IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S223825

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **DAVID J. VALENCIA,** Defendant and Appellant.	Court Of Appeal, Fifth District No. F067946 Superior Court of California, Tuolumne County No. CRF30714

APPELLANT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

CONSTITUTIONS

OTHER

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APPELLANT'S REPLY BRIEF ON THE MERITS

Respondent's entire argument is premised upon two faulty assumptions. First, it assumes that the established standard for determining if a prisoner poses an unreasonable risk of danger to public safety under section Penal Code[1] 1170.126 is a broad, expansive and undefined standard; and second, it assumes that the target recipients for Proposition 36 and 47 are two distinct and separate classes of prisoners. As will be demonstrated below the standard for dangerousness under section 1170.126 is the narrow standard

1. Unless otherwise specified all further references are to the Penal Code.

defined in section 1170.18, subdivision (c)[2] as there is striking *similarity* between the target beneficiaries of Propositions 36 and 47.

I.

THE STANDARD FOR "UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY" UNDER PROPOSITION 36 IS THE SAME AS IN PROPOSITION 47 AS DEFINED IN SECTION 1170.18, SUBDIVISION (C)

A. The Voters Intended that Unreasonable Risk of Danger to Public Safety as Defined in Section 1170.18, Subdivision (c) Applies to Petitions Under Proposition 36

This Court identified the main issue in this case as such:

> Does the definition of "unreasonable risk of danger to public safety" (Pen. Code, § 1170.18, subd. (c)) under Proposition 47 ("the Safe Neighborhoods and Schools Act") apply to resentencing under the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126)?

Respondent vehemently argues that it doesn't. Respondent argues over and over again that there is nothing specifically in Proposition 47 that expressly shows the voter's intent to apply the definition of dangerousness in section 1170.18 to third strikers in section 1170.126. (Respondent's Answer Brief on the Merits p. 17, 19, hereafter A.B.M.) Respondent asserts that the official ballot material is "totally silent" on Proposition 47's effect on Proposition 36. (A.B.M. p. 19.) Respondent further suggests "there is no evidence, let alone undebatable evidence, that section 1170.18 was intended to supersede the discretion allowed to trial courts in determining whether a recidivist

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2. "As used throughout this Code, "unreasonable risk of danger to public safety" means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667."

felony presents an unreasonable risk of danger to public safety under section 1170.126,"

This is simply incorrect.

> In interpreting a voter initiative ..., we apply the same principles that govern statutory construction. (Citations omitted.) The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. (Citations omitted.) When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' (Citations omitted.)

(*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-01.)

This Court has consistently emphasized the particular value of the *arguments* contained in the official ballot material. (*Ibid*; see also *People v. Mosley* (2015) 60 Cal. 4th 1044; *People v. Briceno* (2004) 34 Cal. 4th 451; *People v. Rizzo* (2000) 22 Cal. 4th 681.)

In passing Proposition 47, the voters intended that inmates with prior serious and violent felonies would be released from prison:

> Felons with prior convictions for armed robbery, kidnapping, carjacking, child abuse, residential burglary, arson, assault with a deadly weapon, and many other serious crimes will be eligible for early release under Prop. 47.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), argument and rebuttal for and against Proposition 47, p. 39.)

By passing Proposition 47, the voters also intended that the judicial discretion to block the aforementioned felon's release would be severely limited:

> These early releases will be virtually mandated by Proposition 47. While Prop. 47's backers say judges will be able to keep dangerous offenders from being released early, this is simply not true. Prop. 47 prevents judges from blocking the early release of prisoners except in very rare cases. For example, even if the judge finds that the inmate poses a risk of committing

> crimes like kidnapping, robbery, assault, spousal abuse, torture of small animals, carjacking or felonies committed on behalf of a criminal street gang, Proposition 47 requires their release.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), argument and rebuttal for and against Proposition 47, p. 39.)

The voters were again informed that the drafters of Proposition 47 "wrote this measure so that judges will not be able to block the early release of these prison inmates, many of whom have prior convictions for serious crimes, such as assault, robbery, and home burglary." (*Id.* at p. 38.)

These ballot arguments are clear evidence that the voters specifically intended that persons with prior serious and or violent offenses would be released unless and only unless the court found that they posed an unreasonable risk of danger to public safety as defined in section 1170.18, subdivision (c).

The voters intended that the definition of dangerousness in section 1170.18, subdivision (c) applied to petitions under section 1170.126. The arguments described above do not specify that the relief afforded by Proposition 47 was limited to persons currently serving a prison sentence for a theft or drug related offense described in section 1170.18, subdivision (a) but rather that "*Felons* with prior (serious or violent) convictions . . . will be eligible for early release under Prop. 47." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), argument and rebuttal for and against Prop. 47, p. 39, emphasis added.)

Felony was defined in the official ballot material of both Propositions 36 and 47 exactly the same as "Felonies that are not classified as violent or serious include grand

theft (not involving a firearm) and possession of a controlled substance." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), official title and summary, p. 48; Voter Information Guide, Gen. Elec. (Nov. 4, 2014), official title and summary, p. 34.) Accordingly the ballot arguments above clearly refer to felons under both Propositions 47 and 36.

The voters also clearly intended that the judicial discretion to deny petitions to these *felons* would be severely limited.

> These early releases will be virtually mandated by Proposition 47. While Prop. 47's backers say judges will be able to keep dangerous offenders from being released early, this is simply not true. Prop. 47 prevents judges from blocking the early release of prisoners except in very rare cases. For example, even if the judge finds that the inmate poses a risk of committing crimes like kidnapping, robbery, assault, spousal abuse, torture of small animals, carjacking or felonies committed on behalf of a criminal street gang, Proposition 47 requires their release.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), argument and rebuttal for and against Prop. 47, p. 39.) Again the argument in the official ballot material does not specify that the limited discretion to deny petitions releasing "prisoners except in very rare cases" is restricted to persons currently serving a sentence for a minor theft related or drug offense, but rather refers to felons with prior serious and violent convictions. This is clear evidence that the voters knew and intended that the release of felons under both propositions would be virtually mandated.

Respondent argues that by applying the definition of unreasonable risk of danger to public safety in section 1170.18, subdivision (c) to petitions under 1170.126 marks a significant departure from well-established principal of law. (Respondent refers to

section 1170.18 as a "long established procedure for making dangerousness determinations under section 1170.128, subdivision (g)." (A.B.M. p. 28) .) "The California voters cannot be understood to have silently "decided so important and controversial a public policy matter and created a significant departure from the existing law" *(In re Christian S.* (1994) 7 Cal.4th 768, 782) by changing the rules for section 1170.126 petitions at the very last moment without any express declaration or notice of such intent." (A.B.M. p. 5, 24.) The voters did not silently decide this very important issue. They debated this very issue and ultimately voiced their intent.

Section 1170.18 is not a departure from the long established procedure accepted in section 1170.126. *In re Christian S.* was decided in 1994, and dealt with principles in law that arose in 1979 and had common law roots as well. (*In re Christian S., supra,* 7 Cal.4th at p. 773.) Here we are dealing with an undefined standard that had been in play for a matter of months (starting on November 7, 2012), before it was defined in the Proposition 47 official ballot material shortly before the November 4, 2014 election. There was no long established procedure. Furthermore the fact that this very issue is in front of this Court negates the inference that the procedure for deciding Proposition 36 petitions is established.

The phrase "as used throughout this Code" in section 1170.18, subdivision (c) also shows that the voters did not *silently* approve the definition of unreasonable risk of danger to public safety to apply to those with prior serious and violent and offenses under section 1170.126. In addition to the ballot arguments described above the voters intended that the definition of unreasonable risk of danger to public safety would be used

throughout the entire Penal Code in the actual text of the proposed laws. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of proposed law, p. 74.) These two factors show that the voters intended that the definition of unreasonable risk of danger to public safety as defined in section 1170.18, subdivision (c) was to be applied to those with one or more prior serious or violent offense including petitions under section 1170.126.

Respondent argues that the Court of Appeal was correct in finding that ""[h]idden in the lengthy, fairly abstruse text of the proposed law, as presented in the official ballot pamphlet- and nowhere called to the voters' attention - is the provision at issue in the present appeal," to wit, section 1170.18, subdivision (c)." (A.B.M. 33, citing opinion p. 32.) Respondent relies upon California Government Code section 88002, (f) which requires the "provisions of the proposed measure differing from the existing provisions of law affected shall be distinguished in print, so as to facilitate comparison."

That argument fails because neglecting to italicize information otherwise fully laid out in the text of the proposed laws does not obliterate the fact that the information is laid out in black and white. "[D]espite any failure to facilitate a comparison between the proposed amended text and the existing text of section 902.1, the entirety of the new section (d) was set forth in the ballot. Thus, the voters were informed that if approved the tax ordinance would read as presented in the legal text." (*Coblentz, Patch, Duffy & Bass, LLP v. City and County of San Francisco* (2014) 233 Cal.App.4th 691, 705; reviewed denied April 22, 2015.) Here too, the fact that the definition would be "used throughout this Code" was not italicized does not negate the fact that the voters were fully informed

that the new definition would be "used throughout this Code." Any Government Code section 88002 defect does not negate the fact that the voters were fully informed of the text of the proposed laws.

Respondent argues that "[h]ad the electorate intended to apply the new definition to Proposition 36 proceedings, it could have clarified that the term "petitioner," as used in the new definition, constituted a person filing a petition under either section 1170.18, subdivision (a), or section 1170.126, subdivision (b), but it did not." (A.B.M. p. 14.) This argument clearly fails for three reasons. First the fact that the term petitioner was left undefined indicates that it is not limited to section 1170.18 petitioners. Second, the only other place the term unreasonable risk of danger to public safety is used in the code is in section 1170.126 .

Third, the drafters *could* just as easily have stated "as used throughout this *Section*" instead of Code had they intended the definition to only apply to section 1170.18. If the electorate wanted the definition to be limited to section 1170.18, then using the word "Section" would have mandated such a result. "The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:

> The word "section," whenever hereinafter employed, refers to a section of this code, unless some other code or statute is expressly mentioned."

(§ 7 subd. 20.)

Any other suggestion that the "virtually mandated" release of those with prior serious and violent offenses who petitioned under Proposition 47 was not intended to also

apply to petitions under Proposition 36 is unavailing. The ballot materials emphasized the fact that the inmate had previously been convicted on one of more serious or violent offense and that the standard "virtually mandated" their release. To suggest that the voters accepted this standard for persons whose recent offense was grand theft of an item valued less than $950 versus grand theft of an item valued over $950 is preposterous. The arguments did not discuss the present offense, just the fact that the release of offenders with prior serious and violent offenses was "virtually mandated." The ballot arguments coupled with the text of the prosed laws not only show the voter's awareness of what they were doing, but also their clear intent. Knowing full well that release of felons with prior convictions for serious and violent offenses would be "virtually mandated," the People of the State of California passed Proposition 47.

B. Public Policy and Constitutional Principals Requires that Petitions Under Proposition 36 be Determined by the Definition Provided in Section 1170.18, Subdivision (c) as Enacted by Proposition 47

Despite appellant's contention that there is no ambiguity in the statutory text of "as used throughout this Code" (as fully laid out in Appellant's Opening Brief on the Merits), public policy supports the conclusion that the definition of dangerousness in section 1170.18, subdivision (c) applies to petitions under section 1170.126. "If "statutory text is susceptible of more than one reasonable interpretation, we will consider ' "a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, *public policy*, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." ' " (*Page v. Mira Costa Community College Dist.* (2009) 180 Cal.App.4th 471, 485-86, emphasis added.)

Based upon the erroneous predicate assumption that petitioners under Proposition 36 are more dangerous than those under Proposition 47 (more fully discussed below), respondent suggests that the dangerousness standard under Proposition 47 should naturally be less restrictive than under Proposition 36: "There is a huge difference, both legally and in the risk to public safety, between someone with multiple prior serious and/or violent felony convictions whose current offense is a felony, and someone with no felony criminal history whose current offense is (or would be, if committed today) a misdemeanor. Because the would-be misdemeanants who stand to benefit from Proposition 47, as a class, are less dangerous than recidivist felons with prior strike offenses, it is logical to impose a higher dangerousness standard for them (§ 1170.18, subd. (c).)" (A.B.M. p. 16.)

This position is contradicted by the official ballot material where the voters knew and intended that Proposition 47 would affect those with serious prior criminal records resulting in practically automatic early release. "Felons with prior convictions for (serious and violent offenses) . . . will be virtually mandated by Proposition 47." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), argument and rebuttal for and against Prop. 47, p. 39.)

Respondent's position is unavailing and petitions under Propositions 36 and 47 should be measured by the same standard of dangerousness as defined in section 1170.18, subdivision (c) because by and large they are the same category of offenders (more fully argued below). Both target populations have similar criminal records and present offenses. The criminal record for either petitioner under Proposition 47 or 36 is more

important that the present non-serious and non-violent offense in determining dangerousness. As a matter of fact it is only the prior record and not the present offense that has any effect on the dangerous determination at all.

C. Undefined, Dangerousness in Section 1170.126 is Unconstitutionally Vague and Violates the Due Process Clauses of the California and United States Constitutions

Vague statutes are repugnant to the Due Process Clauses of the California and United States Constitutions. "This Court has consistently favored that interpretation of legislation which supports its constitutionality." (*Screws v. U.S.* (1945) 325 U.S. 91, 98 [65 S.Ct. 1031, 1033-34, 89 L.Ed. 1495] "The prohibition on vagueness is rooted in "'ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.' " (*Johnson v. United States* (2015) 576 U.S. – —, ——, [135 S.Ct. 2551, 2557], 192 L.Ed.2d 569.)" (*In re Kevin F.* (2015) 239 Cal.App.4th 351, 357.) " ' "[A] law that is 'void for vagueness' ... 'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.' " ' " (*In re H.C.* (2009) 175 Cal.App.4th 1067, 1070.)" (*Id.* at p. 358.)

Respondent argues that the standard in Proposition 47 would constitute a "radical reduction of court discretion" if applied to Proposition 36 proceedings. (A.B.M. p. 5.) Respondent is incorrect in asserting that section 1170.126 provided guidelines (A.B.M. p. 10), as section 1170.126 only refers to the types of evidence the court may consider. (See § 1170.126, subd. (g)(1)-(3).) If the standard for determining dangerousness is as respondent suggests, left up to the trial judges with no universally accepted standard, then

that approach is unconstitutionally vague and violates due process.[3] Respondent's preferred test for dangerousness is void for vagueness because there is no set test and it delegates basic policy matters to judges on an *ad hoc* and subjective basis creating a great risk of arbitrary and discriminatory application.

The prohibition against vagueness applies to sentencing statutes as well. "The prohibition of vagueness in criminal statutes . . . apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. (*United States v. Batchelder* (1979) 442 U.S. 114, 123 [99 S. Ct. 2198, 60 L.Ed.2d 755].)." (*Johnson v. U.S.*, *supra*, [135 S. Ct. 2551, 2556-57, 192 L.Ed.2d 569].) In *Johnson*, the United States Supreme Court held that the sentencing laws at issue denied due process because it denied "fair notice to defendants and invites arbitrary enforcement by judges." (*Johnson v. U.S.*, *supra*, 135 S.Ct. 2551, 2557.) Accordingly the Due Process Clauses of the California and United States Constitutions require that petitions under Proposition 36 be decided by the defined standard spelled out in section 1170.18, subdivision (c), as enacted by Proposition 47.

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3. Although the Court of Appeal in *People v. Flores* (2014) 227 Cal. App. 4th 1070, held that the term unreasonable risk of danger to public safety in section 1170.126 with no definition was not vague, this was decided on July 8, 2014, several months before Proposition 47 applied a definition; and the petition for review was denied over a month before Proposition 47 was enacted.

II.

BOTH PROPOSITIONS 36 AND 47 TARGET A STRIKINGLY SIMILAR CLASS OF PRISONERS, WHICH IS PERSONS SERVING A SENTENCE FOR AN OFFENSE THAT IS NEITHER SERIOUS NOR VIOLENT

A. Proposition 36 and 47 Target a Similar Class of Low Level Offenders

Respondent's second faulty assumption is that Propositions 36 and 47 were intended to benefit completely distinct and different classes of prisoners. Respondent argues that because Propositions 36 and 47 have different purposes and scopes the definition of unreasonable risk of danger to public safety in section 1170.18, subdivision (c) was not intended to apply to petitions under section 1170.126. (A.B.M. p. 13.) This erroneous position permeates their entire argument. "Although each initiative created a resentencing scheme, each scheme addressed very different concerns impacting distinct categories of crimes and perpetrators." (A.B.M. p. 15.) "The voters intended each proposition to apply to a different, exclusive class of criminals." (A.B.M. p. 18.) "There is a huge difference, both legally and in the risk to public safety, between someone with multiple prior serious and/or violent felony convictions whose current offense is a felony, and someone with no felony criminal history whose current offense is (or would be, if committed today) a misdemeanor. Because the would-be misdemeanants who stand to benefit from Proposition 4 7, as a class, are less dangerous than recidivist felons with prior strike offenses, it is logical to impose a higher dangerousness standard for them (§ 1170.18, subd. (c))" (A.B.M. p. 16.) Both Propositions 36 and 47 target a relatively small albeit similar and largely overlapping prison population.

At the onset, it should be noted that persons previously convicted of a "Super Strike," which is defined as "any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667," are not eligible for relief under either Proposition. (§ 1170.126 subd. (e)(3)[4], § 1170.18 subd. (i).) Therefore respondent's characterization that "Proposition 36 was intended to apply merely to a select group of California's worst criminals" (A.B.M. 15), is completely wrong.

Respondent fails to reconcile the enormous overlap between section 1170.126 and 1170.18 in purposes and scopes.

In Section 1, the findings and declarations, the People enacted Proposition 36 that will:

> (1) Require that murders, rapists, and child molesters serve their full sentences – they will receive lifetime sentences even if convicted of a new minor third strike crime.

(Voter Information Guide, Gen. Elec. (Nov. 6, 2012), text of proposed law, 105.)

In section 3, purpose and intent, the People enacted Proposition 47 to:

> (1) Ensure that people convicted of murder, rape, and child molestation will not benefit from this act.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of proposed law, p. 70.)

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4. Proposition 36 also excludes persons with prior convictions described in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12 (§ 1170.126 subd. (e)(3), which includes child molestation, murder and assault with a machine gun on a peace officer and possession of a weapon on mass destruction.

Persons serving a sentence for any "serious or violent" offense (described in sections 667, subdivision (e)(2)(C)(i)-(iii), or 1170.12, subdivision (c)(2)(C)(i)-(iii)) are likewise not eligible for relief under either Proposition. Proposition 47 targets theft and drug related offenses, "in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code" (§ 1170.18 subd. (a)), none of which are considered serious of violent offenses. Proposition 36 is eligible to inmates whose "current sentence was not imposed for any" serious or violent offense "appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e)(2).)

Also excluded from the benefits of Propositions 36 or 47 are persons currently serving a prison sentence for any felony that is not serious or violent or described in section 1170.18, subdivision (a), and persons with one prior strike offense (§ 1170.126 subd. (b)) currently serving a sentence of a felony that is not serious or violent or described in section 1170.18, subdivision (a). Together Propositions 36 and 47 target the balance of the prison population consisting of persons serving 25 years to life for non-serious and non-violent offenses and/or persons serving prison sentences for theft and drug related offenses described in section 1170.18, subdivision (a).

Respondent's characterization of the different target populations in Propositions 36 and 47 is unfounded and misleading: "Proposition 36 was intended to apply merely to a select group of California's worst criminals" (A.B.M. 15), whereas Proposition 47's

"targeted group . . . is generally comprised of low-level offenders as opposed to the more volatile and recidivist serious and violent offenders Proposition 36 was designed to reach." (A.B.M. p. 15-16.) This argument is incorrect for several reasons.

First, "California's worst criminals" are not eligible for relief under Proposition 36 because those serving sentences for serious or violent offenses or persons previously convicted of a "Super Strike" are not eligible for relief as explained above.

Second, an inmate could have multiple prior strike offense and be eligible for relief under Proposition 47. "Felons with prior convictions for armed robbery, kidnapping, carjacking, child abuse, residential burglary, arson, assault with a deadly weapon, and many other serious crimes will be eligible for early release under Prop. 47." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), argument and rebuttal for and against Prop. 47, p. 38.)

The voters' intent that Proposition 36 target low level offenders like those described in Proposition 47 is abundantly clear. In the official ballot material the overriding purpose for passing Proposition 36 was for inmates currently convicted of minor theft or drug offenses serving 25 years to life. The official ballot material for Proposition 36 described the targeted felony convictions as:

> Felonies that are not classified as violent or serious include grand theft (not involving a firearm) and possession of a controlled substance.

(Voter Information Guide, Gen. Elec. (Nov. 6, 2012), official title and summary, p. 48.)

In a cut and paste fashion, the official ballot material in Proposition 47 used the same exact definition of felony:

> Felonies that are not classified as violent or serious include grand theft (not involving a gun) and possession of illegal drugs.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), official title and summary, p. 34.)

The official ballot material for Proposition 36 identified its target prison population as those whose current conviction was for shoplifting and simple drug possession. In enacting the Three Strikes Reform Act of 2012, the People voted to:

> (3) Maintain that repeat offenders convicted of non-violent, non-serious crimes *like shoplifting and simple drug possession* will receive twice the normal sentence instead of life sentence.

(Voter Information Guide, Gen. Elec. (Nov. 6, 2012), text of proposed law, p. 105, emphasis added.)

In the rebuttal to the argument against Proposition 36, the voters voiced that "People convicted of shoplifting a pair of socks, stealing bread or baby formula don't deserve life sentences." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), argument and rebuttal for and against Prop. 36, p. 53.) Because Proposition 47 specifically targeted minor theft offenses, it is clear that Propositions 36 and 47 target a similar class of inmate.

B. The Public Safety Provisions in Propositions 36 and 47 are Identical

Respondent also implies that public safety was a purpose for enacting Proposition 36 but played second fiddle in Proposition 47. "Although aspects of public safety were certainly part of the impetus behind Proposition 47, public safety interests nonetheless played second fiddle to monetary interests in the enactment of the Proposition 47

statutory scheme." (A.B.M. p. 17.) Actually in the codified **purpose and intent** of Proposition 47 the electorate declared "In enacting this act, it is the *purpose* and intent of the people of the state of California to (1) Ensure that people convicted of murder, rape, and child molestation will not benefit from this act." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of proposed law, p. 70.)

The public safety concerns were equally emphasized in both Propositions 36 and 47. Both propositions equally underscored that persons with prior convictions of Super Strikes are ineligible:

In Section 1, the findings and declarations, the People enacted Proposition 36 that will:

> (2) Require that murders, rapists, and child molesters serve their full sentences – they will receive lifetime sentences even if convicted of a new minor third strike crime.

(Voter Information Guide, Gen. Elec. (Nov. 6, 2012), text of proposed law, 105.)

In section 3, purpose and intent, the People enacted Proposition 47 to:

> (2) Ensure that people convicted of murder, rape, and child molestation will not benefit from this act.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of proposed law, p. 70.)

Also, at the top of the Official Title and Summary for both Propositions 36 and 47, the bullet points specified that persons with prior "Super Strikes" were ineligible for relief. (See Voter Information Guide, Gen. Elec. (Nov. 6, 2012), official title and summary, p. 48; and Voter Information Guide, Gen. Elec. (Nov. 4, 2014), official title and summary, p. 34.)

Statutorily, both propositions have identical public safety provisions. The benefits of both Proposition 36 and 47 are unavailable to a person with a prior conviction "specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290" (§§ 1170.128 subd. (e)(3) and 1170.18 subd. (i)). A person is also ineligible for resentencing under Proposition 36 or 47 if he or she poses and "unreasonable risk of danger to public safety." (§§ 1170.126 subd. (f) and 1170.18 subd. (b).)

The only way that Proposition 36 has more public safety provisions is if the test for unreasonable risk of danger to public safety is, as suggested by respondent, different in section 1170.126 than in 1170.18. This circular reasoning however and does not support respondent's underlying position that the unreasonable risk of danger to public safety standard *is* more expansive in Proposition 36 than in Proposition 47.

C. The Language of Section 1170.18 Indicates the Voters Intent That Section 1170.18 Sought to Affect Section 1170.126

Respondent argues that section 1170.18, subdivision (n) limited its terms to Proposition 47 petitioners only. Respondent argues that "[t]here is inherent tension in the statutory language between section 1170.18, subdivision (c), which could suggest a change to the entire Penal Code, and section 1170.18, subdivision (n), which expressly narrows Proposition 47's effect on the finality of judgments to cases only within its own purview." (A.B.M. p.14.) There in no tension between subdivisions (c) and (n) as subdivision (n) supports the conclusion that the definition of unreasonable risk of danger

to public safety in subdivision (c) applies "throughout this Code" including petitions under section 1170.126.

Section 1170.18, subdivision (n) reads:

> Nothing in this and related sections is intended to diminish or abrogate the finality of judgments of any case not falling within the purview of this act.

(§ 1170.18, subd. (n).)

Subdivision (n) refers to "the finality of judgments of any case not falling within the purview of this act." If this refers to petitioners under section 1170.126, it does not refer to appellant and all the other appellants whose case is still pending in the California Supreme Court as their "judgment is not yet final because it is on appeal." (*Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489; *Board of Equalization* (1994) 22 Cal.App.4th 1194, 1207.)

Furthermore, subdivision (n) states that "nothing in this and related sections is intended to *diminish* or *abrogate* the finality of judgments of any other case not falling within the purview of this act." *Abrogate* means "to abolish or treat as nonexistent," (Merriam-Webster Online Dictionary)[5] and *diminish* means "to become or to cause (something) to become less in size, importance, etc.; to lessen the authority." (Merriam-Webster Online Dictionary.)[6] Respondent reads these terms to mean alter or affect, because undoubtedly, section 1170.18, subdivision (c) provides more relief not less than section 1170.126. That misreading is clearly error.

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5. https://www.google.com/search?q=abrogate+defined&ie=utf-8&oe=utf-8
6. http://www.merriam-webster.com/dictionary/diminish

If the language of legislation is ambiguous, statutes "must be read in their context and with a view of their place in the overall statutory scheme." (*Utility Air Regulatory Group v. E.P.A.* (2014) 134 S. Ct. 2427 [78 ERC 1585, 189 L. Ed. 2d 372].) "And reasonable statutory interpretation must account for both "the specific context in which ... language is used" and "the broader context of the statute as a whole." (*Robinson v. Shell Oil Co.* (1997) 519 U.S. 337, 341, [117 S. Ct. 843, 136 L.Ed.2d 808].)" (*Id.* at p. 2442.)

To better understand the purpose of subdivision (n), it is important to also consider subdivision (m) of section 1170.18:

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

(§ 1170.18, subd. (m).)

It is clear that subdivision (m) refers to the rights or remedies of the petitioner. What is not so clear is what is intended by subdivision (n). Given the same structure and similar language, it appears that subdivision (n) means that nothing in section 1170.18 shall abrogate or diminish the finality of judgment in favor of the petitioner. There is no evidence that subdivision (n) was intended to insulate the finality of judgments favorable to the prosecution or a prior court ruling. Therefore subdivision (n) does not imply what respondent suggests it implies.

Subdivisions (m) and (n) also recognize the overlap and interplay between petitions under sections 1170.18 and other provisions of law like section 1170.126. The most likely purpose subdivisions (m) and (n) serve is to ensure that nothing in Proposition 47 takes away from any rights afforded by other provisions of law like

Proposition 36, and that nothing in Proposition 47 shall affect the finality of a judgment under another provision of law, like Proposition 36, has successfully petitioned for resentencing.

Respondent also argues that "When the California electorate passed Proposition 47, it did so without any intent, or even any knowledge of the possibility, that the initiative would amend Proposition 36 and broaden the relief available under it." (A.B.M. p. 22.) It is hard to imagine how the electorate could be unaware of the "possibility, that the initiative would amend Proposition 36" when the limiting clauses discussed above in section 1170.18 were cut and paste from section 1170.126, subdivisions (k) and (l):

> (k) Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant.
>
> (*l*) Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act.

(§ 1170.126.)

What is most interesting about these limiting clauses is that they are there at all. The fact that the limiting clauses are there evidences an awareness of how section 1170.18 *could* affect other rights and remedies or diminish or abrogate the finality of judgments of any case not falling within the purview of this act. The fact that the limiting clauses are there also shows that the drafters know how to use limiting clauses when its intent it to not have the provisions of the present legislation affect other provisions of law. That section 1170.18 included the language "as used throughout this Code" in

subdivision (c) and the limiting clauses in subdivisions (m) and (n) is evidence that the voters said what they meant and meant what they said, that the definition of unreasonable risk of danger to public safety shall be "used throughout this Code."

Respondent suggests that "By severely limiting the number of defendants who would benefit from Proposition 36, the electorate clearly valued the three Strikes law's core commitment to public safety above the cost savings likely to accrue as a result of the enacted reform." (A.B.M. p. 16-17.) That argument incorrectly assumes the voter's intended to severely limit the number of defendants who would benefit from Proposition 36. Proposition 36 included a liberal construction clause, "This act is an exercise of the public power of the people of the State of California for the protection of the health, safety, and welfare of the people of the State of California, and shall be *liberally* construed to effectuate those purposes." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), text of proposed law, 110, emphasis added.) The liberal construction coupled with the finding and declaration that "this act will: Restore the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction of for a violent or serious crime" (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), text of proposed law, 105), negates respondent's assertion that the voters intended to severely limit the number of defendants eligible for the benefits of Proposition 36.

Respondent's argument assumes that the voters intended the standard for determining "unreasonable risk of danger for public safety" under section 1170.126 be different from that in section 1170.18. There is no evidence to support this interpretation.

Section 1170.126 describes the types of information the court could consider in exercising its discretion (§ 1170.126 subd. (f)), but never defined the term unreasonable risk of danger to public safety until passing Proposition 47. Both statutes refer to the dangerousness standard using the exact same words:

> [U]nless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.

(§ 1170.126 subd. (f).)

> [U]nless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.

(§ 1170.18, subd. (b).)

Respondent incorrectly argues that applying the standard of determining unreasonable risk of danger to public safety in section 1170.18 to Proposition 36 petitions would eliminate the trial court's ability to "consider the petitioner's criminal history, the circumstances of the current offense, his or her disciplinary record and record of rehabilitation while incarcerated, and any other evidence the court in its discretion, determines to be relevant." (A.B.M. p. 28-29.) Under both Propositions 36 and 47, the court may consider all of the following:

> (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes.
>
> (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated.
>
> (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.

(Pen. Code, § 1170.18 subd. (b)(1)-(3); these are the exact same matters the court may consider under section 1170.126, subd. (g)(1)-(3).)

The two Propositions relate to the same class of persons invoking *in pari materia.* This argument was fully made in Appellant's Opening Brief on the Merits, except for the dissection of the prison population described above and the express intention of the voters that Propositions 36 and 47 both would affect low level "Felonies that are not classified as violent or serious include grand theft (not involving a firearm) and possession of a controlled substance." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), official title and summary, p. 48; Voter Information Guide, Gen. Elec. (Nov. 4, 2014), official title and summary, p. 34.)

III.

THE DEFINITION OF DANGEROUSNESS IN SECTION 1170.18 SUBDIVISION (C) SHOULD BE APPLIED TO APPELLANT'S PROPOSITION 36 PETITION

A. The Definition of Unreasonable Risk of Danger To Public Safety in Section 1170.18, Subdivision (c) *Clarifies* the Term in Section 1170.126 to be Applied to all Prior and Future Proposition 36 Petitions

Respondent does not disagree or even discuss the thrust of appellant's position that section 1170.18, subdivision (c) was clarifying legislation. (Opening Brief on the Merits pp 35- 40.) Clarifying legislation does not imply the constitutional presumption against retroactivity. (See *ABKCO Music, Inc. v. LaVere* (9th Cir. 2000) 217 F.3d 684, 689.) Respondent's silence on the matter should be deemed a concession. (In *People v. Bouzas* (1991) 53 Cal. 3d 467, 480 the Attorney General did not respond to appellant's argument

on appeal was deemed a concession.) Accordingly appellant does not reiterate all the arguments made in the Opening Brief on the Merit on pages 35-40, regarding clarifying legislation.

B. The *Estrada* Rule Applies Because the Voters Intended Retrospective Application

Resentencing provisions are extremely unusual. Except for the resentencing provisions in enacted by Propositions 36 and 47, there are very few other resentencing provisions in California's penal jurisprudence. As such, it is very interesting that respondent did not attempt to distinguish or even discuss *Holder v. Superior Court* (1969) 269 Cal.App.2d 314. *Holder* concerned a statutory procedure for recall and reconsideration of a sentence. (*Id.* at p. 316.) After the petitioner's initial sentence, an intervening amendment to section 1168 allowed a trial court to "recall" a previously-imposed prison sentence and to resentence the defendant "if it is deemed warranted" by a diagnostic study. (*Id.* at p. 315.) In view of the legislation's remedial and rehabilitative objects the court of Appeal reasoned, "the statute should be read and applied literally *and without qualification.*" (*Id.* at p. 318, emphasis added.) The *Holder* court saw no reason "why the Legislature might have intended earlier offenders should not have available to them the contemporaneous approaches to supervision and rehabilitation which are implicit" in the amendment's resentencing provision. (*Ibid.*)

The *Holder* opinion squarely dealt with section 3:

> 'Where the Legislature has not set forth in so many words what it intended, the rule of construction (Pen. Code § 3) 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.'

(*Holder v. Superior Court, supra,* 269 Cal.App.2d. at p. 317, citing *In re Estrada* (1965) 63, Cal. 2d 740.)

Respondent jumps right to section 3 and *People v. Brown* (2012) 54 Cal. 4th 314, without first showing that "considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." (*Id.*) The extrinsic sources, such as the official ballot material, clearly show that the definition in section 1170.18, subdivision (c) applies to *all* Propositions 36 and 47 Petitions, indicating clear intent of retrospective application.

In passing Proposition 47, the voters intended that inmates with prior serious and violent felonies would be released from prison:

> Felons with prior convictions for armed robbery, kidnapping, carjacking, child abuse, residential burglary, arson, assault with a deadly weapon, and many other serious crimes will be eligible for early release under Prop. 47.
>
> These early releases will be virtually mandated by Proposition 47. While Prop. 47's backers say judges will be able to keep dangerous offenders from being released early, this is simply not true. Prop. 47 prevents judges from blocking the early release of prisoners except in very rare cases. For example, even if the judge finds that the inmate poses a risk of committing crimes like kidnapping, robbery, assault, spousal abuse, torture of small animals, carjacking or felonies committed on behalf of a criminal street gang, Proposition 47 requires their release.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), argument and rebuttal for and against Proposition 47, p. 39.)

The argument did not specify that only inmates currently serving a sentence for sentence for offenses described in section 1170.18, subdivision (a) that would now be a

misdemeanor would be released, but rather inmates with serious and violent prior convictions would be released. As such the voters' intent is clear that prisoners with prior serious and violent convictions, such as those eligible for resentencing under Proposition 36, would be released under Proposition 47.

The voter's intended that the definition of unreasonable risk of danger to public safety in section 1170.18, subdivision (c) to replace and supersede the previous unguided and undefined approach used in Proposition 36 petitions. Although respondent could not define the standard for determining dangerous before the enactment of section 1170.18, subdivision (c), respondent concedes that the definition under Proposition 47 would be much more restrictive and radically change the discretion "abundantly granted to the courts to determine a petitioner's dangerousness." (A.B.M. p. 6, 26.)

> The voters intended to strip the judges of that broad discretion.
>
> Felons with prior convictions of (serious and violent offenses) . . . will be eligible for early release under Prop. 47.
>
> These early releases will be virtually *mandated* by Proposition 47. While Prop. 47's backers say judges will be able to keep dangerous offenders from being released early, this is simply not true. Prop. 47 prevents judges from blocking the early release of prisoners except in very rare cases.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), argument and rebuttal for and against Proposition 47, p. 39, emphasis added.)

Accordingly, the voters' intent is clear that the new definition in Proposition 47 of unreasonable risk of danger to public safety would be applied to petitioners under Proposition 36.

Retrospective application is clear because the voters specifically argued that felons with prior serious and violent offenses "will be released under Prop. 47." (*Id.*) Furthermore, the voters specifically rejected the prior broad standard used by judges in deciding previous Proposition 36 petitions by specifically stating that, "Prop. 47 prevents judges from blocking the early release of prisoners except in very rare cases." (*Id.*)

Respondent argues that Proposition 47 did not intend retroactive application of the definition of dangerousness in section 1170.18, subdivision (c) to be applied to Proposition 36 petitions because the fiscal analysis did not calculate the additional cost of granting a "redo" of these petitions. (A.B.M. p. 39.) "The omissions are particularly glaring in light of the fact that Proposition 47 was so focused on monetary results." (A.B.M. p. 39.) This argument also fails, as the voters were made aware of the additional burden that the petitions would have on the legal system:

> Prop. 47 will burden our criminal justice system. This measure will overcrowd jails with dangerous felons who should be in state prison and jam California's courts with hearings to provide "Get Out of Prison Free" cards.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), argument and rebuttal for and against Proposition 47, p. 39.)

More important however the fiscal analysis of Proposition 47 was not limited to persons serving a prison sentence for an offense that would now be a misdemeanor had Proposition 47 been in effect at the time of their sentence. The arguments against Proposition 47 referred to nearly 10,000 inmates who would benefit from the passage of Proposition 47:

> Prop 47 supporters admit that *10,000 inmates* will be eligible for early release.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014), argument and rebuttal for and against Proposition 47, p. 38, emphasis added.)

The official ballot material, however only anticipated that a couple thousand prisoners would be released under the specific provisions of Proposition 47

> [T]he resentencing of individuals currently serving sentences for felonies that are changed to misdemeanors would temporarily increase the state parole population *by a couple thousand parolees* over a three-year period.

(Voter Information Guide, Gen. Elec. (Nov. 6, 2012), official title and summary, p. 36, emphasis added.)

Back in 2012, Proposition 36 anticipated that 3,000 prisoners were eligible for early release:

> If Proposition 36 passes, about 3,000 convicted felons serving life terms under the Three Strikes could petition for a reduced sentence.

(Voter Information Guide, Gen. Elec. (Nov. 6, 2012), argument and rebuttal for and against Prop. 36, p. 52.)

The numbers in support of respondent's argument do not add up. The numbers show that the voters intended that Proposition 47 would affect all petitions under Propositions 47 and 36. With respect to the Proposition 36 petitions, the voters intended that Proposition 47 would affect all previous and future petitions.

CONCLUSION

For the forgoing reasons, appellant respectfully requests this Court find that the definition of "unreasonable risk of danger" as provided in section 1170.18, subdivision

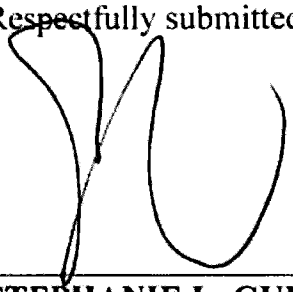
(c) applies to petitions under section 1170.126 (as enacted by Proposition 36.)

Furthermore, appellant respectfully requests that this Court find that the definition of dangerousness as provided in section 1170.18, subdivision (c) is clarifying and does not invoke the presumption against retroactivity. Even if the presumption against retroactivity is implied, it is clearly rebutted by the clear intent of the voters that the definition in Proposition 47 applies to all prior and future Proposition 36 petitions.

Lastly, that this Court reverse and remand the Court of Appeal to dispose of this appeal in accordance with appellant's request.

November 17, 2015

Respectfully submitted,



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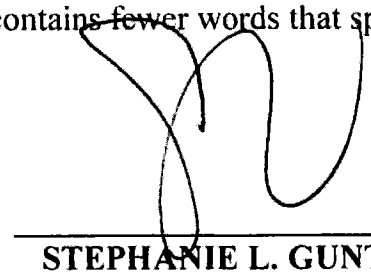
CERTIFICATE OF COMPLIANCE

I, Stephanie L. Gunther, certify that the following APPELLANT'S REPLY BRIEF ON THE MERITS uses 13-point Times New Roman font in Word, and contains 8,203 words, excluding the cover, tables, signature block and this certificate.

The Undersigned certifies that this brief complies with the form requirements set for by rule 8.520, and 8.204 and contains fewer words that specified in rule 8.520.



STEPHANIE L. GUNTHER

Re: *People v. Valencia*
No. S223825
5th DCA No. F067946
Tuolumne County No. CRF30714

ATTORNEY'S CERTIFICATE OF ELECTRONIC & MAIL SERVICE
(Code Civ. Proc., § 1013a (2); Cal. Rules of Court., rules 8.71(f) and 8.77)

I, *STEPHANIE L. GUNTHER*, certify:

I am an active member of the State Bar of California and am not a party to this cause. My electronic service address is *stephanielgunther@gmail.com* and my business address is *841 Mohawk Street, Suite 260, Bakersfield, CA 93309*. On *November* \\, *2015,* ., I transmitted a PDF version of *APPELANT'S REPLY BRIEF ON THE MERITS* by electronic mail to the party(s) identified below using the e-mail service addresses indicated through TrueFiling or e-mail:

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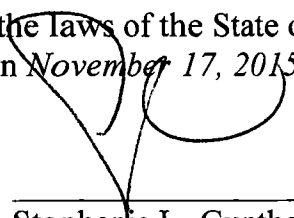
And in a *MAILBOX* regularly maintained by the United States Postal Service at *Bakersfield, CA*, in a sealed envelope with postage fully prepaid, addressed to each the following:

Superior Court of California Tuolumne County 60 N. Washington Street Sonora, CA 95379 Attn: Hon. Eleanor Provost, Judge	David Valencia, AB9906 Corcoran State Prison P.O. Box 8800 Corcoran, CA 93212

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on *November 17, 2015*, at *Bakersfield*, California.



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