IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

VERONICA LORRAINE DEHOYOS
Defendant and Appellant.

Case No. S228230

Fourth District Court of Appeal, Case No. D065961
San Diego Superior Court, Case No. SCD 252670
The Honorable Peter C. Deddeh, Gale E. Kaneshiro, and Lisa C. Schall, Judges

APPELLANT'S REPLY BRIEF ON THE MERITS

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APPELLANT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

Appellant's underlying themes are (1) there is an absence of clear legislative intent contrary to the *Estrada-Kirk*[1] principle in Proposition 47, and (2) based on legislative intent and policy reasons – including the massive and retroactive reduction of countless felonies given the entirety of the proposition's statutory scheme (including the reduction of substantive offenses

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[1] *Estrada* (1965) 63 Cal.2d 740 (*Estrada*); *In re Kirk* (1963) 63 Cal.2d 761) (*Kirk*)

and reduction of judgments long since final) – a defendant such as appellant should be entitled to *Estrada* relief.

Proposition 47's scheme while bearing some similarities to Proposition 36 (as is being currently litigated in *People v. Conley*, S233122, orally argued April 7, 2016) is markedly different in several respects. Where as Proposition 36 only ameliorated the punishment of certain Three Strikers to two strike punishment, Proposition 47, in stark contrast, reduced a number of wobbler and felony offenses to misdemeanor offenses (assuming an offender does not have a "super-strike" history), allowed for resentencing for those under judgment, and, without precedent, allow for the designation as misdemeanors those reduced offenses to misdemeanors (afain assuming no "super-strike" history). The vast retroactive reach and policy/policies underlying same dictate the correctness of appellant's position.

Appellant has argued because Proposition 47 ("the Act") reduces punishment and contains no indication the electorate intended its provisions to be applied prospectively only, the reduction is to be applied retroactively to defendants whose judgments were not yet final under the rule set forth in *Estrada, supra,* (1965) 63 Cal.2d 740 and *Kirk, supra,* 63 Cal.2d 761. Appellant has set forth four groups affected by Proposition 47: (1) defendants who were not sentenced before November 5, 2014 (*Estrada*-defendants); (2)

defendants who were sentenced before November 5, 2014, but whose cases were not yet final (*Kirk*-defendants, e.g., they appealed and the appeals were not final); (3) defendants who were sentenced, who had not appealed or whose appeals were over before November 5, 2014, and are currently serving their sentence (Pen. Code[2], § 1170.18, subd. (a) petitioners ["§1170.18(a)"); and (4) people who had completely served their sentences and indeed may have been sentenced long ago (§1170.18, subd. (f) petitioners ["§11701.8(f)"). Because nothing in the Act, or the electorate's intent, indicates with sufficient clarity the presumption of retroactivity is meant to apply *only* to those defendants in Group 1, *Estrada*-defendants, and not to those in Group 2, *Kirk*-defendants, the Act should *also* apply retroactively to appellant.

Appellant has further argued the recall procedure in section 1170.18 for those defendants "currently serving a sentence" refers to only those defendants whose judgments are final, does not constitute an implied savings clause, and is not intended as the exclusive remedy for *Kirk*-defendants (i.e., appellant). At worst, appellant argued as an *alternative* theory that the "currently serving a sentence" language is ambiguous and subject to rule of lenity. More reasonably, the phrase is a statutory expression to differentiate those

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[2]All further statutory references are to the Penal Code unless otherwise specified.

individuals whose cases are final but whose sentences have not been completely served and may[3] petition under the stricter requirements and consequences of section 1170.18, subdivisions (a) and (b), from those whose sentences have been fully served and may petition under section 1170.18(f) for "designation" of their convictions.

Respondent disagrees, claiming appellant ignores that "the plain language of Proposition 47 indicates such contrary intent by defining" *only* "two categories of individuals who may be eligible for retroactive relief: those 'currently serving a sentence' and those who have completed a sentence for offenses that would have been misdemeanors under Proposition 47." (RBOM 2.) Respondent accuses appellant of arguing for "automatic reduction" even though appellant denied this in her opening brief (ABOM 8, 10, 28, 33, 51), of manufacturing ambiguities in the Act, and is adamant appellant's *Estrada*-defendants and *Kirk*-defendants do not exist. (RBOM 6-7.) Respondent asserts *Estrada* and *Kirk* do not apply, "because the Act is a comprehensive scheme rather than a simple reduction of punishment." (RBOM 9.)

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[3]If an inmate was close to completion of her/his sentence, s/he could choose to forgo a petition under section 1170.18(a) and its restrictions and wait until completion to take advantage of the more lenient section 1170.18(f) procedures and potential results.

In fact, the Attorney General contends "this Court has consistently limited the applicability of *Estrada* and *Kirk* to cases in which statutory amendments simply reduce the punishment for a particular offense without further defining the intent or applicability of the change." (RBOM 9.) Thus, apparently, because the electorate was ever more magnanimous in granting relief to individuals whose judgments were long final, respondent is arguing that even *Estrada*-defendants (let alone *Kirk*-defendants) gain no benefit. Unambiguously, the Attorney General subscribes to the baffling concept, "because those who are 'currently serving a sentence' must file a petition for relief, the amended sections under Proposition 47, including Health and Safety Code section 11377, apply *only prospectively to those who had not been sentenced before the Act's effective date*." (RBOM 18, emphasis added.)

Because respondent's argument is founded on such a faulty premise, once the premise is seen for what it is, an empty void, the entirety of respondent's remaining arguments must fall like dominos.

Based on (1) the absence of a clear legislative intent contrary to *Estrada-Kirk* in the proposition, (2) the evident legislative intent to grant a broad spectrum of magnanimous retroactive relief, and (3) concomitant attendant policy reasons, *Estrada* relief should be available to *Kirk* defendants.

ARGUMENT

I. *ESTRADA* AND *KIRK* APPLY BECAUSE THE ACT IS A COMPREHENSIVE SCHEME WHICH REDUCES THE PUNISHMENT OF DRUG AND THEFT OFFENSES AND THERE IS NO CLEAR LANGUAGE INDICATING A CONTRARY INTENT. THE ADDITION OF SECTION 1170.18 DOES NOT DEPRIVE APPELLANT'S RIGHT TO *ESTRADA* RELIEF, BUT ONLY DEMONSTRATES THE ELECTORATE'S HISTORICALLY UNEXAMPLED BENEFICENT INTENT TO HAVE THE ACT APPLY TO AS MANY DEFENDANTS AS POSSIBLE.

A. Respondent Fails To Acknowledge An Important Rule Of Statutory Construction.

Appellant agrees with respondent that the "interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature," that the "language of the statute is given its ordinary and plain meaning, and the statutory language," "the statutory language is construed in the context of the statute as a whole and within the framework of the overall statutory scheme to effectuate the voters' intent," and that where the "language is ambiguous, the court will look to 'other indicia of the voters' intent." (RBOM 5-6.) But notably, what is unmentioned by respondent in the consideration for statutory construction is that the Legislature and electorate are "deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes 'in the light of such decisions as having a

direct bearing upon them.' [Citations.]" (*People v. Overstreet* (1986) 42 Cal. 3d 891, 897; see also *People v. Hernandez* (2003) 30 Cal.4th 835, 867; *In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11.) Thus in enacting Proposition 47, the electorate is deemed aware of the *Estrada/Kirk* rule.

Ignoring this factor completely, respondent argues *Estrada* does not apply here because section 3 erects a strong presumption of prospective operation (which appellant had already acknowledged (ABOM 17)). While this Court has stated "we have been cautious not to infer retroactive intent from vague phrases and broad, general language in statutes" (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*)), here, the Act can hardly be considered constituted of "vague phrases" or "broad, general language" in regard to its overall retroactive effect. Although *Brown* somewhat narrowed the scope of the *Estrada* principle (see ABOM 18, fn. 12), this Court nevertheless reaffirmed its core applicability to reduced punishment for an offense. *Estrada* is "today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to *all*

nonfinal judgments. [Citation.]" (*Brown, supra,* 54 Cal.4th at p. 324, emphasis added.)

Enactments having an ameliorative or mitigating effect on criminal defendants should be applied retroactively despite the finality of a judgment "if that is what the Legislature intended or what the Constitution requires." (*In re Chavez* (2004) 114 Cal.App.4th 989, 1000.) Thus, this Court has made clear that *Estrada* applied where the newly-enacted statute was a legislative mitigation of the penalty for a particular crime such that, absent a desire for " 'vengeance,' " the Legislature must have intended retroactive application. (*People v. Brown, supra,* at p. 324, quoting *Estrada, supra*, 63 Cal.2d at p. 745.) A "legislative amendment that lessens criminal punishment is presumed to apply to all cases not yet final (the Legislature deeming its former penalty too severe), unless there is a 'saving clause' providing for prospective application." (*People v. Smith* (2015) 234 Cal.App.4th 1464-1465; see also, *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1195-1196.)

B. Appellant Is Not Creating Ambiguities In the Act; Instead, Respondent Overlooks The Fact That The Trial Courts Have Been Granting *Estrada* Relief Since November 5, 2014. Thus, There Are More Than Two Groups Of Defendants Affected By Proposition 47 - The *Estrada* Defendants and *Kirk*-Defendants -Whom Appellant Has Already Described.

Although respondent argues there are no *Estrada* defendants in the Act's comprehensive scheme and accuses appellant of creating ambiguities in the Act "where none exist" (RBOM 6), the trial courts have been applying *Estrada* relief to those unsentenced defendants who had been convicted of eligible Proposition 47 offenses since November 5, 2014, thus "creating" *Estrada* defendants. Indeed, Proposition 47 authorities Judge J. Richard Couzens (Ret.) and Presiding Justice Tricia A. Bigelow acknowledge as much:

> If the crime was committed prior to November 5, 2014, but sentenced after that date, the new sentencing rules will apply to the case. This means that all persons charged with qualified crimes that have not been convicted or sentenced as of November 5th *will be entitled to misdemeanor treatment without the need to request any kind of a resentencing under section 1170.18.*

(Couzens & Bigelow, Proposition 47 "The Safe Neighborhoods and Schools Act" (Feb. 2016), emphasis added, <www.courts.ca.gov/documents/Prop-47-Information.pdf> [as of March 8, 2016] p. 9.) The trial courts would have had no other authority to reduce the sentences for those defendants convicted, yet unsentenced as of November 5, 2014, **but for** the application of *Estrada* relief. Couzens and Bigelow go on to say that section 1170.18 applies only to persons "either *serving a sentence* or who have completed a sentence – circumstances not applicable to persons who have not even been sentenced." (*Ibid.*, italics added.) Although *Kirk*-defendants may have been in jail or in prison while their appeals were pending, the bottom line is that their cases were not final when the Act was enacted and, as such, their situations were *"precisely the same"* as *Estrada*-defendants. (*In re Kirk, supra*, 63 Cal.2d at pp. 762-763.)[4]

Rather than addressing the reality of the circumstances, respondent claims the plain language of the Act provides for only two categories of defendants affected by the Act – those serving a sentence and those who have completed their sentences, relying upon *People v. Shabazz* (2015) 237 Cal.App.4th 303 (*Shabazz*). *Shabazz* held *Estrada* relief was unavailable on

[4]Couzens and Bigelow do not cite to *Kirk, supra*.

appeal, finding the enactment of section 1170.18 showed a voters' intent requiring the filing of a petition in the trial court before considering the matter on appeal. (*Id.*, at p. 309.) However, *Shabazz* is not applicable to the *Estrada/Kirk* situation, because the defendant in *Shabazz* had finished serving his sentence; in other words, he was a section 1170.18(f) defendant, not a *Kirk* defendant (*id.* at p. 311). Under the plain meaning of section 1170.18, the *only* way he could get relief was by filing a section 1170.18(f) petition in the trial court, not by first raising the issue on appeal.

This is similar to the problem with the case of *People v. Noyan* (2014) 232 Cal.App.4th 657 (*Noyan*) relied upon by the court in *DeHoyos,* which appellant has discussed in her opening brief. (ABOM 38-39.) Since both Mr. Noyan and Mr. Shabazz had completely served their sentences, there was no issue regarding *Estrada/Kirk* retroactivity before these lower courts. Thus, since the discussion regarding *Estrada* was irrelevant to the issue before those courts, that language is merely dicta and not authoritative to the issue at hand.

Dicta, of course, consists of things said in an opinion that are not necessary in reaching the decision of the court. (See *Childers v. Childers* (1946) 74 Cal.App.2d 56, 61–62.) The distinction between an opinion's holding and mere descriptive language – dicta – is fundamental. (See

Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1157, superceded by statute as stated in *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 664.) " ' "[T]he language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts." ' [Citations.] 'A litigant cannot find shelter under a rule announced in a decision that is inapplicable to a different factual situation in his own case, nor may a decision of a court be rested on quotations from previous opinions that are not pertinent by reason of dissimilarity of facts in the cited cases and in those in the case under consideration.' [Citations.]" (*Id.*) "An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' [Citations.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620; *People v. Morris* (2015) 242 Cal.App.4th 94, 103.) "[C]ases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10; see also *People v. Mabini* (2001) 92 Cal.App.4th 654, 660.)

The discussion regarding *Estrada* in *Shabazz* and *Noyan* "[h]owever tantalizing," is "dictum . . .[and] not a holding." (See *People v. Petrovic* (2014) 224 Cal.App.4th 1510, 1512.) Because the exact issue *here* was *not before* these courts, it was not briefed; it was not argued; likely as not, it

was not considered. When an issue or argument is not briefed, argued, or considered, it is hardly surprising that the opinion should not and cannot be considered as authority for the proposition not considered. If the proposition had been considered and studied and argued, the opinion could very well had been authored altogether differently. Accordingly, this Court should disregard these opinions.

Even if one were to succumb to the tantalization of pondering either of them, the dicta presented is wrongly interpreted. *Shabazz* looked only to one statute of the many amended or added by Proposition 47, i.e., section 1170.18, without considering the effect of the ameliorative reductions of the **substantive** offenses. If one confines the universe to section 1170.18, it is little wonder one would find only two types of defendants affected by the Act – section 1170.18(a) and (f) petitioners. From this, respondent and *Shabazz* maintain Proposition 47 therefore "makes no distinction between final and non-final judgments, instead only drawing a distinction between those currently serving a sentence and those who are not" and this "plainly indicates finality of judgment is irrelevant to a defendant's status under Proposition 47." (RBOM 7-8; *Shabazz, supra,* 237 Cal.App.4th at 313.)

Here, the Act contains not one, but several statutes mitigating the penalty for particular crimes, plus one newly enacted statute (§ 459.5), the

result of which is to mitigate a particular species of erstwhile burglary – the classic *Estrada* scenario. Absent clear language indicating a contrary intent, under the rule of statutory construction which includes the factor that the electorate is "deemed to be aware of existing laws and judicial in effect at the time legislation is enacted" (*People v. Overstreet, supra,* 42 Cal.3d at p. 897), defendants whose judgments were not final on the day the Act was enacted would gain the benefit of amelioration of lessened punishment. To argue otherwise, as respondent does, is to ignore not only established precedent, but what has been happening in the lower courts in thousands of cases without objection.

Respondent is either being disingenuous or is oblivious as to what has been happening in the trial courts. Both logic and commonsense dictate that by November 5, 2014, there were a multitude of unsentenced defendants who had been charged with and convicted of felonies and who would now be eligible for reduction under Proposition 47.

Commonsense and logic also dictate that of those convicted, yet unsentenced defendants, none was required to file a petition for relief under section 1170.18(a); instead, their eligible convictions were simply reduced to misdemeanors during sentencing (*after* a formal determination of no disqualifying factors). They were not subjected to the more intense

dangerousness determination of section 1170.18(a) and would not be subject to the firearm prohibition. If the People and/or trial courts had required otherwise, defense attorneys throughout the state would have either filed writs or appeals arguing *Estrada* required this reduction at sentencing – as they have done for every other potential issue arising out of Proposition 47.

On the flip side, had the People objected to such reductions during sentencing (that is, arguing Proposition 47 required these convicted, yet unsentenced defendants to go through the petition process), but the trial court disagreed, there would have been a flurry of appeals from the People. Yet, there have been no such writs or appeals from either party. These defendants referred to, of course, are the Group 1 "*Estrada*-defendants" who respondent now claims do not exist. (RBOM 6-7.)

In other words, what the parties and the trial courts were doing in all these sentencing hearings after November 5, 2014, was to apply *Estrada* relief to Group 1 defendants. (See, e.g., *People v. Lynall* (2015) 233 Cal.App. 4th 1102, 1105, 1007 [parties agreed that due to the passage of Proposition 47 in the interim, the felony charged in the information became a misdemeanor "by operation of law."].) The courts would have had no authority otherwise to reduce the convictions, **but for** *Estrada* relief

because there is no *express* language in the Act concerning *Estrada* defendants.

Since respondent is actually arguing that *Estrada* does not apply even to those who had not yet been sentenced on November 5, 2014, then even though Proposition 47 is the most far-reaching, beneficent act in our history, eligible defendants awaiting sentencing on the Act's enactment date would have to be sentenced as felons. If there was no appellate issue, the defendant would then have to file a section 1170.18 petition. If a defendant did have an appellate issue, she or he would have to go through the appellate procedure, and once the appeal was final, go back into the superior court and file a section 1170.18 petition.

Of course, two benefits would inure to the prosecution through this legerdemain. One, rather than endure the burden of proving value of more than $950 at trial and the existence of a so-called "super-strike" or required sex registration offense (§§ 667, subd. (e)(2)(C)(iv); 290, subd. (c)), the People would demand the defendant prove the negative, that the value did not exceed $950 and the non-existence of the "super-strike." Second, and perhaps more important, the defendant would be saddled with firearm prohibitions and future criminal prosecution. Somewhat without reason, the Attorney General argues that, "This analysis of a prisoner's [prior] record is

not possible if the defendant does not file a petition in the trial court." (RBOM 22.) The elementary answer is that it is *already* occurring daily in thousands of cases throughout our state, both in canvassing new misdemeanor filings for offenses committed on/after November 5, 2014 (or more accurately, to determine whether felony prosecution is still appropriate) as well as for potential *Estrada*-type defendants, i.e., potential in the sense of whether the defendant has a criminal history for a "super-strike" or required sex registration offense. If a potential misdemeanant would be otherwise ineligible because of a "super-strike" or required sex registration offense, the prosecutor has the burden to notice same and prove the disqualifying offense, just as the prosecutor has the burden in analogous circumstances.

The Attorney General goes on to write:

> Following Proposition 47's passage, however, the district attorney's office and the probation department have an *additional incentive* to investigate and present all relevant information regarding a defendant's criminal history, including qualifying misdemeanor convictions or harder to prove out-of-state convictions that were not previously included – information that would otherwise be omitted from

> the record on appeal. For these reasons, the petitioning process enacted under section 1170.18 provides the mechanism by which a court may ensure that such relevant information is before it when it rules on a defendant's eligibility for resentencing.

(RBOM 22, emphasis added.) But this assertion does not answer why such an "incentive" requires a petitioning process. There are several examples where, given amelioration or some similar potential statutory benefit, prosecutors would have had an incentive to pursue litigation without the defendant engaging in any petitioning process. For example, in recent years, the Legislature, lessened the criminal penalties of transporting personal amounts of certain drugs. (E.g., Health & Saf. Code, §§ 11352, subd. (c), 11360, subd. (c), 11379, subd. (c) .) The *Estrada* principle applied. (*People v. Ramos* (2016) 244 Cal.App.4th 99, 103.) In many such prosecutions, the quantity of the contraband was of such amount that no reasonable jury could have concluded anything but that transportation was for other than personal use, i.e., the lack of instruction would be harmless error. In a few, limited cases, the evidence was definitive or there was a special verdict of personal transportation. But between the two poles, where evidence was not introduced at trial because the law at that time

would have rendered it irrelevant, if the prosecution desired to retry same, such is the prosecution's prerogative. (*Id.* at pp. 103-104.)

Similarly here, for current offenders who may not be eligible for misdemeanor prosecution and for *Estrada*-defendants who had not been sentenced before November 5, 2014, the prosecution has the incentive, if not the duty, to investigate and carry the burden to prove any disqualifying criminal history. There is no meaningful difference in such an incentive whether a *Kirk*-defendant remains historically aligned with *Estrada*-defendants or instead should be severed and placed in the camp of defendants whose judgments are final.

The only "basis" respondent provides for this staggering position is that the Act is so "comprehensive" *Estrada* relief does not apply. Respondent's rationale is that the electorate demonstrated its intent with "sufficient clarity" by requiring petitioning by those currently serving a sentence (RBOM 18), but such statement is merely conclusory. The Attorney General then follows up the conclusion by attempting to link her interpretation by its consistency with the voters' public safety goal. (RBOM 18 et. seq.) But her argument is unpersuasive on several scores.

For example, respondent contends that "Proposition 47 sought to promote public safety by not authorizing misdemeanor *resentencing* without

first requiring that the trial court assess the defendant's risk of dangerousness and determine whether he or she has any "super strike" or qualifying sex offense convictions." (RBOM 18-19, emphasis added.) First, the "super-strike" or qualifying sex offense convictions disqualification also disqualifies any current, *new* offender from misdemeanor prosecution. (See §§ 459.5, subd. (a), 473, subd. (b), 476a, subd. (b), 490.2, subd. (a), 496, subd. (a), 666, subd. (b), Health & Saf. Code, § 11350, subd. (a), Health & Saf. Code, § 11357, subd. (a), Health & Saf. Code, § 11377, subd. (a).)[5] In other words, these disqualifiers prevent misdemeanor treatment of new offenders, *Estrada* defendants, *Kirk* defendants, and section 1170.18 petitioners; the Act does not distinguish between the four groups of defendants.

Second, while it is true that "dangerousness" in the abstract is a required consideration for the trial courts for *true* section 1170.18(a) petitioners, for the vast number of such petitioners, including probationers,

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[5] As to appellant's case, new Health and Safety Code section 11377 provides a punishment "by imprisonment in a county jail for a period of not more than one year, except that such *person may instead be punished pursuant to subdivision (h) of Section 1170 of the Penal Code if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code.*"

very few indeed have been and are being denied Proposition 47 relief on that basis. Since a prior conviction of a section 667, subdivision (e)(2)(C)(iv) offense precludes relief altogether, the required absence of such past offense is an excellent indicator of the "lack of a reasonable risk" a defendant will commit such an offense in the future. (§ 1170.18, subd.(c).)

At pages 18-19 of her brief, the Attorney General advances pro and con arguments in the Ballot Pamphlet as to whether there would be automatic releases of anyone, and again revisited the same topic at page 21. Again, her argument is too facile. First, and most elementary, it begs the current question. Given the axiomatic principle that the legislative body, here the electorate, is presumed to know the existing law, i.e., the *Estrada-Kirk* ameliorative regime, these pro-con arguments offer precious little as to whether the electorate intended to sever and divorce *Kirk*-defendants from their kindred *Estrada*-defendants.

Respondent also cites a pro-argument:

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

(RBOM 20, citing Ballot Pamp., Gen. Elec. (Nov. 4, 2014) p. 35, emphasis original.)

But – and this point is lost on respondent – by stating "strict protections to . . . make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit," the pro-argument suggests there will be strict discretion – which is the standard for the court *to* determine "dangerousness," if eligible at all. (§ 1170.18, subds. (b), (c).) In contrast to discretion, the absolute disqualifiers of any past offenses (including those being served) encompassed within sections 667, subdivision (e)(2)(C)(iv) and 290, subdivision (c) would qualify as "rapists, murderers, molesters and the most dangerous criminals," ensuring ineligibility. Stated otherwise, a new offender, an *Estrada*-defendant, a *Kirk*-defendant, a serving inmate with a final judgment, or one who had completed her/his sentence cannot gain relief with such past offenses.

As a follow up point to this rationale, the Attorney General contends that the release of dangerous criminals was a major issue before the voters. (RBOM 20.) In determining the intent of the electorate and the policies to be effected which, in turn, determines the *Estrada-Kirk* effect of the legislation, the utmost concern is what was the ***primary*** issue before the

electorate? One may search and scour respondent's brief for the primary purpose of the proposition, but one will not find it.

One thing that appellant and respondent *do* agree upon is that the Act **is** a comprehensive statutory scheme. Where the parties disagree is what exactly is the "comprehensiveness." It appears to appellant that respondent is ignoring the major effect of Proposition 47, the vast reductions of many felony offenses, and attempting to have the tail waggle the dog, i.e., argue that the extremely beneficent retroactive features somehow eviscerates the *Estrada* effect on the former felonies. In contrast, appellant looks to the *entirety* of Proposition 47 – the text of the all of the codified statutes and the uncodified sections 1-17. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 1-17, pp. 70 (Pamp.).) The *primary* intention of Proposition 47, as shall be shown below, is the reduction of felony status for several different crimes. Thus under the *Estrada* principle, those defendants whose convictions were not final (which includes *Kirk*-defendants) were entitled to ameliorative effect of the Act.

C. The Entire Act Must Be Considered, Rather Than Only Section 1170.18, When Determining The Voters' Intent. When Considering The Complete and Overall Scheme Of The Act, We Find The Voters Intended Immediate Reduction Of Penalties For Several Non-Violent Offenses, And Thus By Doing So, Implicated *Estrada* and *Kirk.*

The foundation, the faulty premise, for respondent's contention is that *Estrada, supra,* does not apply to the Proposition 47 analysis at all, because *Estrada*'s savings clause analysis derives from cases involving outright repeal, but even if a savings clause analysis does apply, section 1170.18 serves as a functional equivalent of same, supposedly consistent with the voter's intent. (RBOM 16.) Neither is true, and the Attorney General's argument should be rejected.

On the contrary, to determine the electorate's intent in regard to whether any sub rosa phraseology was intended to serve as a "savings clause" – it wasn't – one must consider the overall, overarching intent of the voters as manifested by *all* of the provisions and policies of the Act.

1. Respondent Misreads *Estrada.*

The Attorney General has written, "*Estrada* stated that '[i]f there is no saving clause [an appellant] can and should be punished under the *new* law,' rather than the old law." (RBOM 16, citing to *Estrada, supra*, 63 Cal.2d at p. 747, with respondent's emphasis added.) Respondent continues by positing, "*Estrada* derived this rule from *Sekt v. Justice's Court of San*

Rafael Township (1945) 26 Cal.2d 297, [304]" which respondent describes as "the court explain[ing] that 'the outright repeal of a criminal statute without a saving clause bars prosecution for violations of the statute committed before the repeal." (RBOM at pp. 16-17.) The *Estrada* Court did not, however, constrain or embrace its now well-entrenched principle upon such a basis, and the Attorney General stumbles in attempting to so tether it.

This Court faced two arguments, one founded on the "prospective only" application of statutes under the common law, embodied in section 3 and the other, Government Code section 9608. (*Estrada, supra*, 63 Cal.2d at pp. 746-747.) The discussion of *Sekt, supra*, was made in the context of the latter section. But this Court was quite clear:

> That rule of construction [i.e., prospective only], however, is not a straitjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. It is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent. In the instant case there are, as will be pointed out,

> other factors that indicate the Legislature must have intended that the amendatory statute should operate in all cases not reduced to final judgment at the time of its passage. These factors also compel the conclusion that the saving clause of section 9608 does not compel or require a contrary interpretation.

(*Estrada*, at p. 746.) Simply stated, contrary to respondent's argument, *Estrada*'s "savings clause" analysis does apply. What truly controls is legislative intent – here, that of the electorate, and the overall intent of the electorate was that punishment be mitigated.

2. Section 1170.18 Does Not Serve as a Savings Clause to Eliminate *Estrada* Amelioration.

Initially, respondent contends that section 1170.18 operates as the functional equivalent of a savings clause. (RBOM 17.) Taken literally, and in the context to the preceding portions of the brief, one may infer that respondent is arguing that the effect of the "savings clause" of section 1170.18 is to render inapplicable any *Estrada* retroactive application. The Attorney General makes this abundantly clear when she declares "because those who are 'currently serving a sentence' must file a petition for relief, the amended sections under Proposition 47, including Health and Safety

Code section 11377, *apply only prospectively to those who had not been sentenced before the Act's effective date*." (RBOM 18, emphasis added.)

As stated above, respondent errs by failing to consider the entire Act. By focusing only on the enactment of section 1170.18, respondent insists this action shows a voter intent to deny *Estrada/Kirk* relief. Respondent's argument that, even though there is such a beneficent change to so many defendants past and present, the further addition of an even greater retroactive application (the petition process) than what even *Estrada* would have allowed, shows a voter intent to deny retroactive relief to those defendants who had not yet been sentenced and those whose cases were on appeal as of the Act's effective date (RBOM 9-16), just logically does not make sense. Appellant urges instead that the *entire* Act needs to be considered when interpreting the voters' intent – what is the "overall statutory scheme" of Proposition 47?

The Act is two-fold: reducing punishment for non-violent drug and theft offenses (for qualifying defendants, i.e., those without past "super-strike" or required sex registration convictions) and providing a mechanism for further, uncharted retroactive relief. The former, reducing the punishment for many former wobbler or felony drug or theft offenses, truly eclipses the latter.

Indeed, the first three bullet points of the Summary, "*Prepared by the Attorney General*" herself (Pamp., *supra*, Official Title & Summary, at p. 34), the very first words an inquisitive voter would read, indicate a considerable reduction in sentences for *new* offenses so long as the defendant has no "super-strikes" or required sex registration offenses:

- Requires misdemeanor sentence instead of felony for certain drug possession offenses.
- Requires misdemeanor sentence instead of felony for the following crimes when amount involved is $950 or less: petty theft, receiving stolen property, and forging/writing bad checks.
- Allows felony sentence for these offenses if person has previous conviction for crimes such as rape, murder, or child molestation or is registered sex offender.

The fourth bullet refers to required resentencing unless the court finds unreasonable public safety risks. (As an aside, though the Attorney General notes in her Introduction that the Act provides a resentencing procedure "[i]n addition to reducing specified drug and theft offenses to misdemeanors" (RBOM 1), the latter effect is only briefly mentioned again (*id.* at p. 4).)

Similarly, when reviewing the Analysis by the Legislative Analyst, under "Proposal," there is first a short one paragraph introduction followed by ten detailed paragraphs describing the "**Reduction of Existing Penalties**" should Proposition 47 be enacted. (Pamp., *supra*, Analysis, at pp. 35-36.) Following these ten descriptive paragraphs is a *one*-paragraph discussion concerning resentencing from felonies to misdemeanors for previously convicted offenders – the petition process of section 1170.18, including a mention of the designation of completed felony sentences to misdemeanors. (*Id.* at p. 36.)

Moreover, the text of the proposition advised the electorate that absent "good cause," a section 1170.18 petition had to be filed within three years of November 5, 2014, whereas the reduced penalties for the substantive offenses would remain in place until, if and when, legislatively amended. (§ 1170.18, subd. (j).) After reading through the Attorney General's bullet points, the Legislative Analysis, and the proposed new laws (Pamp., *supra*, at pp. 71-74), the voter could only reasonably believe that the ***primary*** intent of Proposition 47 was to reduce penalties for non-violent drug and theft offense.

Had section 1170.18 not been included within Proposition 47, there now could be no "savings clause" argument that appellant was precluded

from retroactive relief through *Estrada* and *Kirk* of amended Health and Safety Code section 11377. The question which devolves is why should the propitious addition of the petition process, which encompasses even greater benefits to more defendants – both serving and long past – allow less benefit to *Kirk*-defendants than would have been effected by only an amelioration in the substantive law?

Respondent urges a comparison to *In re Pedro T* (1994) 8 Cal.4th 1041 (*Pedro T.)*, *People v. Floyd* (2003) 31 Cal.4th 179 (*Floyd*), and *People v. Brown, supra,* 54 Cal.4th 314. Each is easily distinguished. Although appellant has already set forth the differences between *Pedro T.* and *Floyd* as to appellant's situation (ABOM 25-28), appellant will do so again. *Pedro T.* involved an amendment that temporarily increased the penalty for vehicle theft, but then lapsed back to the lesser, former punishment under a "sunset" provision; there was no express savings clause. (*Pedro T., supra*, 8 Cal.4th at p. 1045.) This Court held the Legislature clearly indicated, in the preface to the statute, its intent to punish offenders more harshly in order to address the increasing threat of vehicle thefts to the public. "Far from determining that a lesser punishment for vehicle theft would serve the public interest, the Legislature expressly declared that increased penalties were necessary. *Estrada* is not implicated on these facts." (*Id.* at pp.

1045-1046.) Proposition 47, however, contains no such expressly declared statement which would clearly indicate the Legislature specifically intended that *Estrada*-defendants and *Kirk*-defendants were unentitled to *Estrada* relief.

In *Floyd*, the legislation, Proposition 36 of 2000, provided treatment for nonviolent drug offenders. This Court found the legislation applied prospectively only, because the proposition *expressly stated*, "[e]xcept as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively." (*People v. Floyd, supra,* 31 Cal.4th at p. 182.) Here, unlike in *Floyd*, Proposition 47 contains no such express language.

Brown involved emergency legislation enacting former section 4019, which increased the rate at which prisoners could earn credit for good behavior. This Court found *Estrada* did not apply to a statue designed to control *future* inmate behavior. Specifically, this Court held that a statute which increased the rate at which prisoners may earn credits for good behavior "does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent. Former section 4019 does not alter the penalty for any crime; a prisoner who earns no conduct credits

serves the full sentence originally imposed. Instead of addressing punishment for past criminal conduct, the statute addresses *future conduct* in a custodial setting by providing increased incentives for good behavior." (*Brown, supra,* at p. 325, emphasis in original.) This Court explained:

> [T]he rule and logic of *Estrada* is specifically directed to a statute that represents " 'a legislative mitigation of the *penalty for a particular crime* ' " (*Estrada*, at p. 745, 48 Cal.Rptr. 172, 408 P.2d 948, italics added) because such a law supports the inference that the Legislature would prefer to impose the new, shorter penalty rather than to " 'satisfy a desire for vengeance' " (*ibid.*). The same logic does not inform our understanding of a law that rewards good behavior in prison.

(*Id.*, at p. 326.) Since the legislation in *Brown* did not involve a "legislative mitigation of the penalty for a particular crime," *Estrada* was not applicable.

In contrast, here, the electorate, in a remedial measure of unprecedented benevolence not only reduced the severity of a host of common wobbler/felonies, but also provided a mechanism for resentencing for those serving sentences whose sentences were final, plus rendered a vehicle for those whose judgments were long past to reap the advantage of

misdemeanor designation. While much in the Ballot Pamphlet discussed the state effect and county effects of reduced penalties and concomitant funding for truancy prevention, treatment, and victim services (Pamp., Analysis, *supra*, at pp. 36-37), still, there would be little if no fiscal savings for misdemeanor designation to those former felons who had completed their sentences. The major, if only benefit at all, inures to the individuals personally by the elimination of the felony consequences that the proposition and law permit.

The Attorney General recognizes that appellant has suggested a *Kirk*-defendant such as appellant may choose to seek either the *Estrada-Kirk* remedy or the section 1170.18(a) petition. (RBOM 23-24, citing to ABOM 35-37.) The Attorney General citing to *Estrada*, *supra*, argues that appellant is "mistaken." (RBOM 24.) It is the Attorney General who is mistaken.

The Attorney General argues that implicit in *Estrada*'s reasoning is, in respondent's words, the "notion that one of two sentencing regimes applies, but not both." (RBOM 24.) But the Attorney General then mixes apples and oranges. In the parenthetical phrase which follows (*ibid.*), she combines two quotes from *Estrada* which are pages apart and she adds the following emphasis: "[attempting to determine '*which* statute should

apply']," citing to *Estrada, supra*, 63 Cal.2d at p. 744, and "[analyzing 'whether [petitioner] should be punished under the old law *or* the new one']," citing to *id.* at pp. 747-748.

The mixing of apples and oranges is this – in *Estrada*, the tension between the two different "statutes" was in the sentences (punishment) per se: the older, more severe sentence, and the amended, newer less severe sentence. Here, in stark contrast, the sentence sought is the same, the new, less severe, misdemeanor sentence. The "difference" between "statutes" here is not in the ultimate sentence, but *in the procedures toward that sentence*, e.g., sentencing anew a la *Estrada-Kirk* or a section 1170.18(a) petition. To be sure, to some very few *Kirk*-defendants who may possibly not pass the discretionary "dangerousness" bar of the section 1170.18(a) petition process, the *Estrada-Kirk* sentencing anew would be the only option. But for the many, many more who do not fall under the definition of likely to commit a "super-strike" or required sexual offense in the future (§ 1170.18, subd. (c)), having an option between procedures is not unheard of.

For example, though this Court certainly *prefers* a petition for review rather than a petition for writ of habeas corpus, if a Court of Appeal summarily denies a habeas corpus without issuance of an order to show

cause (and not on the same day as a related appeal), the order is final immediately and the petition for review is due in ten day, sometimes a difficult task to accomplish for one with a crowded calendar; therefore, either a petition for review or a petition for writ for habeas corpus is an *authorized* option.

If a defendant suffers what she or he believes to be too severe sentence, either an appeal arguing an abuse of discretion or a motion to recall the sentence (§ 1170, subd. (d)) is available; in fact, both may be undertaken simultaneously (e.g., *People v. Espinosa* (2014) 229 Cal.App.4th 1487, 1496-1497).

If counsel and the trial court assure a defendant that a statement taken allegedly in violation of *Miranda*,[6] but ruled admissible during in limine motions may be appealed notwithstanding a guilty plea, surely, a motion to withdraw the guilty plea on the basis of ineffectiveness of counsel and involuntariness may lie, but so may an appeal. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 893.) The manifest point is that different procedures may co-exist to achieve a common goal.

Respondent goes on to cite *Shabazz, supra*, 237 Cal.App.4th 303, *Noyan, supra,* 232 Cal.App.4th 657, *People v. Diaz* (2015) 238 Cal.App.4th

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[6]*Miranda v. Arizona* (1966) 384 U.S. 436.

1323, and *People v. Awad* (2015) 238 Cal.App.4th 215, for the point that the Court of Appeal has consistently required that defendants file a petition in the trial court in order to receive Proposition 47 relief. (RBOM 24.) If the primary significance is that the sentencing function is to be in the trial court rather than the appellate court, then appellant has no dispute, because a *Kirk*-defendant will be sentenced anew by the trial court just as will a section 1170.18(a) petitioner. But if those cases are cited for the proposition that they hold that a *Kirk*-defendant must be severed from *Estrada*-defendants and be linked with defendants whose judgments are final, appellant disagrees, because they did not and could not do any such thing. (See pp. 10-13, *ante*.)

3. Respondent errs in discounting subdivision (m) and fails to address the rules of liberal construction.

a. Subdivision (m).

The Attorney General argues that section 1170.18, subdivision (m) ("subdivision (m") or "§1170.18(m)") "merely protects defendants who have already been sentenced from being forced to choose between filing a petition for recall of sentence and pursuing other remedies to which they might be entitled, such as filing an appeal of other issues or a petition for writ of habeas corpus" (RBOM 25, footnote and citation omitted) and "[t]o interpret . . . subdivision (m), as allowing automatic resentencing on appeal

would defy the basic principle of statutory construction that language should be construed in the context of the overall statutory scheme as a whole, and that significance should be given to every word, phrase, sentence, and part of an act pursuant to its overarching purpose" (RBOM 25-26). Appellant disagrees.

Subdivision (m) succinctly provides, with emphasis provided:

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

Of course, "this section" refers to section 1170.18. "Any rights or remedies otherwise available" would include, not only the "mere" protection of choosing between appeal, habeas, and section 1170.18 petition, but any other right or remedy as well, i.e., the ameliorative *Estrada-Kirk* reduction inherent in the amendment of substantive offenses.[7] Failing to recognize the primary effect of Proposition 47, i.e., significant changes in the substantive law which were the highlights of the Ballot Pamphlet (see pp. 23, 26-29, *ante*), truly ignores the "overall statutory scheme as a whole" which the Attorney General claims to embrace.

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[7] §§ 459.5, 473, 476a, 490.2, 496, 666, Health & Saf. Code, §§ 11350, 11357, 11377.

Continuing on, respondent asserts "it makes little sense to assume that the drafters would intend to include automatic relief not by specific language, but rather by a generic catch-all provision." (RBOM 26.) Appellant concurs with the Attorney General's prose, but not her implicit conclusion. The so-called "automatic relief" is achieved by well-known *Estrada-Kirk* principles, and the drafters would be inclined to have added subdivision (m) not only for the protections alluded to above but also to protect against any imaginative "savings clause" argument.

b. Proposition 47 is to be liberally construed.

As stated in the Opening Brief on the Merits (ABOM 40-41), the courts have been instructed to "broadly" and "liberally" construe Proposition 47 to accomplish its purposes. (Prop 47, §§ 15, 18). Section 18 of the Proposition states "Liberal Construction. This act shall be liberally construed to effectuate its purposes." (Voter Information Guide, Gen Elec. (Nov. 4, 2014) Text of Proposition 47, § 18, p. 74.) Respondent, however, omits any discussion of this directive. Construing the Act to apply retroactively to both *Estrada* and *Kirk* defendants and not limiting them to the recall process makes sense given the electorate wanted it to be liberally construed to effectuate its purpose. It also makes sense in that it helps promote the goal of the initiative by stopping as soon as possible the

expensive warehousing of individuals for non-violent crimes such as minor property offenses. Applying Proposition 47 retroactively to *Kirk*-defendants would sooner meet the goals of the Act.

Conversely, denying retroactive application of the legislative changes made by Proposition 47 and requiring *Kirk*-defendants to rely only on the section 1170.18 recall procedure would increase spending for legal representation, e.g., for filing and litigating sentence-recall petitions and for judicial (and support staff) time required to decide such petitions. This would subvert the announced intent of the voters: (1) the reduction of felony status for several different crimes, and (2) to maximize savings from reduced incarceration for non-serious and non-violent offenders and to channel that money into designated education and crime-prevention programs.

D. Should This Court Find Ambiguity In The Electoral Intent, The Doctrine Of Lenity Applies.

Early on, when it suit her purpose, the Attorney General hinted at some ambiguity in the Act. (RBOM 11, citing *Brown, supra*, 54 Cal.4th at pp. 319–320 ['[A] statute that is ambiguous with respect to retroactivity application is construed . . . to be unambiguously prospective'"].)[8] But in regard to appellant's lenity argument, the Attorney General switches her tack: "there is no ambiguity in section 1170.18, therefore the rule of lenity does not apply." (RBOM 26.)

Tactically this makes sense since there is nothing for respondent to gain by conceding any ambiguity, since any ambiguity must be resolved in favor of the defendant. (See ABOM 43-50.) The Attorney General merely states there is no ambiguity so as not to be pulled into a maelstrom from which she could not escape: better to duck the argument altogether than attempt to address it and find to one's chagrin that, absolute best, the competing interpretations are equipoised, and respondent must lose.

Because respondent has not responded, there is little to which to reply. Appellant only further notes that respondent did choose to emphasize

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[8]Appellant interjects here that in *Brown*, this quote followed the sentence that "we have been cautious not to infer retroactive intent from vague phrases and broad, general language in statutes." (*Id.* at p. 319.) As noted *ante*, the Act can hardly be constituted of "vague phrases" or "broad, general language" in regard to its overall retroactive effect.

"*egregious* ambiguity" (RBOM 16), but then immediately decline to address appellant's detailed analysis of how "egregious" inappropriately has crept into our California jurisprudence (RBOM 27, fn. 7).

For the reasons set forth in the Opening Brief on the Merits, pages 43-50, as an alternative argument, the rule of lenity does apply, notwithstanding respondent's declination to address same.

SUMMARY

As appellant has exposed *ante*, respondent's bewildering premise *Estrada* does not apply to the Proposition 47 analysis at all, because *Estrada*'s savings clause analysis derives from cases involving outright repeal, is utterly flawed and illogical. Respondent's further assertion that, even if a savings clause analysis does apply, section 1170.18 serves as a function equivalent of same, supposedly consistent with the voter's intent (RBOM 16), is also unfounded and groundless. Neither contention is supported in respondent's briefing, nor is either accurate. Because appellant has demonstrated respondent's argument is founded on such faulty premises, the entirety of respondent's remaining arguments collapse. Respondent's arguments must therefore be rejected.

When a change in the law results in a reduction of punishment for criminal conduct and the new statute contains no savings clause requiring

punishment under the former statute, a criminal defendant is entitled to the benefit of the change in the law if his or her conviction was not yet final on the date the change went into effect. (*People v. Wade* (2012) 204 Cal.App.4th 1142, 1151, citing *Estrada, supra*, 63 Cal.2d at p. 740; see also *People v. Babylon* (1985) 39 Cal.3d 719, 722 [defendant entitled to benefit of change in law during pendency of appeal].) Stated otherwise, under the *Estrada/Kirk* rule, "a legislative amendment that lessens criminal punishment is presumed to apply to **all cases** *not yet final* (the Legislature deeming its former penalty too severe), unless there is a 'savings clause' providing for prospective application." (*People v. Smith, supra,* 234 Cal.App.4th at pp. 1464-1465, italics original, boldface added; see also, *People v. Hajek and Vo, supra,* 58 Cal.4th at pp. 1195-1196.) Appellant has established, *ante,* and in her Opening Brief on the Merits (ABOM 23-40) that the Act contains no indication the electorate intended its provisions to be applied prospectively only.

The phrase "currently serving a sentence," when read in the context of the presumptions created by *Estrada, Kirk* and the arguments made, *ante,* and in the Opening Brief on the Merits, should be read to mean those defendants who are currently serving a sentence after their cases became *final.* As appellant has argued, the most reasonable interpretation of the phrase is as a shorthand expression to differentiate those individuals whose sentences have

not been completely served and may petition under the stricter requirements and consequences of section 1170.18 (a) and (b), from those whose sentences have been fully served and may petition under section 1170.18 (f) for "designation."

From a policy stand-point, such limitation would make little or no sense. First, while *Estrada, supra*, relief has been effected in the past for sole or limited number of offenses, in contrast, in Proposition 47, the spectrum of substantive of reduced offenses is extensive and covers a wide spectrum of offenses constituting a goodly portion of the prosecution felony caseload – including reduced punishment but redefined crime (§ 459.5). Second, the reduction to misdemeanor classification not only reduces the potential custody, but also alleviates many severe collateral consequences (e.g., Elec. Code, § 2150 [ineligibility to vote if on parole for the conviction of a felony]; Ins. Code, § 1723 [insurance commissioner shall commence proceeding upon application by applicant whose application shows conviction of a felony involving dishonesty].) Third, of course, those who are under sentence, incarcerated or on probation, but whose judgments are final, may petition for recall (if eligible, i.e., no "super-strike" history), and if not "dangerous," not likely to commit a "super strike," are entitled to relief. And finally, individuals whose judgments may be decades old who have "completed" their sentences

– and indeed the "completion" could have been very recent as well – are entitled, if otherwise eligible to have their felonies designated as felonies.[9] The lesson is plain – the electorate was effecting an ameliorative sea-change, and for such an amelioration to divest *Kirk*-defendants of their remedy would be unreasonable.

In the typical *Estrada-Kirk* circumstance whereby a penalty is decreased and there is no savings clause, then any individual whose prosecution is pending (*Estrada*) or whose judgment is not yet final (*Kirk*) is entitled to the ameliorative benefit. (See, e.g., *Tania v. Superior Court* (1991) 53 Cal.3d 282, 300-301; *People v. Rossi* (1976) 18 Cal.3d 295, 299; *People v. Vasquez* (1992) 7 Cal.App.4th 763, 765, 767-768.) But here, as was shown, the legislative scheme is unprecedented and is *far more* ameliorative: the proposition added a petitioning process to permit current inmates (and probationers and parolees) whose judgments were final to seek a reduction not only in sentence but in severity of condemnation (felony to misdemeanor) ***and*** it provided a

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[9]Indeed, the electorate's liberal policy of magnanimity may be that the section 1170.19(f) petitioners may not necessarily be subject to firearm restrictions. The firearm proviso is expressly limited to "such resentencing" and "designation" is not mentioned. This is not necessary an oversight and is entirely rational. An individual whose erstwhile felony was decades ago may be seen as meriting the recovery of firearm possession (all other prerequisites met). Should the language also embrace defendants who just recently completed their sentences, that is the prerogative of the legislators who may choose not to burden the courts with endless hearings and appeals on questions of abuse of discretion.

previously unheard of mechanism for former felons whose judgments may be decades old to reduce their felon status by a similar, though slightly different, process. It is illogical to conclude the electorate would have enacted such a far reaching magnanimous benefit and, notwithstanding such an intent, specifically desire to deny *Kirk*-defendants the amelioration which they would have received had they, the electorate, not been so very magnanimous.

Construing the Act to apply retroactively to both *Estrada* and *Kirk* defendants and not limiting them to the recall process makes sense given the electorate wanted the Act to be liberally construed to effectuate its purpose. It also makes sense in that it helps promote the goal of the initiative by stopping as soon as possible the expensive warehousing of individuals for non-violent crimes such as minor property offenses. It further makes sense in light of section 1170.18, subdivision (m), which reads that "[nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant."

Thus, given the objectives of Proposition 47, the plain language of section 1170.18, especially subdivision (m), and absent an explicit abrogation of *Estrada-Kirk* or a specific statement that section 1170.18 provides the sole and exclusive remedy under the Act, it is *not* reasonable to find the "currently

serving a sentence" language was meant to include *Kirk*-defendants or that section 1170.18 was meant to be an exclusive remedy to *Kirk*-defendants.

If there be any ambiguity, the reasonable interpretations of the same provision – "currently sentenced" – are in relative equipoise. Respondent's interpretation is that "currently sentenced" means judgment has been imposed (or probation granted) such that the defendant is in custody, actual or constructive, whereas appellant's interpretation is that "currently sentenced" is a shorthand phrase employed in section 1170.18(a) to distinguish defendants in that category from those whose who have "completely served" their sentences and may seek relief under section 1170.18(f), a similar but distinctly different scheme with different procedures and results. When both interpretations are considered in juxtaposition with *Estrada-Kirk* jurisprudence and the vastly magnanimous effect of the Proposition, then appellant's interpretation is the most reasonable, but at worst, the two interpretations are in equipoise, "the tie must go to the defendant," i.e., lenity must favor appellant. (See e.g. *People v. Franco* (2009) 180 Cal.App.4th 713, 724-725 [statute ambiguous, justifying adoption of interpretation more favorable to defendant]; *People v. Shabtay* (2006) 138 Cal.App.4th 1184, 1194-1196

[same]; *In re Rosalio* (1995) 35 Cal.App.4th 775, 780-781 [same]; see ABOM 43-50.[10])

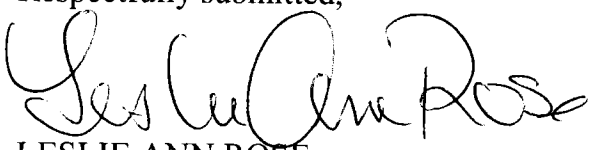
[10]Respondent declined to address this point. (See RBOM 26-27.)

CONCLUSION

Under the Act, the amendment to Health and Safety Code section 11377 mitigates punishment for certain individuals who do not have disqualifying priors. The right to be resentenced under *Estrada/Kirk* is a right available to a defendant whose judgment is not yet final. Under *Overstreet, supra,* the Legislature must be deemed to have been aware of the *Estrada/Kirk* rule at the time it enacted section 1170.18 and to have enacted the statute in light of those decisions. For this reason, appellant's case should be remanded to the trial court and the conviction for possession of a controlled substance be reduced to a misdemeanor under the *Estrada/Kirk* rule, after a formal determination of no disqualifying priors.

Dated: 1.8.16

Respectfully submitted,



LESLIE ANN ROSE
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CERTIFICATION OF WORD COUNT

I, Leslie Rose, hereby certify that, according to the computer program used to prepare this document, appellant's reply brief on the merits contains 8,931 number of words.

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

Executed April 6, 2016 in San Diego, California.

Leslie Rose
Staff Attorney
State Bar No. 106385

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Court of Appeal No. D065961
Superior Court No. SCD 252670

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