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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S223676

THE PEOPLE,
Plaintiff and Respondent,

v.

CLIFFORD PAUL CHANEY,
Defendant and Appellant.

Court of Appeal
Third District
No. C073949

Superior Court of California
Amador County
No. 05CR08104

REPLY BRIEF ON THE MERITS (CORRECTED)

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ARGUMENT

I. THE DEFINITION OF "UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY" IN PROPOSITION 47'S RECALL AND RESENTENCING PROVISION (§ 1170.18) APPLIES RETROACTIVELY TO THE RECALL AND RESENTENCING PROCEEDINGS UNDER THE THREE STRIKES REFORM ACT OF 2012 (§ 1170.126).

The State concurs with Chaney that in answering the question whether the electorate intended Proposition 47's definition of the phrase "unreasonable risk of danger to public safety" to apply retroactively to Proposition 36 proceedings on appeal of judgments in which the court denied relief on the ground the petitioner presented such a risk, this Court must first determine if the electorate intended to "apply Proposition 36 proceedings at all." (AB 4; see also AB 14.) As Chaney has explained in this regard:

> [A] retroactivity analysis wholly depends on the intent of the lawmaker. A court cannot determine the lawmaker's intent to apply a provision retroactively in a vacuum. It must first ascertain what the lawmaker intended the provision to reach prospectively in order to fairly determine whether it further intended the provision to reach back retroactively.

(OB 46, fn. 9.)

Chaney accordingly addresses each of the sections of the State's answering brief on the terms in which the State answers his arguments, and does so in the order the State makes its

arguments. As Chaney sets forth below, the State's arguments that Proposition 47's definition of the "unreasonable risk" phrase does not apply at all to Proposition 36 determinations of unreasonable risk are unpersuasive, for they are made in the face of the clarity of the language itself specifying that the definition applies to that phrase "as used throughout the Code." Equally unavailing is the State's further argument that even if the electorate intended to apply the definition to future Proposition 36 cases, it did not intend to apply the definition retroactively to past adjudications of unreasonable risk on appeal. Once it is settled that the definition applies to future Proposition 36 determinations of dangerousness, the inference inevitably follows that it applies to past determinations of such as well, since there is no reason to distinguish between the two groups and every reason not to.

A. The State's Point that Proposition 36 Provides for Resentencing of Qualified Third Strike Offenders Like Chaney "Subject to Broad Judicial Discretion" Does Not Aid Its Argument.

The State recognizes that a qualified Third Strike petitioner like Chaney "shall be resentenced as a second striker, 'unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.'" (AB 9, quoting § 1170.126, subd. (f)[1].) As the State further notes:

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

> The term "unreasonable risk of danger to public safety" is not expressly defined in the statute, but the statute does provide guidelines for the trial court to consider in making its determination. In exercising its discretion, the trial court may consider the petitioner's criminal history, the circumstances of the current offense, his or her disciplinary record and record of rehabilitation while incarcerated, and any other evidence the court, in its discretion, determines to be relevant. (§ 1170.126, subd. (g).)

(AB 9.)

Although the State never notes it, Proposition 47 similarly sets forth these same "guidelines for the trial court to consider in making its determination" of unreasonable risk, and does so in exactly the same language. (See OB 11 ["Proposition 47 also includes a list of factors that a 'court may consider' in making that determination [of unreasonable risk] that is identical to the list of factors that guides a court's Proposition 36 determinations of dangerousness. (Compare § 1170.18, subd. (b), with § 1170.126, subd. (g).)"].)

The State concludes its exposition of Proposition 36 with the following quote from *People v. Yearwood* (2013) 213 Cal.App.4th 161, 175: "Enhancing public safety was a key purpose of Proposition 36." (AB 10, brackets in quote deleted.].) The language from *Yearwood* that follows that quotation, however, explains it:

> The Act's proponents argued that the initiative would ensure dangerous criminals remain in prison. One of the arguments in the ballot pamphlet in opposition to the Act referenced the postconviction release created by section 1170.126. It asserted that "a hidden

> provision will allow thousands of dangerous criminals to get their prison sentence reduced and then released from prison early." [Citation.] In rebuttal, proponents denounced this argument as a "scare tactic." [Citation.] Proponents insisted that the Act "requires that murderers, rapists, child molesters, and other dangerous criminals serve their full sentences," and it "prevents dangerous criminals from being released early." [Citation.]

(*Id.* at pp. 175–176, brackets and ellipsis deleted.)

Proposition 36 does the latter by means of the same language in Proposition 47 that prevents dangerous prisoners from being released pursuant to its retroactive benefits: namely, when "the court, in its discretion, determines that resentencing the person would pose an 'unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).)" (AB 11; see also *ibid.* ["The language of section 1170.18, subdivision (b), is similar to the language appearing in section 1170.126, subdivisions (f) and (g)."].) Given that both propositions are designed to except from its benefits "dangerous criminals" who pose an "unreasonable risk of danger to public safety," the State's notation that a key purpose of Proposition 36 was enhancement of public safety begs the question here: certainly a key purpose of Proposition 47 also was enhancement of public safety. (See, e.g., AB 12 [quoting one of the stated purposes and intent in section 3 of Proposition 47, namely: "Require a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety."].)

B. The State's Point that Proposition 47 Provides for Resentencing of Felons Who Would Be Misdemeanants If Charged After Its Enactment Subject to Circumscribed Judicial Discretion Does Not Aid Its Argument.

First, the discretion of a court to deny the benefits of Proposition 47 to a qualified petitioner is the same as the discretion of a court to deny the benefits of Proposition 36 to a qualified petitioner: a court may do so in each case only if it determines, based on identical guides to what it may consider, "that resentencing the person would pose an 'unreasonable risk of danger to public safety.' " (AB 11.) Proposition 47, however, limits the power of a court to deny resentencing in a way that Proposition 36 did not. While "[t]he term 'unreasonable risk of danger to public safety' is not expressly defined in [Proposition 36]" (AB 9), Proposition 47 does expressly define the phrase: "'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." (AB 11, quoting § 1170.18, subd. (e).) In that sense, Proposition 47 does circumscribe judicial discretion to find the petitioner an unreasonable risk, for the court's finding of such must come within the parameters of the definition.

In contrast, "[w]ithout any objective standard or definition [in Proposition 36] to determine whether a qualified third-striker posed an 'unreasonable risk to public safety,' the trial courts imposed widely varying measures to determine such according to

each judge's subjective determination," with some courts applying the standard much more stringently and cautiously than others. (OB 8.) The more circumscribed discretion that Proposition 47 set forth in defining "unreasonable risk," however, appears to better approximate the original purpose and intention of the "safety valve" exception to retroactive application of Proposition 36 for dangerous prisoners. (See, e.g., Mills & Romano, *The Passage and Implementation of the Three Strikes Act of 2012 (Proposition 36)* (2013) 25 Fed.Sent.R. 265, 268 ["the intent of the Prop. 36 is that inmates will be entitled to new sentences in all but the rarest outlier cases involving true risk to public safety"].) Experience in the courts' implementation of Proposition 36's retroactivity provision thus apparently motivated the drafters not only to provide a stringent definition of "unreasonable risk" to Proposition 47's dangerousness determinations, but also to apply that definition to that phrase "[a]s used throughout this Code." (See AB 11, quoting § 1170.18, subd. (c).)

In short, the question still remains under the State's explication of both propositions whether Proposition 47's definition of the phrase "unreasonable risk of danger to public safety" applies to Proposition 36's selfsame use of that phrase.

C. The State's Recitation of the General Principles of Statutory Construction Does Not Aid Its Argument.

The State in the next section of its brief recites "the general principles of statutory construction." (See AB 13–14.) That recitation does not aid its cause, however, for it shows only that the State agrees with Chaney on those principles. Chaney

acknowledged those same principles of statutory construction and indeed demonstrated that application of them supported his claim.

D. Proposition 47's Definition of "Unreasonable Risk of Danger to Public Safety" Applies to Proposition 36's Determinations of "Unreasonable Risk of Danger to Public Safety."

1. The Statutory Language of Section 1170.18 and the Respective Scopes and Purposes of Propositions 47 and 36 Do Not Demonstrate that the Voters Had No Intention to Apply Section 1170.18, Subdivision (c) to Section 1170.126 Proceedings.

The State acknowledges that "[a]t first blush, when viewed in isolation, the language 'as used throughout this Code" in section 1170.18, subdivision (c) appears to apply Proposition 47's definition of 'unreasonable risk of danger to public safety' whenever that phrase is used in the Penal Code, including section 1170.126." (AB 15.) The State nevertheless submits that despite this plain and unambiguous language, "consideration of the statutory contexts, scopes, and purposes reveals that the voters did not intend for Proposition 36 proceedings to be affected by the passage of Proposition 47." (AB 15.)

The State could not be more wrong in that submission. As Chaney demonstrated in his opening brief, not only "[a]t first blush" and at face value does the language "as used throughout this Code" plainly reveal the electorate's intention to apply

Proposition 47's definition of "unreasonable risk of danger to public safety" to Proposition 36's use of that phrase, but placing that language in context only "fortifies" and "reinforces the conclusion that the electorate said what it meant and meant what it said." (OB 21.)

i. The Language of Section 1170.18 Unambiguously Reflects the Electorate's Intent to Apply Its Dangerousness Definition to Proposition 36' s Dangerousness Determinations.

The State contends that appearances to the contrary, the statute's language shows it does *not* apply to Proposition 36's dangerousness determination, or, hedging its bets, "at least creates ambiguity as to its application." (AB 15, italics added.) Quite the opposite.

The State first tries to create ambiguity by emphasizing that the definition refers to the unreasonable risk posed by "the petitioner." (AB 15–16.) From this the State asserts that "the statutory language as a whole shows an intent to apply the definition to 'petitioners' under section 1170.18, *not any other petitioners*." (AB 16, italics added.) But in so construing the statutory language, the State simply negates the language "as used throughout this Code," rendering it superfluous. If the definition was intended to apply only to Proposition 47 petitioners, the drafters would have introduced the definition with the phrase "in this section" or "in this act," if not dispensed with an introductory phrase altogether. (See OB 39–40

[explaining how the interpretation here sponsored by the State renders the introductory phrase surplusage].) Not included in the State's recitation of the statutory rules of construction, but one very pertinent to this case, is the rule that "[s]tatutes ..., will be construed so as to eliminate surplusage." (See OB 19, quoting *People ex rel. Lungren v. Superior* (1996) 14 Cal.4th 294, 302.)

The only conceivable purpose in introducing the definition of dangerousness with the language "as used throughout this Code," is broadening of application of the definition to include its use beyond the Proposition 47 context; namely, to wherever else in the Penal Code it appeared. Thus, construing the language as indicating an intent not to apply it to Proposition 36 does violence to that language, whose whole import is to apply that definition in contexts beyond that of Proposition 47. The State's submission that the dangerousness definition introduced by the language "as used throughout this Code" reflects the electorate's intention *not* to apply it beyond the section of the Penal Code at hand sends us like Alice down the rabbit hole, confronted with Humpty Dumpty's assertion, "When *I* use a word, ... it means just what I choose it to mean--neither more nor less." (Lewis Carroll, Through the Looking Glass (1934 ed.), ch. 6, p. 205, quoted in Plat, Respectfully Quoted: A Dictionary of Quotations (Wash. D.C. Library of Congress 1989) entry 2019.)

ii. The State's Asserted "Different Scopes of Propositions 36 and 47" Do Not Detract From the Plain Meaning of "As Used Throughout This Code."

The State implicitly acknowledges that Propositions 36 and 47 are complementary sentencing reform measures, and explicitly acknowledges that they "each created a resentencing scheme" for their retroactive implementation. (AB 17.) Although the State does not mention it, in fact the resentencing schemes are exactly the same except for one particular: Proposition 47, using Proposition 36's scheme as a model, added to it a definition for the phrase "unreasonable risk to public safety" that serves as a safety valve against blanket retroactivity of the propositions.

The State asserts that this definition does not apply because the respective groups of felony offenders affected by them are "very different." (AB 17.) The State asserts that Proposition 36 concerns a "group of California's worst criminals" (AB 17), while Proposition 47 concerns "low level offenders" serving felony sentences "in the much less serious context of ... drug- and theft-related offenses." (AB 17.) The State submits that "[t]here is a huge difference, both legally and in the risk to public safety," between the two groups. (AB 18.)

The State greatly overstates the difference between the two groups of offenders. To begin with, the "drug- and theft-related felonies" the subject of Proposition 47 are the classic type of offenses that the electorate had in mind when it enacted Proposition 36. As the State itself pointed out, among the Findings and Declarations of Proposition 36 were that life sentences should be reserved for offenders whose "current

conviction is for a violent or serious crime," as opposed to a "new minor third strike crime" or "non-violent, non-serious crimes like shoplifting and simple drug possession ...." (See AB 9, quoting section 1 of Proposition 36.) Indeed, there is such little difference between Proposition 36 and Proposition 47 offenders that the two groups of them substantially overlap: as the State acknowledged, the same offense that qualified a third-strike offender for a life offense may now qualify that offender for relief under both Proposition 36 and Proposition 47. (See AB 17 ["it is possible for an individual to be eligible for relief under both Proposition 36 and Proposition 47"].)

Proposition 36 additionally found and declared that the beneficiaries of retroactive application of Proposition 36 would be "elderly, low-risk, non-violent inmates serving life sentences for minor crimes." (See AB 10, quoting section 1 of Proposition 36.) If anything, the most important distinction between the respective groups of prisoners affected by the propositions in terms of public safety is the elderly nature of the Proposition 36 group. It is well known that the older the offender when released, the less likelihood of recidivism. (See, e.g., OB 29–30, fn. 7, quoting *In re Stoneroad* (2013) 215 Cal.App.4th 596, 632–634 ["The electorate may well have found that the predilection of trial judges to find dangerousness according to their own subjective standards in the retroactive implementation of the Reform Act was 'incongruent with the present predicament of our correctional system,' and did 'not appear necessary to protect pubic safety, because due to their age, the recidivism rate of lifers is dramatically lower than that of all other state prisoners, indeed infinitesimal.'"].) The State's gross overstatement about the danger posed by the prospect of

release of Proposition 36 offenders compared to the danger posed by Proposition 47 offenders is reflected by the fact -- published well before the electorate enacted Proposition 47 -- that "the recidivism rate of third-strikers resentenced and released under the Reform Act was strikingly low at 1.3%." (See OB 30.)

Finally, the State argues that "as a class" Proposition 47 prisoners are less dangerous than Proposition 36 prisoners. (AB 18.) The State points to no empirical evidence to support that assertion, whereas "the experience of implementation of the retroactive provision of Proposition 36, which resulted in an astoundingly low rate of recidivism" for releasees (OB 28) -- an experience that may well have been in the forefront of the electorate's mind when it enacted Proposition 47 -- tends to undermine it. But even if true, that premise has little significance in determining whether the electorate in enactment of Proposition 47 intended its definition of "unreasonable risk of danger to public safety" to apply to Proposition 36 offenders. For both groups of offenders, the determination of the requisite unreasonable risk is an individualized one dependent on the multiplicity of circumstances related to that person that both statutes identify. In short, while the State submits that "it is logical to impose a higher dangerousness standard for Proposition 36 offenders than Proposition 47 offenders" (AB 18), the logic of doing so was a matter for the electorate to determine. It made that determination when it provided that the definition of dangerousness it added in Proposition 47 be applied "throughout this Code" rather than restricted to Proposition 47 offenders -- an equally logical determination in the efforts of both propositions to apply its benefits retroactively to all but the truly

dangerous prisoner "to ensure that the courts left behind no qualified prisoner when making the dangerousness determination called for in both propositions." (OB 29.)

iii. The State's Assertion of "Different Purposes of Propositions 36 and 47" Is False and In Any Event Does Not Detract From the Plain Meaning of "As Used Throughout This Code."

In making its argument, the State concedes Chaney's contention that Propositions 36 and 47 had the same twin purposes: 1) reducing the State's costly and unnecessary reliance on mass imprisonment to preserve public safety, and 2) redeploying the savings from that reduction to more effective crime-fighting measures. (See AB 19–20; accord, OB 23 ["Proposition 47 and the Reform Act address the same evil, over-reliance on imprisonment, by the same means: reduced punishment for offenders of low-level felonies."]; OB 25 ["Both propositions here seek to improve public safety by addressing the evil of prisons overcrowded with less serious offenders draining fiscal resources, with the objective of redeploying the financial savings to more effective methods of fighting crime."].) What the State contests is Chaney's contention that both propositions "subordinat[e] their interest in cost savings to maintenance of imprisonment for serious and violent [or otherwise dangerous] offenders." (See OB 26.) The State submits that cost savings played second fiddle to public safety concerns only in Proposition

36, while "public safety interests ... played second fiddle to monetary interests in the enactment of the Proposition 47 statutory scheme." (AB 19.)

The State's submission should be rejected out of hand. When has a lawmaker, never mind the public, ever enacted a criminal justice provision where public safety interests played second fiddle to financial concerns? Preservation of public safety is always the paramount consideration in any criminal justice enactment, and Proposition 47 is no exception. Indeed, as Chaney already has pointed out: "Proposition 47 is titled 'the Safe Neighborhoods and Schools Act'— a title that obviously makes public safety pre-eminent." (OB 26.)

The State's effort to show that Proposition 47's "main purpose" was "cost savings" at the expense of public safety (AB 19), and thus was more concerned than Proposition 36 with saving money than preserving public safety, falls flat. In the end, to show that Proposition 36 was more concerned than Proposition 47 with public safety, the State relies solely on Proposition 36's retroactivity provision that "ensured current inmates would not be released from state prison ... in any case in which the trial court, in its discretion, determined resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)" (AB 18.) But the State overlooks the fact that Proposition 47 has that same retroactivity provision. (See OB 10 ["like Proposition 36, Proposition 47 requires the court 'in its discretion' to grant the petition unless it finds that to do so would present 'an unreasonable risk of danger to public safety.' (Compare § 1170.126, subd. (f) with § 1170.18, subd. (b).)"].)

The State further concedes that "Proposition 47 modeled its mechanism for resentencing relief on the Proposition 36 resentencing scheme." (AB 20.) Nevertheless, it submits that "there is no reason to believe that the voters intended" the one change they made to the model -- adding a definition of "'unreasonable risk of danger to public safety" -- to thereby define that same phrase in section 1170.126. (AB 20.) According to the State, "there is no indication that the voters intended [such] other than the mere language 'throughout this Code' ... in Proposition 47 ...." (AB 20.)

In arguing that it is "merely" the language of the provision that indicates the electorate's intent to apply its newly-minted definition to the phrase it had used just two years earlier and on which Proposition 47 was modeled, the State overlooks the first principle of statutory construction it recited: "To determine the voters' intent, the court turns first to the words of the provision adopted by the voters, giving the language its ordinary and plain meaning." (AB 13.) The State also omits entirely the corollary to that principle, set forth in the very next sentence of *People v. Jones* (1993) 5 Cal.4th 1142, 1146 that it cited for the first principle: "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of ... the voters." (See also OB 18, quoting *People v. Canty* (2004) 32 Cal.4th 1266, 1276 ["If the language is clear and unambiguous, we follow the plain meaning of the measure."].) Thus, the State's protest that "[t]here was no evidence of voter sentiment that the recently passed Proposition 36 was broken or ill-construed" or otherwise could stand some improvement (AB 19) is an empty one, for the proof is in the pudding of Proposition

47 itself: The voters in Proposition 47 in fact *did* find that Proposition 36's retroactivity provision could be improved, for it added a definition to the operative phrase that justifies denial of resentencing. Indeed, the voters found that the improvement was significant enough that it further specified that its definitional gloss be applied to all uses of that phrase in the Penal Code.

The State goes to some length to argue that "Propositions 36 and 47 are not truly *in pari materia*," so that this Court need not give the "similar phrases appearing in each ... like meaning." (AB 21.) First it cites *Walker v. Superior Court* (1988) 47 Cal.3d 112, but missing from that case was any showing that "the statutes reflect some shared legislative objective." (AB 21.) In contrast, here the propositions not only share objectives, but also the means to accomplish them:

> Both propositions here seek to improve public safety by addressing the evil of prisons overcrowded with less serious offenders draining fiscal resources, with the objective of redeploying the financial savings to more effective methods of fighting crime. Their means to do so are identical: In the long term, by blanket reduction of the punishment for all such future less serious offenders, and in the short term, by retroactive extension of the reduction of punishment to as many qualified prisoners as possible consistent with public safety. They accomplish that short-term fix by denying reduction of their punishment only to that pool of eligible offenders who are truly dangerous.

(OB 20.)

The State asserts that this Court's recent application of the pari materia doctrine in *People v. Tran* (2015) 61 Cal.4th 1160,

"is distinguishable," but in fact *Tran* illustrates the appropriateness of defining "unreasonable risk of danger to public safety" as set forth in Proposition 36 in accordance with the explicit definition of that phrase in Proposition 47. For example, the State asserts that "the initiatives target different groups of offenders" (AB 22), but overlooks the fact that the two statutory schemes in *Tran* also targeted different groups of offenders, respectively mentally disordered offenders (MDO) and offenders found not guilty by reason of insanity (NGI). Nevertheless, *Tran* found that the statutory schemes were in para materia because "both address persons afflicted by mental disorders." (*Id.* at p. 1168.) Likewise, here, both propositions address low-level felony offenders eligible for resentencing. And, just as the statutory schemes in *Tran* "[b]oth have the dual purpose of "protecting the public while treating severely mentally ill offenders" (*ibid.*), both propositions have the dual purpose of protecting the public while reducing imprisonment for those low level offenders. Finally, just as the schemes in *Tran* provided similar procedures for determining whether each group should be released from custody (*ibid.*), both propositions provide similar procedures to determine whether each group should be resentenced. In sum, as in *Tran*, the retroactivity "provisions in the two schemes are in pari materia, [and] 'should be given like meanings.' [Citations.]" (*Ibid.*)

2. The Initiatives' Official Ballot Materials Do Not Show that the Voters Did Not Intend Proposition 47 to Amend Proposition 36.

In support of its claim that the official ballot materials show that the voters did not intend Proposition 47 to amend Proposition 36, the State largely relies on the fact that "[t]he official ballot materials were totally silent as to whether Proposition 47 would amend Proposition 36 [and] did not mention Proposition 36 at all." (AB 25.) Such hardly constitutes a showing that there was no such intention. Indeed, it is precisely because "the analyses and arguments did not address the reach of Proposition 47's definition of dangerousness or the critical language here at issue" that they "are of no help here" in ascertaining the voter's intent on this point and do not make ambiguous the otherwise clear language of the proposition expressing its intent. (See OB 29.)

Seeking to avoid the substantial law that Chaney cited to the effect that the plain language of an initiative prevails over the ballot material in ascertaining voter intent because the summary must yield to the statute, particularly when it is the *absence* of something from the summary urged against the initiative's language (see OB 30–34), the State contends that the initiative's plain language applying its definition of dangerousness throughout the Penal Code actually "conflict[s] with the voter intent reflected in the official ballot pamphlet." (AB 30.) There is no inherent conflict, however, between Proposition 47's intention to provide for resentencing of prisoners covered by it as described in the ballot materials and application of its definition of

"unreasonable risk to public safety" to like dangerousness determinations that are made pursuant to other Penal Code provisions such as the Proposition 36 dangerousness determinations; rather, Proposition 47 explicitly provides that its definition of "unreasonable risk to public safety" applies to that phrase as it is "used throughout this Code."

Claiming that "[t]he use of the word 'Code' in section 1170.18, subdivision (c), was hidden in an obscure subdivision in the text of the lengthy proposed Proposition 47,"[2] the State submits it "unreasonable to assume the California voters" read it with any understanding of its apparent implications on Proposition 36 dangerous determinations. (AB 26; see also AB 28 ["When the California electorate passed Proposition 47, it did so without any intent, or even any knowledge of the possibility, that the initiative would amend Proposition 36 and broaden the relief available under it.']; *ibid.* ["there was no reason for the average voter to believe that by voting for Proposition 47, he or she was

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2 The State's characterization of the provision defining the dangerousness phrase as "hidden in an obscure subdivision" of lengthy text harkens back to the argument in opposition to Proposition 36, which called its retroactivity provision "[a] hidden provision" that would have dire consequences. (See Voter Information Guide, Gen. Elec. (Nov. 6, 2012) rebuttal to argument in favor of Prop. 36, p. 52, capitalization omitted.) According to the State's argument here, if the opponents to Proposition 36 had not pointed out this provision in the guide, a court should assume the voters had no knowledge of this "hidden provision" and accordingly hold that they did not intend to apply Proposition 36 retroactively.

also voting to expand the relief provided for under Proposition 36 by applying a new definition of 'unreasonable risk of danger to public safety' to those proceedings"].)

That argument is nothing more than a claim of voter ignorance. Even if an initiative as a whole may be complex or prolix, a court will not infer an intent different from that disclosed by the plain and unambiguous language of a provision in that initiative "based upon the improbable assumption that the people did not know what they were doing." (OB 28, quoting *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 252.) Rather, the assumption is quite the opposite, as the Supreme Court long has noted and reiterated most recently in *Brosnahan*:

> Rather, in accordance with our tradition, "we ordinarily should assume that the voters who approved a constitutional amendment 'have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered.'" [Citations.]

(*Ibid.*)

In anticipation of the State's argument based on the evidence of the ballot materials that the electorate who voted in favor of Proposition 47 had no intention by that vote to amend Proposition 36 or even inkling that it might do so, Chaney submitted evidence of 1) dissemination to the public at the time of the election of the fact that Proposition 47 would affect Proposition 36 dangerousness determinations; 2) contemporaneous interpretations of Proposition 47 reflecting that understanding; and 3) after-the-fact statements of the drafters of

the propositions reflecting that understanding. (See OB 24–28, 34–37, 56–58.) The State submits that none of the "numerous articles, commentaries, and websites" that Chaney marshaled on in these regards are "properly considered as evidence of the electorate's intent." (AB 30.)

Starting with the first category of evidence, public dissemination of the information that Proposition 47's definition of dangerousness applied to Proposition 36, the State provides no authority for its assertion that only information "disseminated to all voters" [may] "properly [be] considered as indicative of the electorate's intent." (AB 32.) In fact, the authority is to the contrary:

> Where a provision in the Constitution is ambiguous, a court must ordinarily adopt that interpretation which carries out the intent and objective of the drafters of the provision and the people by whose vote it was adopted. [Citations. To ascertain the intent and objective of an ambiguous constitutional provision, a court may consider ... contemporaneous exposition or interpretation of the provision .... [Citation.]

(*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 495; see also *Brosnahan v. Brown, supra,* 32 Cal.3d at p. 252 ["Proposition 8 received widespread publicity. Newspaper, radio and television editorials focused on its provisions, and extensive public debate involving candidates, letters to the editor, etc., described the pros and cons of the measure."].)

As the State conceded, information that Proposition 47's definition of dangerousness would apply in Proposition 36 cases

was "easily accessible to potential voters [at] a website created by opponents of Proposition 47" (AB 32); the fact that "all voters" may not have accessed that information (AB 32) does not make irrelevant its public dissemination -- particularly where a claim of "voter ignorance" is raised. Moreover, the contemporaneous understanding and interpretation of Proposition 47 by those professionals who studied it and, in the case of the California District Attorney's Association were most motivated to narrowly interpret it, that it applied to Proposition 36 dangerousness determinations is a further indication that it did so. Finally, while an "after-the-fact declaration of intent by a drafter of the initiative ... would 'by no means govern our determination how *the voters* understood the ambiguous provisions'" (AB 31, quoting *Carman v. Alvord* (1982) 31 Cal.3d 318, 331, fn.10, inside quotation marks and ellipsis deleted), it nevertheless "may deserve some consideration ...." (*Ibid.*)

3. A Literal Interpretation of Proposition 47's Provision That Its Definition of Dangerousness Applies "Throughout This Code" to Mean that It Applies to Proposition 36 Determinations of Dangerousness Would Not Lead to Unreasonable and Absurd Results Contrary to the Voters' Intent.

The State claims that a literal construction of the language "throughout this Code" "would lead to unreasonable and absurd results ... that the voters did not intend." (AB 32.) It would not.

The State asserts first that one such absurd result would be that the change would be effective for Proposition 36 cases "only

two days" before the two-year period that proposition established for filing a petition. (AB 33–34.) There is nothing absurd about that consequence, however, never mind showing that it is a consequence the voters could not have intended. As this case illustrates, virtually all Proposition 36 dangerousness determinations were still in the pipeline at that point. Moreover, that two-year deadline has no application where there is "good cause for a late-filed Proposition 36 petition." (AB 22.) The State maintains that dispensation from the two-year deadline to file a new petition based on the "good cause" of a new standard of review would also be an absurd result that the voters did not intend, but never explains why that is so.

The State next maintains that it would be "unreasonable" for the electorate "to have silently 'decided so important and controversial public policy matter ...' without any express declaration or notice of such intent." (AB 33, quoting *In re Christian S.* (1994) 7 Cal.4th 768, 782, and also citing *Jones v. Lodge at Torrey Pines P'ship* (2008) 42 Cal.4th 1158, 1171.) Those cases are inapposite, first, because the addition of a definition to make a minor adjustment to better carry out the actual intent of the retroactive Proposition 36 provision bears no comparison with the changes in law at issue in those cases. Moreover, neither of those cases involved a finding that absurd consequences contrary to the purpose of the legislation would flow from determining the voters' intent pursuant to the plain and unambiguous language of the statute.

For example, *Christian S.* addressed the question whether the Legislature abrogated "the well-established doctrine of imperfect self-defense—a doctrine that differs significantly from the

doctrine of diminished capacity" when it "eliminate[d] the diminished capacity defense" in 1981 in "direct response to the public outcry against the diminished capacity defense successfully used in the infamous trial [of Dan White], which raised no question of self-defense." (*In re Christian S., supra*, 7 Cal.4th at p. 771.) *Christian S.* is the opposite of a case decided on the basis of literal interpretation of a statute's plain and unambiguous language that would result in an absurd consequence contrary to the lawmaker's intent. As the Court there stated:

> The language and history of the 1981 Penal Code amendments leave no question that the Legislature intended to abolish the diminished-capacity defense. The Legislature explicitly and repeatedly stated that it was doing so. Conspicuously absent, however, is any similarly clear indication the Legislature also intended to eliminate imperfect self-defense.

(*Id.* at p. 774.)

Rather than finding that an absurd result would result from a literal interpretation of the statutory amendments, the Court in *Christian S.* noted from the language of the changes that "[t]he Legislature made absolutely clear its intent to abrogate the diminished-capacity defense," while "[t]here is no similar reference to imperfect self-defense." (*In re Christian S., supra*, 7 Cal.4th at p. 775.) It thereupon concluded: "We decline to insert into the statute what the Legislature omitted. That is not our function." (*Ibid.*)

In contrast, here it is not a question of inserting language into the statute, but accepting the statute's language. Likewise, it is

not the Court's function to change the language of the statute from "throughout this Code" to "in this section," for that would be an impermissible judicial rewriting of the proposition. There simply is no absurd consequence contrary to the electorate's intent in straightforward application of Proposition 47's definitional gloss on "unreasonably risk to public safety" to that same phrase in Proposition 36 in accordance with the statute's language.

Likewise, the *Jones* case made no finding that literal application of the language at issue there would result in absurd results contrary to the statute's purpose. As in *Hartnett v. Crosier* (2012) 205 Cal.App.4th 685, 693, "the *Jones* case is inapposite to and offers us no guidance on how to resolve this case, [for] the California Supreme Court interpreted statutory language and a statutory scheme far different from the statutory language and statutory scheme at issue here."

Finally, the State argues that "had the electorate determined that the initiative it had passed just two years earlier was already in need of amending, it could have done exactly that." (AB 33.) But that is exactly what it did do, plus more: The reformers and the electorate endorsing the reforms acted to apply the definition of the phrase not only to determinations of dangerousness under Proposition 36, where they had introduced the phrase to the Penal Code, but also to any future sentencing reform whose retroactive application depended on a determination that the individual posed an unreasonable risk to public safety. (See, e.g., AB 34 [acknowledging that "the new definition" may apply "to any future ameliorative sentencing procedures enacted in the Penal Code."].)

If the all-inclusive language "as used throughout this Code" connotes application of Proposition 47's definition of "unreasonable risk of danger to public safety" to any future ameliorative sentencing scheme that uses that phrase, why would that inclusive language not similarly connote application of its definition to any past ameliorative sentencing scheme that uses that phrase -- particularly when the same reformers and electorate that used that very phrase in the past ameliorative sentencing scheme they enacted then added the definition in Proposition 47? In this regard, the drafters and electorate did not so much "enact a drastic sea change to Proposition 36" (AB 34) as merely clarify what they meant by "unreasonable risk of danger to public safety" to begin with. (See OB 24 ["The explicit definition of the phrase in the latter proposition serves to clarify or amend the meaning of the same phrase used in the earlier proposition, making it applicable to that earlier proposition."].) Again, at the time of enactment of Proposition 36, its drafters and voters that endorsed it envisioned that only that "rare[] outlier involving true risk to public safety" (Mills & Romano, *The Passage and Implementation of the Three Strikes Act of 2012 (Proposition 36)*, *supra*, 25 Fed.Sent.R. at p. 268), that "truly dangerous" prisoner (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), argument in favor of Prop. 36, p. 52), would be denied resentencing based on a determination that resentencing of that individual posed "an unreasonable risk of danger to public safety."

4. **The Rule of Lenity Favors the Adoption of a Literal Interpretation of Proposition 47's Provision That Its Definition of Dangerousness Applies "Throughout This Code."**

The State agrees with Chaney (see OB 45) that "true ambiguities are resolved in a defendant's favor under the rule of lenity" (AB 34), and that the "rule acts as a tie-breaker" when the court can only "guess" which of two vying interpretation the lawmaker intended. (Compare OB 45 with AB 34.) If "there is no uncertainty or relative equipoise" here, as the State contends (AB 35), it is only because an interpretation of Proposition 47 that extends its definition of dangerousness to Proposition 36 cases accords with the reformers' intent when they drafted Proposition 47 and the electorate's intent when it enacted that proposition.

E. **Proposition 47's Definition of Dangerousness Applies Retroactively to Proposition 36 Cases on Appeal.**

The State properly keys in on the fact, as did Chaney, that "[w]hether a statute operates prospectively or retroactively is simply 'a matter of legislative intent.'" (AB 37, quoting *People v. Brown* (2012) 54 Cal.4th 314, 319.) Thus, though section 3 provides the default rule that no statute is retroactive "unless expressly so declared" (AB 37), sometimes the very nature of a statute indicates "that the Legislature must have intended, and by necessary implication provided," for its retroactivity. (AB 36, quoting *In re Estrada* (1965) 63 Cal.2d 740, 745.) For example, this Court reasoned in *Estrada* that "[w]hen the Legislature

amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (See AB 36, quoting *Id.* at pp. 745–46.) Thus, even without an express intent set forth in that statute for retroactivity, the Court found "an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply."].) (AB 36, quoting *Estrada*; see also OB 46.)

The State argues that there is no such inevitable inference, or "'clear and unavoidable implication' that the voters intended a retroactive application." (AB 39, quoting *People v. Brown, supra,* 54 Cal.4th at p. 320; compare OB 45 ["Once it is determined that the people intended to apply Proposition 47's definition of dangerousness to the dangerousness determination in Proposition 36 cases, there is an inevitable inference that they further intended to apply it to those cases on appeal."].)

Against Chaney's contention that" [t]here is no logical basis to infer an intent of the electorate in Proposition 47 to extend the definition of dangerousness to Proposition 36 cases, but to deny the benefits of that definition to those inmates whose section 1170.126 petitions were pending on appeal at the time Proposition 47 was enacted" (OB 46–47), the State points to the Legislature's interest in maintaining its "two-year window, subject only to good cause, in which previously-sentenced third strike offenders could seek resentencing." (AB 40.) But that limitation remains unimpaired by application of the new definition to cases on appeal; for example, Chaney's petition was

filed within that two-year window. Moreover, as the State recognizes, a prisoner may file a petition after expiration of that two-year window for "good cause." As Chaney has pointed out:

> The establishment of a more restrictive standard for finding dangerousness than the one the trial court used at the time it made its dangerousness determination presumably would provide such good cause. Thus, the Court of Appeal's focus on retroactivity here is a red herring, for it is not clear that Chaney even requires retroactivity of that definition to obtain a redetermination of his dangerousness under the standard that applies following enactment of Proposition 47.

(OB 52, fn. 10.)

The inevitable inference of retroactivity is fortified by the fact that Proposition 47's addition of an explicit definition to the phrase "unreasonable risk of danger to public safety" that it coined in Proposition 36's retroactive provision to establish the dividing line for balancing its twin goals of reducing the State's reliance on imprisonment while preserving public safety was designed to better achieve that balance. Just as the State notes, "the new definition simply changes the lens through which section 1170.126 dangerousness determinations are made by narrowing the broad discretion Proposition 36 confers on the trial court to decide who is suitable for a downward modification of sentence." (AB 42.) In so refining its design for effecting that balance, the drafters of Proposition 47 and the electorate who endorsed it must have deemed that definitional gloss on the phrase an improved way to achieve that balance. "For the reformers and the electorate that endorsed the initiatives, it was

just a matter of being more discriminating in identifying those truly dangerous prisoners to ensure that the measures left behind no qualified non-dangerous offender." (OB 22.)

The State never satisfactorily responds to Chaney's point, to wit: "Having refined and polished to the point of clarity in Proposition 47 the cloudy lens it fashioned as a prototype in Proposition 36 to identify dangerousness, and having further intended that the trial courts utilize in the future this more evolved instrument to determine the dangerousness of Proposition 36 offenders, it is inconceivable that the electorate would restrict a court in its review of a dangerousness determination made pursuant to the unimproved and now discarded instrument to that same outdated instrument." (OB 49.) Rather, the State misapprehends the addition of an express definition here as effecting a "drastic sea change to Proposition 36" (AB 42) instead of recognizing the much more modest nature of the electorate's intention in defining the phrase: to add a clarifying tweak to the retroactive mechanism of Proposition 36 so that it would operate more in accordance with its original intention in establishing that mechanism.

The State does not appreciate that the electorate in adding that definition never took its eyes off the prize of the balance of its twin goals, and did no more than clarify when it meant and intended to begin with in its enactment ofProposition 36's retroactive provision to achieve that balance. That failure is fatal to the State's retroactivity argument here, for an amendment which merely clarifies existing law may be given retroactive effect without any need for an expression of legislative intent for retroactivity. (*Bowen v. Bd. of Ret.* (1986) 42 Cal.3d 572, 575, fn.

3; *Balen v. Peralta Junior Coll. Dist.* (1974) 11 Cal.3d 821, 828, fn. 8; see generally OB 35–40 in sister case *People v. Valencia*, No. S223676 [discussing fact that the express definition served to clarify rather than change Proposition 36's retroactive provision and thus does not implicate section 3].)

Just as the State argues, "in enacting the two initiatives, the California electorate intentionally struck a careful balance between preserving final judgments and granting resentencing relief." (AB 41.) Because "[i]t is only the finding of dangerousness that tips the balance" (OB 50), it is critical to apply the definition of dangerousness the electorate has fashioned to fairly implement its fine balance between maintaining those judgments to preserve public safety and upsetting those judgments to reduce imprisonment.

Nor does the State have an answer to Chaney's point that "[t]he fact that the retroactive mechanisms of both propositions are designed to assess current dangerousness reinforces the inference that the change was intended to apply to Proposition 36 cases now on appeal." (OB 52.) Given the clarification in the standard for assessing current danger, it stands to reason that Chaney's current danger be measured against the current standard -- a standard that the State acknowledges "would grant relief to the majority of persons eligible to file a section 1170.126 petition." (AB 34.) As Chaney has already emphasized, the electorate intended the majority of Proposition 36 prisoners to be granted relief and resentenced accordingly. The electorate has now made that intent even clearer with its definition of dangerousness in Proposition 47. The electorate must have intended that its superior model more finely balancing public

safety with reduced imprisonment in the retroactive application of Proposition 36 apply to every case to which it could apply. The electorate must have intended its remedy for the much rougher, ambiguous standard that it had first devised in Proposition 36 and found unsatisfactory by the time it enacted Proposition 47 be applied to Proposition 36 cases on appeal, where the court had determined dangerousness by the inferior model the electorate had first devised but since had improved upon.

Chaney anticipated the State's points about *Estrada* and *Brown* (AB 41–45) and fully explained in his opening brief why those cases support his cause here. (See OB 51–55.) The key points are that the State reads *Estrada* unduly narrowly, while reading *Brown* too expansively.

Finally, the State again objects to this Court's consideration of the evidence that Chaney has marshaled of the contemporaneous public and professional understanding that the definition of dangerousness set forth in Proposition 47 would apply to Proposition 36 cases on appeal. (AB 39, fn. 11.) But, once more, while not dispositive, the contemporaneous interpretation of "throughout this Code" is a proper extrinsic source for this Court to consider in determining the drafters' and electorate's intent when it enacted this provision in Proposition 47.

For these reasons, the electorate must have intended its definition of "unreasonable risk of danger" to apply to Proposition 36 cases on appeal. It simply would make no sense for that definition not to apply to those cases simply because the court had already ruled on them using the standard the electorate inferably had found deficient because it resulted in too many false positives on non-dangerous prisoners. Indeed, presumably it

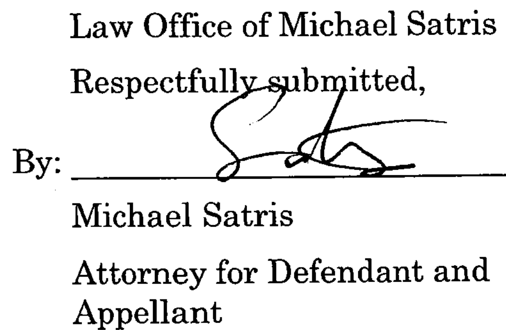
was because the electorate had found use of the undefined phrase unsatisfactory in achieving the fine balance it sought to strike that it defined the phrase in a way that more Proposition 36 candidates would be granted relief. The inference is thus inevitable that the electorate intended to apply the defined phrase to Proposition 36 cases on appeal

CONCLUSION

For the reasons set forth above, the Court should find that the definition of "unreasonable risk of danger to public safety" in Proposition 47 (§ 1170.18) applies retroactively to the recall and resentencing proceedings of the Three Strikes Reform Act of 2012 (§ 1170.126), and grant Chaney relief accordingly.

Law Office of Michael Satris

Respectfully submitted,



Dated: October 29, 2015 By: ______________________

Michael Satris

Attorney for Defendant and Appellant

CERTIFICATE OF COMPLIANCE

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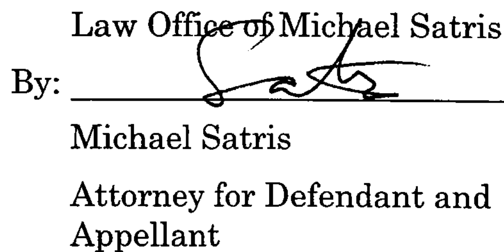
Dated: October 29, 2015

Law Office of Michael Satris

By: 

Michael Satris

Attorney for Defendant and Appellant

Court of Appeal, Third Appellate District, Case No. C073949
Amador County Superior Court No. 05CR08104
People v. Chaney

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(Cal. Rules of Court, rules 1.21, 8.50.)

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On November 5, 2015, I caused to be served the within **CORRECTED REPLY BRIEF ON THE MERITS** by placing a true copy of each document in a separate envelope addressed to the parties as follows:

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County of Amador
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Jackson, California 95642

Office of the District Attorney
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708 Court Street
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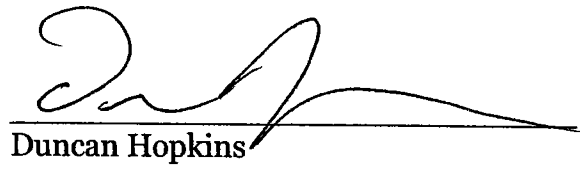
Central California Appellate Program at eservice@capcentral.org

The Attorney General, State of California (Respondent) at
sacAWTTrueFiling@doj.ca.gov

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Bolinas, California, on November 5, 2015.



Duncan Hopkins

S223676

California Supreme Court, Case No.
Court of Appeal, Third Appellate District, Case No. C073949
Amador County Superior Court No. 05CR08104
People v. Chaney

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State of California
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
(Respondent)

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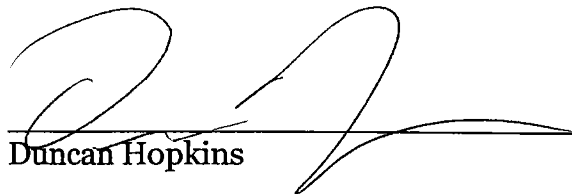

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