IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSUE VARGAS MORALES, Defendant and Appellant.	SUPREME COURT NO. S228030 APPELLATE COURT NO. G051142 SUPERIOR COURT NO. 13WF3934

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF ORANGE

Honorable Christopher Evans, Commissioner

ANSWER BRIEF ON THE MERITS

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On August 26, 2015, this Court granted review of the published decision of the Court of Appeal, Fourth Appellate District, Division Three (per Ikola, J.) filed June 26, 2015.

This Court stated the issue for review as follows: "Can excess custody credits be used to reduce or eliminate the one-year parole period required by Penal Code section 1170.18, subdivision (d), upon resentencing under Proposition 47?"

Petitioner filed the Opening Brief on the Merits on October 16, 2015.

INTRODUCTION

Proposition 47 (Prop 47) was enacted to reduce the economic impact on taxpayers of housing and supervising low-grade offenders. The goal was never to maximize post-release parole supervision periods or the attendant costs. Yet, if respondent's interpretation of the statute is adopted and the Court of Appeal opinion reversed, that is precisely what will occur.

Respondent attempts to insert ambiguity and implied provisions into a statutory framework where none exist. The language of Penal Code Section 1170.18, subdivision (d)[1] is clear: a defendant has the right to credit for time served and is subject to the imposition of parole, subject to the court's exercise of discretion. The concepts of parole and credit, which are neither new nor novel, go hand in hand here, just as they consistently have in a variety of other contexts.

The right to apply excess custody credits to a statutorily mandated parole term has been recognized to apply to a vast array of situations, including where an inmate has served more time in custody, either before or after sentencing, than he ultimately was required to serve for his convictions. (See sections 1170, subd. (a)(3) and 2900.5; *In re Lira* (2014) 58 Cal.4th 573, 582 [listing numerous scenarios where pre- and post-

[1] All further code and rule references are to the California Penal Code and Rules of Court unless otherwise noted.

sentence custody and conduct credits must be applied to period of parole]; *In re Ballard* (1981) 115 Cal.App.3d 647, 649; *In re Sosa* (1980) 102 Cal.App.3d 1002, 1006; *People v. Espinoza* (2014) 226 Cal.App.4th 635, 638.) If the excess credits exceed the entire parole period, the prisoner is entitled to be discharged unconditionally. (§§ 1170, subd. (a)(3), 2900.5, subds. (a), (c); Cal. Code Regs., tit. 15, § 2345; see *In re Carter* (1988) 199 Cal.App.3d 271, 273.)

To avoid the plain meaning of section 1170.18, subdivision (d) and application of the above clearly established law, respondent endeavors to create a new implied form of "misdemeanor parole" and argues, based solely on the double inclusion of the word "shall" in subdivision (d), that unlike all other types of parole, Prop 47 parole must be served in full – without the application of credit.

The Court of Appeal correctly rejected respondent's interpretation and for the reasons set forth below appellant respectfully asserts that the opinion should be affirmed.

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PROCEDURAL BACKGROUND

On March 20, 2014, Josue Morales (appellant), entered a guilty plea to one felony count of violating Health and Safety Code section 11350, subdivision (a) and one misdemeanor count of violating Health and Safety Code section 11364.1, subdivision (a). (CT 8-9, 14-19; RT 1-2.)[2] In addition, appellant admitted that he had previously suffered two prior strikes and two prison priors within the meaning of sections 667 and 667.5. (CT 19; RT 1-2.) On April 10, 2014, pursuant to the terms of the plea agreement, the priors were stricken and appellant was sentenced to the low term of sixteen months for the felony conviction. (CT 10-12, 19, 22-23; RT 3-6.) He was awarded 220 days of pre-sentence custody credit. (CT 10, 23.)

On November 18, 2014, appellant filed a petition for relief under section 1170.18, subdivision (f), or alternatively under subdivision (a). (CT 24.) A hearing was held on the same day and appellant's felony conviction was "designated" a misdemeanor. (RT 8.) The trial court then imposed a 365 day time-served misdemeanor sentence. (RT 8.) Over defense counsel's objection, the trial court also imposed one year of parole. (RT 7-9.)

Notice of Appeal was filed on December 12, 2014. (CT 25.)

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[2] "CT" and "RT" refer respectively to the Clerk's and Reporter's Transcripts with numerical volume reference when required.

On June 26, 2015, the Court of Appeal issued a published opinion wherein it held that appellant had a right to have excess custody credits applied to the period of parole imposed by the trial court. (Opinion pp. 7-9.) The relevant portions of the opinion are quoted below:

> As a general rule, excess custody credits (referred to as *Sosa* [*In re Sosa* (1980) 102 Cal.App.3d 1002, 1006] credits) reduce parole. (*In re Ballard* (1981) 115 Cal.App.3d 647, 650 ["section 2900.5 credits may be applied against either or both of the period of incarceration and the parole period"].) And as defendant also notes, section 1170.18, subdivision (m), states, "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant."
>
> The People contend, however, that applying custody credits to the period of parole is not consistent with the statutory language of section 1170.18, subdivision (d), which states, "A person who is resentenced pursuant to subdivision (b) shall be given credit for time served *and shall* be subject to parole for one year following completion of his or her sentence . . . ." (Italics added.) The People contend that use of the words "and shall" indicates the voters' intent that the defendant serve a parole period notwithstanding any credits. However, the People fail to give due consideration to the phrase "subject to." The statute does not state that the defendant shall *serve* a period of parole, only that the defendant shall be subject to parole. And as noted above, a person subject to parole is entitled to credit excess custody time against the parole period. "We must assume that the voters had in mind existing law when they enacted Proposition" 47. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1012.) There is no clear indication the voters intended to change the law on this front; to the contrary, they expressly retained all "otherwise available" remedies. (§ 1170.18, subd. (m).)
>
> The People also contend this interpretation would lead to the absurd result that the worst offenders — i.e., those who had been given the longest sentences — would have the least

supervision. But "[w]e must exercise caution using the 'absurd result' rule; otherwise, the judiciary risks acting as a '"super-Legislature"' by rewriting statutes to find an unexpressed legislative intent." (*California School Employees Assn. v. Governing Bd. of South Orange County Community College Dist.* (2004) 124 Cal.App.4th 574, 588.) And we do not find this result to be so absurd as to warrant a departure from a straightforward interpretation of the language of section 1170.18. The result we reach is not so unusual: all felons are intended to be subject to postrelease supervision as a general rule (§ 3000), yet if they have excess custody credits they are entitled to reduce or even eliminate their parole (§ 2900.5, subds. (a), (c)). Permitting that same result here is even more tolerable than usual because those subject to resentencing have by definition committed a minor offense and do not "pose an unreasonable risk of danger to public safety" under section 1170.18, subdivision (b). (Opinion pp. 7-9.)

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ARGUMENTS AND POINTS AND AUTHORITIES

I.

THE COURT OF APPEAL PROPERLY CONCLUDED THAT EXCESS CUSTODY CREDITS MUST BE APPLIED AGAINST ANY PERIOD OF PAROLE IMPOSED UNDER SECTION 1170.18 BECAUSE THAT HAS LONG BEEN THE CLEARLY ESTABLISHED LAW IN CALIFORNIA AND THE NEW STATUTE EXPRESSLY INCORPORATES THAT LAW.

The gravamen of respondent's argument is that the double inclusion of the word "shall" in section 1170.18, subdivision (d), should be interpreted to mean that the statute was intended to preclude the application of the clearly established law that excess custody credits are applied to reduce parole. (OBM 8-9.)[3] Respondent argues that the statute is clear on its face and that voter intent and policy considerations favor this interpretation. (OBM 8-15.) Appellant disagrees and asserts that the statute, in light of its express language and clearly established pre-existing law, requires the application of excess credits to parole.

Respondent also advances two new arguments regarding an alternative methodology for limiting the application of credits and for reversing the trial court's order terminating appellant's parole. (OBM 16-18.) These arguments should not be addressed by this Court because they

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[3] "OBM" refers to respondent's Opening Brief on the Merits.

were not properly presented in the trial court, court of appeal, or petition for review process. The arguments also fail on their merits.

A. Legal Background: Under clearly established law in existence at the time Prop 47 was passed, excess custody credits applied to reduce parole.

A defendant's custody release date (prison or local) is calculated by reference to the term of imprisonment assigned by the sentencing court (§ 1170 et seq.) or by the Board of Prison Terms (§ 1170.2), reduced by any applicable credits for presentence time actually served, credits for good conduct and participation while in presentence custody, and credits for good conduct and participation while in prison. (§§ 4019; 2930–2933.5, etc.).

"Where the presentence credits exceed the total state prison term, the excess credits, commonly known as *Sosa* credits are deducted from the defendant's parole period." (*People v. Espinoza* (2014) 226 Cal.App.4th 635, 638, citing *In re Sosa* (1980) 102 Cal.App.3d 1002.)

More generally, and as repeatedly held by this Court, the right to apply excess credits to an inmate's parole term has been recognized to apply to a vast array of situations, including where an inmate has served more time in prison custody than he ultimately was required to serve for the offenses. (See §§ 1170, subd. (a)(3) and 2900.5; *In re Lira, supra,* 58 Cal.4th at p. 582; *In re Ballard, supra,* 115 Cal.App.3d at p. 649; Cal. Code Regs., tit. 15, § 2345; *In re Carter* (1988) 199 Cal.App.3d 271, 273; *In re*

Young (2004) 32 Cal.4th 900, 909, fn. 5 [holding prisoner retroactively entitled to a "heroic act" reduction of his sentence after he had already been released on parole].)

In sum, when Prop 47 was being drafted and enacted, the well-known rule in California was that whenever a prisoner who is subject to parole over-serves his or her ultimate sentence, the excess credits must be applied to shorten the parole period. If the excess credits exceed the entire parole period, the prisoner is entitled to be discharged unconditionally.

B. Read in the context of pre-existing statutes, judicial decisions, and the statutory framework as a whole, the plain language of section 1170.18, subdivision (d), clearly incorporates the long standing rule that excess custody credits must be applied to reduce any imposed period of parole.

As fully detailed below, the literal language of the statute defeats any assertion that it was written to preclude the application of credits to the contemplated period of parole and respondent's arguments to the contrary should be rejected.

Given the above well-established law that credits apply to reduce parole, it is implausible that the drafters and adopters of Prop 47 would have intended parole under the newly enacted statute to be treated differently than every other kind of parole without including an express provision so stating. To the contrary, the language of section 1170.18, subdivision (d), is clear. Petitioners are entitled to "credit for time served"

if their sentences are reduced and they are placed on "parole." (§ 1170.18, subd. (d).) Respondent's contrary contention that the drafter's use of the word "shall" twice in subsection (d) was somehow intended to create an exception to the longstanding rules governing the award of credit for time served is specious and should be rejected.

1. The express language of section 1170.18 entitles the petitioner to credit for time served with no exception for the application of excess credits.

The bedrock of statutory interpretation is that a court must "first examine the words of the statute, 'giving them their ordinary and usual meaning and viewing them in their statutory context." (*People v. Albillar* (2010) 51 Cal.4th 47, 55; *Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 763.) "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 Legislature (in the case of a statute)..." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.)

Respondent asserts that section 1170.18, subdivision (d) requires the petitioner to serve a mandatory full year of parole (OBM 8-9), but the actual language states that the petitioner shall be given credit for time served and shall be "*subject to*" one year of parole. Had the drafters intended to effectuate respondent's interpretation, they could have easily removed the "subject to" statement and instead drafted the provision to expressly state

that the petitioner "shall be given credit only against his jail term and shall serve one complete year of parole after release." This is not what the statute says. The clear language of the statute contemplates that a petitioner is "subject to" the normal rules governing the imposition of parole and the award of credits for time previously served, without limitation to the new jail term.

As the court of appeal correctly noted, what occurs in section 1170.18 is no different than what occurs in every parole sentencing context. (Opinion p. 8.) A defendant sentenced for a crime to which parole attaches is always "subject to" parole because, by operation of mandatory law, it is always imposed as part of the defendant's sentence. At the same time, the court must award credits in accordance with law. *Both* the imposition of parole *and* the award of credits are contemplated by our sentencing laws and both are mandatory in every case. Section 1170.18 is merely another example of parole and credits working hand-in-hand.

In addition, while it is true that in some circumstances excess credits may *satisfy* some or all of the parole period, the defendant has nevertheless plainly been "subject to" a period of parole in exactly the same way a defendant who is sentenced to state prison has had a felony prison sentence imposed even if he or she receives presentence custody credit against the entire term and never sets foot in prison. The parole or prison term is

imposed for purposes of the record – but *deemed* served by application of the credits.

Thus, the actual meaning of the statute is quite clear – the court must award credits and, but for an exercise of discretion, impose parole. The statute does not make a full year of parole mandatory or disclaim the application of credits to the period of parole under existing law. To the contrary, section 1170.18, subdivision (m) expressly disclaims any intent to change the existing rules and statutes controlling the application of excess credits to parole terms.

2. Presumed awareness on the part of the drafters and electorate of decisional law in existence when Prop 47 was passed suggests that there was no intent to limit the application of credits to parole imposed under Prop 47.

The drafters and electorate had a variety of options to select from when deciding how Prop 47 petitioners would be supervised after they finished serving their new misdemeanor sentences. Those options included placement on parole, post-release community supervision (PRCS), mandatory supervision, or the creation of an entirely new type of post-release supervision program. The electorate expressly chose to make successful petitioners subject to "parole," a specific type of supervision that had already been pre-defined by a long-standing set of statutes and judicial decisions.

It is presumed that the electorate is aware of previous decisional law when it enacts a new statute. (*Walters v. Weed* (1988) 45 Cal.3d 1, 10-11; *People v. Garrett* (2001) 92 Cal.App.4th 1417, 1432.) "'It is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts.'" (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007, quoting *In re Jeanice D.* (1980) 28 Cal.3d 210, 216.) "The 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.)

If the enactors of a statute do not **expressly** change the impact of existing law, they are presumed to have intended that it be left as it existed. "'The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.'" (*Estate of McDill* (1975) 14 Cal.3d 831, 837-38.)

As detailed in Subdivision A, the law has long been settled that excess credits apply to reduce parole. Section 1170.18 makes no reference to these laws and using the word "parole" without any further definition or

modification. As a result, the law requires us to conclude that parole – as it is and was construed under our existing laws, was intended.

Even more specifically, two cases published in 2014, before the passage of Prop 47, explicitly held that *Sosa* credits apply to parole but not to the newly created Post Release Community Supervision (PRCS). (*People v. Espinoza, supra,* 226 Cal.App.4th at pp. 638–639; *People v. Tubbs* (2014) 230 Cal.App.4th 578, 585.) These cases clearly highlighted the credits considerations facing courts and expressly detailed the importance of parole verses other types of supervision. Because of the temporal proximity of these cases to the drafting and adoption of Prop 47, it is dubious that they were overlooked.

Because the drafters and adopters of Prop 47 are presumed to be aware of *Sosa*, *Tubbs,* and *Espinoza*, by explicitly stating that the petitioner is to be placed on *parole* rather than PRCS, without any express limitations to the application of the parole credits rules, the drafters and enactors of Prop 47 are presumed to have meant parole in its precise legal meaning and function as it previously existed including the application of excess credits.

Simply stated, if the drafters and adopters of Prop 47 did not want excess credits to apply to the supervision under section 1170.18, they could have simply chosen to impose PRCS rather than parole in light of the *Espinoza* opinion.

Respondent's suggestion that the above longstanding rules do not apply here because Prop 47 created a new form of "misdemeanor parole" (OBM 14) is not supported by the statute. Prop 47 says nothing about a new form of "misdemeanor parole." Rather that statute specifically references the imposition of "parole" and makes no additional allowance or discussion of how Prop 47 parole might be different from traditional parole. Neither this law, nor any law in place when Prop 47 was passed, makes a distinction between felony and misdemeanor parole and therefore respondent's assertion that the drafters and voters likely understood all of the laws on felony parole to be inapplicable here is pure and unfounded speculation.

3. Respondent's arguments relying on the double inclusion of the word "shall" in the statute are unpersuasive and ignore the voter's plain directive that petitioners are to be given credit for time served against the new sentence as a whole.

As explained in detail above, the actual language of section 1170.18, subdivision (d) does not require the petitioner to serve a "mandatory" full year of parole, but rather states that the petitioner "shall be given credit for time served" and shall be "subject to" one year of parole.

Respondent's entire statutory construction relies on the double inclusion of the word "shall" in the statute and asserts that the "subject to" language merely reinforces the right of the trial court to impose the mandatory year of parole. (OBM 9-10.) However, this analysis places far

too much weight and inherent importance on a single word, renders the "subject to" language superfluous, and implausibly inserts an implied limitation that the credit award only applies to the jail term.[4]

Respondent's interpretation runs afoul of two well-settled principles of statutory construction.

First, respondent's assertion that the "subject to" language in subdivision (d) merely means that the defendant will actually be serving a year of parole renders the language redundant and violates the rule that "reasonable, interpretations which produce internal harmony, avoid redundancy, and accord significance to each word and phrase are preferred. [Citation.]" (*Pacific Legal Foundation v. Unemployment Ins. Appeals. Bd.* (1981) 29 Cal.3d 101, 114.) The words "shall" and "subject to" must be reconciled within the statute and given a reasonable interpretation. Under respondent's interpretation, a petitioner who qualifies for Prop 47 relief will always be "subject to" a year of parole because it "shall" be imposed. This interpretation has several weaknesses.

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[4] One wonders if respondent's view would be any different if the word "shall" was included only once in the statute ("shall be given credit for time served and be subject to parole for one year"). Presumably respondent would still argue that the modifier "shall" applied to both verb phrases, but perhaps not.

First, parole will not always be imposed because the trial court can exercise discretion to withhold it. Therefore, every person who is "subject to" parole "shall" not be serving parole.

Second, in some cases the court will be precluded by function of section 1170.18, subdivision (e) from imposing a full year of parole if that parole would increase the total term of the petitioner's original sentence.

As explained in *People v. Pinon* (2015) 238 Cal.App.4th 1232, 1238, a court cannot impose a period of parole under Prop 47 that would increase the overall term of confinement and supervision previously imposed. (See § 1170.18, sub. (e) ["[u]nder no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence."].) This problem is most likely to occur in the context of realignment cases where "[t]rial courts have discretion to commit the defendant to county jail for a full term in custody, or to impose a hybrid or split sentence consisting of county jail followed by a period of mandatory supervision." (*People v. Catalan* (2014) 228 Cal.App.4th 173, 178.)

For example, in a case where the Prop 47 petitioner was originally sentenced under section 1170, subdivision (h), to a year in jail with no post release period of supervision, the Prop 47 court would be precluded from imposing any period of parole under section 1170.18, subdivision (d) because it would increase the overall term imposed. In that case, while the

petitioner would be "subject to" the possibility of a parole term under section 1170.18, subdivision (d), imposition of the term would be precluded by application of section 1170.18, subdivision (e).

Finally, a petitioner who is serving a mixed count felony sentence where only part of the sentence is subject to Prop 47 (e.g. drug possession and robbery), presumably would not serve a year of parole under Prop 47 but rather would serve parole under the term applicable to the remaining felony. In that situation, the petitioner would be technically "subject to" parole under Prop 47, but it would not be imposed because the longer term for the felony would apply.

In each of the above situations a petitioner is "subject to" parole under Prop 47 that ultimately "shall" not be imposed or served. As a result, respondent's attempt to reconcile "subject to" and "shall" within the statute by giving them effectively the same meaning fails.

The second fundamental flaw in respondent's construction is the insertion of an "implied" limitation that the credit portion of the statute only applies to the new jail term. (OBM 9-10) Because there is no express reference to any such limitation, inserting it through expansion of the word "shall" violates the rule that courts "may not insert words into a statute under the guise of interpretation." (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 65.)

It is implausible that the drafters of Prop 47 decided to create an exception to the clearly established right to apply excess custody credits to parole in this cryptic way. Had that been the intent, it is far more reasonable to conclude that the drafters would have explicitly stated that the credits for time served shall be applied to the new jail term only and that the defendant shall be placed on parole for a full one-year term.

One reason this conclusion is reasonable is that case law gives us a clear example of legislation drafted with the intent to create a mandatory complete period of parole. *In re Chaudhary* (2009) 172 Cal.App.4th 32, a life prisoner was subject under section 3000.1 to a lifetime parole term, with eligibility for discharge "'when [he] has been released on parole from the state prison, and has been on parole continuously for...five years...since release from confinement...'" (*Ibid.* at p 37, quoting § 3000.1, subd. (b).) The prisoner's release on parole was delayed based on litigation of the Governor's reversal of his parole grant and the prisoner claimed credit against his parole term for the period between when his parole grant would have taken effect and his actual release date. The Court of Appeal rejected the claim, and stated: "By placing these explicit limitations on the parole discharge eligibility requirement, the Legislature made unmistakably clear that a parolee must first have 'been released on parole' and must then complete five continuous years on parole after the parolee's 'release from

confinement.' This intent explicitly precludes the application of any time spent in custody prior to release to satisfy any part of section 3000.1's five-year parole discharge eligibility requirement." (*Ibid*; see also *In re Gomez* (2010) 190 Cal.App.4th 1291, 1310.)

The reasoning of *Chaudhary* is informative here. Had the drafters and adopters of Prop 47 intended to preclude the application of credits to a mandatory complete year of parole they could have explicitly stated that. Instead, Prop 47 expressly requires that a resentenced defendant be subject to parole and awarded credits. (§ 1170.18, subd. (d).)

Respondent also tries to avoid the implications of section 1170.18, subdivision (m)'s express statement that "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant" by arguing that the language is irrelevant because it refers only to a remedy or right that "springs from a source other than section 1170.18." (OBM 11.) This argument fails because the right to apply excess custody credits to parole comes from a variety of sources, all extrinsic to section 1170.18.

Finally, as discussed by the court of appeal, section 1170.18 does not include any express language stating that the existing parole credit laws do not apply. (Opinion pp. 8-10.) For example, the law does not state that "Notwithstanding any other provision of the law a person released from

custody under section 1170.18, subdivision (d), shall be subject to a full year of parole."

In this way, the law clearly deviates from Proposition 36, which expressly stated in section 3451, subdivision (a) that "Notwithstanding any other provision of law...all persons released from prison... for a period not exceeding three years...shall...be subject to community supervision...." The phrase, "[n]otwithstanding any other law" is all encompassing, eliminates potential conflicts between alternative sentencing schemes, and was central to the determination that credits did not apply to PRCS. (See *Espinoza* at pp. 639-640.)

Respondent asserts that there was no need to include the above type of language because the drafters of the statute had already intentionally included the very clear "shall" statement that implied the existing parole credit laws did not apply. (OBM 10-11.) This is implausible given the historic use of the "notwithstanding" phraseology and its clear judicial interpretations. Given the implications and importance of denying the application of credits to parole, it is doubtful that the drafters would have chosen to stake the issue on a vague use of the word "shall" rather than an express use of the phrase "[n]otwithstanding any other law" which had recently been clearly construed as precluding the application of credits to PRCS. (See *Espinoza* at pp. 639-640.)

Respondent's pure speculation is also defeated by the mere fact that we are before this Court. If the statute clearly stated that the all of the authority authorizing the application of credits to parole did not apply in this context then there would be no split in authority or need for review. To the contrary, it is respondent that attempts to imbue the single word "shall" with the additional meaning that none of the other laws applying to credits apply here.

For the above stated reasons, respondent's interpretations convolute the statute by adding implied meaning to a single isolated word. As such, they should be rejected.

C. Because the statute is clear and should be interpreted in accordance with the law in effect at the time it was passed, no consideration of voter intent is necessary.

Respondent contends that *if* there is ambiguity in the statute, then the voter intent clearly supports a conclusion that a full year of mandatory parole was contemplated. Appellant maintains that there is no need to resort to the limited information available regarding voter intent, but even if such intent is considered, it is not as clear cut as respondent asserts.

Where an ambiguity exists in a statue, courts may resort to legislative history and other extrinsic evidence and principles of statutory construction in an attempt to resolve the ambiguity:

> [I]f the terms of the statute provide no definitive answer, then courts may resort to extrinsic sources, including the objects to

> be achieved. . . .When the statutory language is ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. . . .Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. (*County of Santa Clara v. Perry* (1998) 18 Cal.4th 435, 442 (citations omitted).)

Where, as here, the statute in question is an initiative enacted by the voters, courts must look to the arguments set forth by its proponents, including those set forth in the statement of purpose and the ballot pamphlet provided to voters. (*People v. Montes* (2003) 31 Cal.4th 350, 361; *see also, e.g., People v. Floyd* (2003) 31 Cal.4th 179, 187-88; *Davis v. City of Berkeley* (1990) 51 Cal.3d 227, 237 n.4 ["Ballot pamphlet arguments have long been recognized as a proper extrinsic aid in construing constitutional amendments adopted by popular vote"].)

Respondent is correct that the voter information related to Prop 47 indicated that prisoners who qualified for resentencing would "be required to be on state parole for one year." This makes sense because the statute, which was included in the information guide, explicitly provided for parole in most cases, unless the court exercised discretion to withhold the parole term. However, this isolated sentence in the ballot pamphlet begs the question of what it means to "be" on parole. Voters are presumed to know the law which clearly mandates that a defendant who is placed on parole be given credit against his or her parole term for excess time served in custody.

In any event, the parole language was not the primary focus of the voter information. The statement of purpose (*see* Historical and Statutory Notes to Government Code section 7599 provides, in its "Findings and Declarations" (section 2)) indicates that the initiative was being enacted among other reasons "to ensure that prison spending is focused on violent and serious offenses [and] to maximize alternatives for nonserious, nonviolent crime," while section 15 states that the initiative "shall be broadly construed to accomplish its purposes." Similarly, the argument in favor of Proposition 47 (*See* Voter Information Guide, Gen. Elec. (Nov. 4, 2014), pp. 34-39) states among other things that "Proposition 47 will "[r]educe prison spending and government waste" by "focus[ing] law enforcement dollars on violent and serious crimes."

It is important to remember that a legislative analyst's interpretation of a statute is a simplified summary of the measure in language intended to be understandable to the average voter. (See Elections Code 9080-9096.) Read with this understanding, it is clear that a voter would likely have understood that the main intent of Prop 47 to be the reduction of law enforcement spending on low grade offenders like appellant. While the concept of parole was included, it was not the focus of the law in any respect. As such, it is dubious that a reader would conclude that a full year of parole was intended to be mandatory in all cases under the law.

Respondent next argues that if the court of appeal opinion is affirmed then most Prop 47 petitioners will serve no parole. (OBM 14.) This claim is speculative. While it is true that defendants who have served long prison sentences for what are now misdemeanor offenses will likely serve no parole, a newly convicted defendant with little pre-sentence custody will likely not avoid parole.

Furthermore, it is entirely within the broader sprit of Prop 47 to shorten or eliminate the parole period for petitioners who have served the most time. Prop 47 created a manifest difference in the punishment suffered upon misdemeanants convicted of reclassified offenses on or after November 5, 2014, and felons convicted of those same crimes prior to that date. In many cases, the felons will likely have been incarcerated in prison longer than their post-Prop 47 misdemeanant counterparts could be confined in jail. By giving such persons, to the extent possible, full credit for long excess custody periods served for their now misdemeanor offense, fundamental fairness is achieved.

Respondent next suggests that if Prop 47 petitioners have a right to credit against the period of parole, more judges will likely deny petitions under section 1170.18, subdivision (b), by finding that the petitioner presents an unreasonable risk of danger to public safety. (OBM 14-15.) This is again pure speculation and highly unlikely for the simple fact that a

denial under such *pretense* would be illegal. Section 1170.18, subdivision (c) specifically defines the qualifying "unreasonable risk" as the risk that the petitioner will commit a new violent felony under section 667. It can hardly be asserted that the inability to impose a full year of parole on a misdemeanor offender equates to a finding that there is an unreasonable risk that the misdemeanor offender will commit a violent crime.

In sum, respondent's interpretive goal is to keep misdemeanor offenders on parole for as long as possible – despite them having served felony sentences for their misdemeanor crimes. This was never the intent of Prop 47. As highlighted by the court of appeal, violent offenders are not covered by the statute and truly dangerous offenders can be retained in custody. Only non-violent offenders who do not pose an unreasonable risk to the public will have their sentences recalled. The point of the law was to stop spending money on these types of offenders – not make sure we supervise them on parole for a full year.

D. The grant of credits should not be limited to pre-sentence custody credits as requested for the first time on review by the People.

Respondent generally limits the discussion of credits to section 2900.5 pre-sentence custody credits. (OBM 3-4, 16-17.) In doing so, respondent makes the policy argument that because pre-sentence custody credits were designed to avoid the inequity of defendant's serving more

prison time if they lack the ability to post bail, they have no application here. (OBM 10-11.) Respondent then appears to assert that even if a defendant has a right to credit against the period of parole imposed under section 1170.18, that credit should be limited to pre-sentence custody credit. (OBM 16-17.) These arguments should be ignored and lack merit.

Preliminarily, it should be noted that respondent is now advancing a new position not presented in the court of appeal. Because respondent raises this issue for the first time in this Court, it makes the issue inappropriate for review because the court of appeal had no opportunity to review or rule upon the issue. (Cal. Rules of Court, rule 8.500, subd. (c)(1); *People v. Camacho* (2000) 23 Cal.4th 824, 837, fn 4.) Respondent also did not petition for review on this issue and therefore has forfeited the claim. (Cal. Rules of Court, rule 8.500, subd. (a)(2).) Appellant therefore requests that this Court decline to address this new legal argument.

If this Court does address the merits of the argument, it is clear that respondent is substantively incorrect to the extent he is arguing that appellant had no right to apply his prison custody credits to his new misdemeanor confinement and parole sentence.[5]

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[5] To the extent that respondent is only asserting that appellant does not earn "pre-sentence" credits for time spent in custody following sentencing and awaiting resentencing (i.e. prison custody) appellant agrees. Appellant had a right to apply both pre- and post- sentence custody credits (actual and conduct) in this case, but those credits were accumulated under separate

Section 1170.18 contemplates a "recall" of the felony sentence and a "resentencing" for the new misdemeanor. When a petitioner has his felony sentence recalled under section 1170.18, subdivision (b), it in fact means that the original felony sentence never happened. (See Pen. Code, § 1170, subd. (d); *Dix v. Superior Court* (1991) 53 Cal.3d 442, 456 [*Dix*].)

In *Dix* this Court explained the general meaning of a recalled sentence under section 1170, subd. (d), which, because of the similarity in language should inform our understanding of the "recall" that occurs under section 1170.18. This Court in *Dix* stated:

> By its terms, section 1170(d) empowers a trial court to recall and vacate a prison sentence after commitment...[P] Once the sentence and commitment have validly been recalled, section 1170(d) authorizes the court to 'resentence . . . in the same manner as if [the defendant] had not previously been sentenced . . .' Insofar as it is not limited by other phrases in the subdivision, the 'as if' language indicates that the resentencing authority conferred by section 1170(d) is as broad as that possessed by the court when the original sentence was pronounced. [P] The statute makes resentencing power narrower than original sentencing power in only two ways. First, the resentence may not exceed the original sentence. **Second, the court must award credit for time served on the original sentence.** (*Dix* at p. 456; bold added.)

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statutes and do not overlap. (See *People v. Buckhalter* (2001) 26 Cal.4th 20, 23-24 [In resentencing a defendant on remand from appeal the trial court must separately calculate the pre-sentence custody credits (actual and conduct) and post-sentence actual credits under their respective systems and the period served while awaiting resentencing qualifies as prison custody – not pre-sentence custody for purposes of awarding conduct credits.].)

In light of the above authority, what happens in a section 1170.18 sentencing hearing is that the felony sentence is recalled, a new misdemeanor sentence is imposed, and a new period of parole is ordered. As stated above, at the new sentencing hearing, "the court must award credit for time served on the original sentence." (*Dix* at p. 456.) This accords with clearly established law, under a variety statutes, that when a defendant is re-sentenced for a previous conviction he has the right to apply all forms of custody credit to that new sentence – not just his original pre-sentence custody credit. (See *People v. Buckhalter* (2001) 26 Cal.4th 20, 23-24, 29; *People v. Saibu* (2011) 191 Cal.App.4th 1005, 1012.)

Finally, as cogently stated by Couzens & Bigelow, "[t]he purpose of section 1170.18 is to take the defendant back to the time of the original sentencing and resentence him with the Proposition 47 count now a misdemeanor." (See Couzens & Bigelow, Proposition 47 "The Safe Neighborhoods and Schools Act," 2/3/15 revision, p. 59.) The statute contemplates a recall of the felony sentence, not a partial modification. (§ 1170.18, subd. (b.) Because the court was sentencing appellant anew, it was required to award him all of his earned and accrued credits – not just his pre-sentence custody credits.

E. The order terminating appellant's parole was not appealed by the People and is therefore not before this Court on review.

Respondent asserts that the trial court's July 25, 2015, order awarding appellant additional credit and terminating his parole was unauthorized because the Court of Appeal had jurisdiction over the matter at that time. (OBM 7, fn 5.) Respondent also asks this Court to remand the case to the Court of Appeal to consider that order. (OBM 16.) These claims have been forfeited and are not properly before this Court on review.

First and foremost, the People did not appeal the order terminating parole and awarding additional credit to appellant. Therefore, the People have forfeited any opportunity to assert procedural error as to those orders.[6] To the extent the People wished to argue that the July, 25, 2015, orders were unauthorized, they should have filed for appellate review.

Waiting to raise the propriety of the trial court's order for the first time in this Court, without any record of the proceedings, is not the proper remedy. This is because reviewing courts are not fact-finding courts and therefore do not function to decide questions of fact or make legal rulings in the first instance. (1 Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (¶ 8:1 et seq. (rev. # 1, 2010); *Stinnett v. Tam* (2011) 198 Cal.App.4th

[6] Respondent is fully aware of the fact that numerous nearly identical orders were issued in a variety of Orange County cases following the issuance of the opinion in this case. As far as appellate counsel knows the People did not appeal any of those orders.

1412, 1435.)

Fundamentally, respondent has not established that any objection was entered in the trial court. It is well settled that defects and erroneous rulings not objected to in the trial court are waived or forfeited on appeal. (*People v. Valdez* (1995) 33 Cal.App.4th 1633, 1368.) The failure to obtain a ruling on an objection forfeits the claim. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1249; *People v. Memory* (2010) 182 Cal.App.4th 835, 857.) Because there is no record of the trial proceedings on the parole termination order the People have failed to establish that an objection was even made and that the error was not invited.

Respondent's argument also fails substantively because the trial court had jurisdiction to correct the credit error, which constituted an illegal sentence, through informal or formal means while the direct appeal was pending. (See *People v. Taylor* (2004) 119 Cal.App.4th 628, 647; *People v. Duran* (1998) 67 Cal.App.4th 267, 270; *People v. Fares* (1993) 16 Cal.App.4th 954; *People v. Robinson* (1994) 25 Cal.App.4th 1256, overruled on other grounds in *People v. Buckhalter* (2001) 26 Cal.4th 20, 40.)

"A sentence not authorized by law is subject to correction whenever the error comes to the attention of the trial court or a reviewing court. In such a case, the sentence, or at least its unlawful part, is void. A void

judgment may be vacated by the trial court despite the pendency of an appeal." (*People v. Chagolla* (1983) 144 Cal.App.3d 422, 434, citations omitted.)

This Court has clearly explained the reasoning for the above rule:

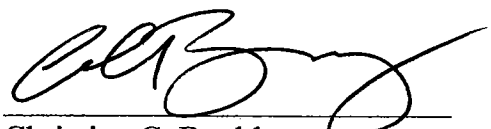
> Although, as a general rule, 'an appeal from an order in a criminal case removes the subject matter of that order from the jurisdiction of the trial court', it is settled that an unauthorized sentence is subject to correction despite the circumstance that an appeal is pending. Because the trial court was not authorized simply to waive sentencing on these counts, any error in failing to impose sentence in this regard would have been subject to judicial correction when it ultimately came to the attention of the trial court or this court. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1044–1045.)

Therefore, this Court should not address an order that was not appealed by the People in the first instance and which was made within the jurisdiction of the trial court.

CONCLUSION

For the above stated reasons the court of appeal opinion should be affirmed.

Respectfully submitted,



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CERTIFICATE OF WORD COUNT COMPUTATION
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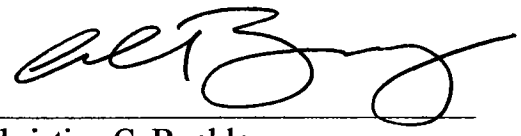
Dated: November 12, 2015



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People v. Morales
Supreme Court No. S228030
Court of Appeal No. G051142

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

The undersigned declares that I am a citizen of the United States, over eighteen years of age, not a party to this cause, an attorney authorized to practice in the State of California, and my business address is 9921 Carmel Mountain Rd. #355, San Diego, CA 92129.

That I served the following document(s): **Appellant's Answer Brief on the Merits** by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

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Furthermore, the undersigned declares, that I electronically served from my electronic service address of ccbuckley75@gmail.com the **above-referenced document** on 11/12/15 at approximately 9:30 am to the following entities:

1. Appellate Defender's Inc.: e-service-criminal@adi-sandiego.com
2. Attorney General's Office: ADIEService@doj.ca.gov
3. Court of Appeal E-Submission: http://www.courts.ca.gov/4dca-esub.htm

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 12, 2015

Christian C. Buckley