to Apply the Preponderance Standard to Determinations of Resentencing Eligibility

The Act, in section 1170.126, subdivision (e), specifies three factors that will make a prisoner ineligible for resentencing. It does not state the burden of proof for determining eligibility under those factors. An "enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted" (*People v. Weidert* (1985) 39 Cal.3d 836, 844), "and to have enacted or amended a statute in light thereof" (*People v. Harrison* (1989) 48 Cal.3d 321, 329). "This principle applies to legislation enacted by initiative. [Citation.]" (*People v. Weidert*, *supra,* at p. 844.) Given the existence of Evidence Code section 115, the initiative's drafters and the voters who approved it should be presumed to have known that the failure to specify a different standard of

proof would lead to the application of the preponderance standard. "As a *statutory* matter, preponderance of the evidence therefore is the appropriate standard." (*People v. Newman* (2016) 2 Cal.App.5th 718, 728-729, review granted Nov. 22, 2106, S237491, italics in original; cf. *Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 366 ["if [a higher standard of proof] had been the initiative's intent, its drafters would have written the higher standard of proof into [the] Proposition"].)

This conclusion is reinforced by a structural contrast between the Act's resentencing provisions in section 1170.126 and the Act's provisions for prospective sentencing in section 1170.12 and section 667. The Act's prospective provision specifies that a defendant will be subject to third-strike sentencing only when the current offense is serious or violent, unless the prosecution "pleads and proves" one of the enumerated circumstances that allow third-strike sentencing for a non-serious, non-violent felony. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C); see *People v. Manning* (2014) 226 Cal.App.4th 1133, 1137.) Those circumstances are identical to the factors that would render an already sentenced third-striker ineligible for resentencing under section 1170.126, subdivision (f). Under the Penal Code, if a statute assigns the prosecution the burden to plead and prove a fact that increases maximum and minimum punishments, the proof must be beyond a reasonable doubt. (*See* § 501 ["Insofar as any statute, except Section 522, assigns the burden of proof in a criminal action, such statute is subject to Penal Code Section 1096]; § 1096 ["A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal...."].) The same is true under the federal constitution. (See generally *Blakely v. Washington* (2004) 542 U.S. 296, 303-304; *Alleyne v. United States* (2013) 133 S. Ct. 2151, 2161-2163; see pp. 15-16, post.) The Act's pleading and proof requirement for future

three-strike sentences therefore requires the prosecution to prove any disqualifying factors beyond a reasonable doubt: "the drafters of the Act were well aware of the constitutional requirements of jury trials and proof beyond a reasonable doubt for factors which enhance sentences." (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1303, fn. 26.)

In contrast, as this Court recently noted, the resentencing provisions of section 1170.126 do not textually require the prosecution to "plead and prove" the existence of the disqualifying conduct; rather, the resentencing court "shall determine whether" any disqualifying conduct applies. (*People v. Conley*, *supra*, 63 Cal.4th at pp. 660-661.) In *Conley*, this Court held that previously sentenced defendants seeking a sentence reduction under the Act must proceed under section 1170.126, rather than under section 1170.12. (*Id.*, at p. 651.) In reaching that result, the Court noted that "the Act does not address the complexities involved in applying the pleading-and-proof requirements to previously sentenced defendants precisely because the electorate did not contemplate that these provisions would apply. Rather, voters intended for previously sentenced defendants to seek relief under section 1170.126, which contains no comparable pleading-and-proof requirements." (*Ibid.*) (See also *People v. Brimmer* (2014) 230 Cal.App.4th 782, 801-803; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1314-1315; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1058-1059; *People v. White* (2014) 223 Cal.App.4th 512, 526-527.)

"[W]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes." (*In re Jennings* (2004) 34 Cal.4th 254, 273, quoting *People v. Norwood* (1972) 26 Cal.App.3d 148, 156.) The Act's inclusion of a pleading and proof requirement in the Act's prospective provision incorporates the Penal Code's beyond a reasonable

doubt standard for matters which must be pleaded and proven; the absence of a pleading and proof requirement in the retrospective provision demonstrates an intent not to impose that higher burden for resentencing. (Cf. *Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1138 ["When the Legislature specifies the clear and convincing evidence standard of proof applies in one statute, and omits such a standard from another statute in the same chapter and article, we presume the Legislature did not intend the clear and convincing evidence standard to apply in the latter statute."].) As *People v. Osuna* (2014) 225 Cal.App.4th 1020, and *People v. Blakely*, *supra*, 225 Cal.App.4th 1042 reasoned, the absence of a pleading and proof requirement in the Act's resentencing provision shows that the electorate did not intend to incorporate a reasonable doubt standard for "determining whether an inmate already sentenced as a third strike offender is eligible for resentencing as a second strike offender." (*People v. Osuna*, *supra*, at pp. 1036-1040; *People v. Blakely*, *supra*, 225 Cal.App.4th at pp. 1058-1063.)

Any other interpretation would upset what this Court has described as the Act's careful "balance" between the goal of "mitigating punishment" and that of "protecting public safety." (*People v. Conley*, *supra*, 63 Cal.4th at p. 658.) "The Act's proponents stated that 'Criminal justice experts and law enforcement leaders carefully crafted Prop. 36 so that truly dangerous criminals will receive no benefits whatsoever from the reform.'" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 171.)[4] As this Court has recognized, "the Act [was] more cautious with respect to resentencing"

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[4] This is consistent with the voter ballot pamphlet that identified the target beneficiaries of the initiative: "'[p]eople convicted of shoplifting a pair of socks, stealing bread or baby formula don't deserve life sentences.'" (*People v. Conley*, *supra*, 63 Cal.4th at p. 658, quoting Voter Information Guide, Gen. Elec. (Nov. 6, 2012), rebuttal to argument against Prop. 36, p. 53.)

those already serving three-strikes sentences than it was with respect to sentences for newly convicted offenders. (*People v. Johnson*, *supra*, 61 Cal.4th at p. 686.) Among other things, section 1170.126, subdivision (e) promotes this "cautious" intent by including threshold disqualifying criteria that are broader than the elements that were originally pleaded and proven, in order to identify those prisoners who committed their crimes in a violent manner even when their offense of conviction was not "serious" or "violent" under the Three Strikes Law. The factor here at issue—that "the defendant intended to cause great bodily injury to another person"—is one of those criteria. (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); see *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1333 [the bodily injury criterion " do[es] not describe a particular offense but appl[ies] to conduct relating to a[n] . . . intent to cause great bodily injury that occurred during the commission of an adjudicated offense"].) The other threshold disqualifying factors—concerning the use of weapons—are similarly important to effectuate the initiative's intent to disqualify from relief those defendants whose current offenses demonstrate an inherent risk of violence. (See §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).)

Requiring the prosecution to prove these factors by a preponderance of the evidence—but not beyond a reasonable doubt—is consistent with the initiative's "cautious" intent. In contrast, a beyond a reasonable doubt standard would undercut that intent, by allowing truly dangerous prisoners to take advantage of shortcomings in the historical record of long-past convictions that were judged under a prior version of the law. As this Court has explained: "Before the Reform Act became law, the prosecution ordinarily would have had no reason to plead and prove a defendant's *intent* to cause great bodily injury. . . ." (*People v. Conley*, *supra*, 63 Cal.4th at p. 660, citation and footnote omitted, italics in original.) At resentencing under the Reform Act, the prosecution must have the opportunity to prove

applicable disqualifying factors, otherwise "the defendant might receive a second strike sentence without the prosecution ever having had occasion to plead and prove that the defendant was actually disqualified from receiving that sentence under section 1170.12, subdivision (c)(2)(C). (*Ibid.*)

Notwithstanding any shortcomings of the original record, it is certainly the People's burden to establish the presence of a disqualifying factor under subdivision (e). Under the preponderance standard, the prosecution will be able to meet that burden where warranted, even though the prosecution at the original proceeding had no need to establish, for instance, an intent to cause great bodily injury. In contrast, imposing a beyond a reasonable doubt standard would in many cases make the prosecution unable to prove ineligibility even for those defendants who truly did have a disqualifying factor—merely because of the happenstance that the prosecution, having no need to prove such a factor years ago, made a less than complete record. Such a windfall for dangerous defendants would not fulfill the voters' intent.[5]

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[5] In some contexts, the absence of an explicit instruction requires that a penal law be construed in the defendant's favor. But that "rule of lenity" is inapplicable here for two reasons. First, the rule of lenity "applies "'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."'" (*People v. Nuckles* (2013) 56 Cal.4th 601, 611, citation omitted.) Here, the court can do far more than merely "guess" about legislative intent: the statute's text, structure, and overall purposes all show that the preponderance standard applies. Second, the rule of lenity exists to guarantee fair warning in advance that certain conduct will be criminal and will subject a person to particular penalties. The rule's purposes would not be served by applying it here. Frierson, who had fair warning when he committed his original crimes, seeks mercy based on statutes that postdate his crime and that could not have affected his original decision to break the law.

C. Case Law Does Not Impose a Higher Standard

Frierson, following the court of appeal decision in *People v. Arevalo*, *supra*, 244 Cal.App.4th 846, argues that a beyond a reasonable doubt standard is required for resentencings because *People v. Johnson*, *supra*, 61 Cal.4th 674, mandates "'equal outcomes'" under the prospective and retrospective provisions of the Act. (ABM 17-18.) He is mistaken.[6]

Frierson and *Arevalo* read *Johnson* as requiring that the same standard of proof be employed for new sentencings and resentencings, because the "parallel structure of the Act's sentencing and resentencing provisions appears to contemplate identical sentences in connection with identical criminal histories." (*People v. Johnson*, *supra*, at p. 686.) But *Johnson*'s observation about identical sentences addressed the substantive question of what counts as a disqualifying offense—the question was whether a defendant should be eligible for resentencing if his third strike was not listed as a serious felony at the time of his conviction, but was listed as such at the time of the Act's effective date. (*People v. Johnson*, *supra*, 61 Cal.4th at p. 687.) In that context, it makes sense to apply a single definition (the definition in place as of the Proposition's enactment), rather

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[6] This case does not present the concern that was central to *Arevalo*—the possibility that a resentencing court, using a predominance standard, could reach a finding contrary to one made by the jury at trial, beyond a reasonable doubt. (See *People v. Arevalo*, *supra*, 244 Cal.App.4th at p. 853.) In any event, both the United States Supreme Court and the California Supreme Court have held a sentencing court may constitutionally rely upon facts underlying acquitted counts as long as the facts are established by a preponderance of the evidence. (See *United States v. Watts* (1997) 519 U.S. 148, 157; *In re Coley* (2012) 55 Cal.4th 524, 557.) A trial court's reliance upon facts underlying an acquitted count in a sentencing proceeding does not turn an acquittal or an untrue finding into their "opposites," as asserted in *Arevalo*, *supra*, 244 Cal.App.4th at p. 853, because an acquittal is not an affirmative factual finding of innocence. (*Coley*, *supra*, at p. 557.)

than to apply multiple definitions based on the precise version of the Penal Code in place at the time of the underlying offense. That certainly does not mean that the Act's resentencing outcomes must in all respects mirror outcomes for new sentences.

Indeed, outcome differences are inherent in the procedures established by the Act—for instance, courts have a discretionary ability to maintain a previously imposed three-strike sentence under section 1170.126, subdivision (f) even where they would not be able to impose a new three-strike sentence under section 1170.12. Moreover, as *Conley* reasoned, the electorate did not contemplate that the pleading and proof requirements in the prospective provision of the Act would apply retrospectively at resentencing. (*People v. Conley*, *supra*, 63 Cal.4th at pp. 660-661.) That, too, results in an outcome difference—the prosecution's failure to have pleaded a disqualifying factor, which precludes the imposition of a third-strike sentence in a new case, does not require that someone who was previously sentenced be resentenced. In short, the Act expressly envisions that, as between new sentencings and resentencings, different procedures will be employed that will sometimes lead to different outcomes.

D. No higher burden of proof is constitutionally required

Finally, nothing higher than the preponderance standard is required as a matter of constitutional law. Frierson expressly disclaims any argument that "the [state or federal] [C]onstitutions impose a beyond reasonable doubt standard." (ABM 15.) That concession is undoubtedly correct as to a defendant's rights under the *Apprendi*[7] line of authority, because the rights to a jury determination and the beyond a reasonable doubt standard do not apply to proceedings that function solely to reduce a validly imposed sentence. (See *Dillon v. United States* (2010) 560 U.S. 817, 827-829 [a

[7] *Apprendi v. New Jersey*, *supra*, 530 U.S. 466.

criminal defendant's Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt does not apply to downward sentencing modifications due to intervening laws]; *People v. Perez* (2016) 3 Cal.App.5th 812, 822, fn. 10 [summarizing case law].)

Nor is a higher standard required under the due process clause, notwithstanding the contrary reasoning of *People v. Arevalo*, *supra*, 244 Cal.App.4th at pp. 850-853. (AMB 15-16.) The *Arevalo* court, relying upon a concurring opinion in *People v. Bradford*, *supra*, 227 Cal.App.4th at pp. 1346-1340 (conc. opn. of Raye, P.J.), believed that due process requires a beyond a reasonable doubt standard to protect a defendant's "liberty interest" because of the substantial difference in potential prison time that could result from resentencing, the risk to the defendant of potential error, and what it viewed as only minimal countervailing governmental interests. (*People v. Arevalo*, *supra*, 244 Cal.App.4th at pp. 850-852.)

But once a defendant has been properly convicted and sentenced, the defendant's liberty interest in an ameliorative remedy is set by the statute that the State has enacted. With respect to parole, for instance, the United States Supreme Court has made clear that "[w]hatever liberty interest exists is, of course, a *state* interest created by California law." (*Swarthout v. Cooke* (2011) 562 U.S. 216, 220, italics in original.) The defendant's due process right is the right to "fair procedures" for vindicating that state-created right. (*Ibid.*) And "the procedures required are minimal." (*Ibid.*) Here, the electorate established a predominance standard for determining whether a petitioning defendant is disqualified from resentencing, and there is no independent federal constitutional right to a higher standard. Frierson's liberty interest is in receiving a second-strike sentence when that is required by the Act's standards—including the preponderance burden of proof—having been met. (See *id.* at p. 221.)

A defendant's time in prison, if he is found ineligible under subdivision (e), may certainly differ substantially from what he would serve if resentencing were granted. But a finding of ineligibility under subdivision (e) does not result in a new additional sentence being imposed—rather, a defendant in Frierson's position desires the reduction of sentence that was previously imposed with full due process. The beyond a reasonable doubt standard is "applied to cases involving a deprivation of important personal rights." (*In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1490.) Proceedings under the retrospective portion of the Act do not "deprive" a petitioner of an important personal right, because the deprivation has already happened when the defendant was convicted and sentenced under lawful statutes. (See *Kaulick*, *supra*, 215 Cal.App.4th at p. 1303.)

In an analogous context, defendants who have served their minimum time are presumptively eligible for parole (§ 3041, subd. (a)(2)), and the decision to grant or withhold parole can make a tremendous difference in an individual defendant's custody time. But courts reviewing a denial of parole do not apply the beyond a reasonable doubt standard. Rather, they apply a standard that is even lower than the preponderance standard at issue here, upholding a denial of parole if the Board or Governor had merely "some evidence" establishing that the defendant remains a danger to the public. (*In re Prather* (2010) 50 Cal.4th 238, 243.) Nor is the beyond a reasonable doubt standard required even when deciding whether to return to custody a previously sentenced defendant who is free on parole or probation. (See *Morrissey v. Brewer* (1972) 408 U.S. 471, 480, 488-489 [minimum due process requirements at parole revocation proceedings do not include heightened standard for making factual findings]; *People v. Rodriguez* (1990) 51 Cal.3d 437, 439, 441 [probation revocation proceedings are determined based on a preponderance of evidence

standard].) More generally, the preponderance standard applies to numerous decisions that impact the liberty of a criminal defendant.[8]

Finally, the "risk of potential error" and the governmental interest involved do not argue for a heightened standard of proof. (See ABM 16.) As this Court has noted, the Act's "balanc[ing]" of risks (*People v. Conley, supra*, 63 Cal.4th at p. 658) results in a structure that is indeed "cautious with respect to resentencing"(*People v. Johnson, supra*, 61 Cal.4th at p. 686). That is because of the concern (which the initiative's proponents were anxious to dispel) that dangerous felons would otherwise be released. When the State grants retrospective lenity to those who have been lawfully convicted, the Constitution does not compel the State and its residents to bear the burden of error. And, while it is true that, by its nature, a resentencing court's retrospective fact-finding may involve evidentiary limitations, the potential lack of evidence is no more attributable to the prosecution than to the defense. Neither party had any incentive to obtain a formal finding at trial about the existence of the disqualifying conduct at issue here—whether during the commission of the current crime petitioner intended to cause great bodily injury to another person—since this conduct was not an element of either offense. Indeed, certain forms of evidence—

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[8] The preponderance standard applies, for instance, to a trial court's decision to admit a confession (*Lego v. Twomey* (1972) 404 U.S. 477, 489), a jury's determination as to whether a defendant committed crimes other than those for which he or she is charged (*People v. Carpenter* (1997) 15 Cal.4th 312, 380-382), whether a defendant had the same intent and objective in committing multiple offenses for the purposes of section 654 (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 266, 268-270), whether the prosecution has acted in bad faith in refilling criminal charges for a third time under section 1387.1 (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 746-748), and whether the statute of limitations may be extended against a defendant (*People v. Riskin* (2006) 143 Cal.App.4th 234, 237, 241-242).

such as the defendant's own testimony—are things that only the defendant has the power to produce. Accordingly, a preponderance standard is appropriate. (See *People v. Arriaga* (2014) 58 Cal.4th 950, 961.)

CONCLUSION

For the reasons given above, this Court should hold that determinations under section 1170.126, subdivision (e) are to be made under the preponderance of the evidence standard, and should affirm the court of appeal.

Dated: March 15, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains **4,732** words.

Dated: March 15, 2017

XAVIER BECERRA
Attorney Generalof California

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DECLARATION OF SERVICE

Case Name: ***People v. James Belton Frierson*** **No.: S236728**

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 March 15, 2017, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Richard B. Lennon
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Honorable William C. Ryan, Judge
Los Angeles County Superior Court
210 West Temple Street
Department 130
Los Angeles, California 90012-3210

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Deputy District Attorney
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320 West Temple Street, Suite 540
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On March 15, 2017, I caused an original and **8** copies of the **ANSWER BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **FEDEX OVERNIGHT CARRIER, Tracking # 806265809080**.

On March 15, 2017, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On March 15, 2017, 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 by using the Court's Electronic Service Document Submission 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 March 15, 2017, at Los Angeles, California.

Maria Lasso
Declarant

Maria Lasso
Signature

LA2015600454
Robert C. Schneider