APPELLATE DEFENDERS, INC.
555 WEST BEECH STREET
SUITE 300
SAN DIEGO, CA 92101-2939

(619) 696-0282
Automated Attendant: (619) 696-0284, ext. 32
www.adi-sandiego.com

February 28, 2017

Jorge E. Navarrete, Supreme Court Clerk/Administrator
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: *People v. Veronica Lorraine DeHoyos*
Supreme Court Case No. S228230
Court of Appeal Case No. D065961
Appellant's Supplemental Reply Letter Brief

Dear Mr. Navarrete:

Please accept this supplemental reply letter brief pursuant to the court's invitation - "Each party may file a reply supplemental letter brief on or before February 28, 2017."

INTRODUCTION

The Attorney General's less-than-three-page Supplemental Letter Brief (Resp. Supp.) merely quotes passages from this court's opinion in *People v. Conley* (2016) 63 Cal.4th 646, 655 (*Conley*); baldly asserts that such passages apply to Penal Code[1] section 1170.18, subdivision (a)[2] (§ 1170.18(a)) without any analysis of the intent of the entire Proposition 47; and, even when considering section 1170.18 in isolation, does not consider all of its subdivisions as a composite whole. In other words, in his reply, the Attorney General does nothing to tackle what is truly at issue: the *intent of the Proposition 47 electorate*. The Attorney General cannot rationally argue the proposition does not effect a very broad reform because, on its face, Proposition 47 is a sweeping, extensive reform of criminal law. Here, the intent of the electorate who voted for the Proposition 47 on November 4, 2014 is paramount. When *Conley, supra*, is held up to Proposition 47 as a *whole* with the intent

[1]All statutory references shall be to the Penal Code.

[2]All references to undesignated subdivisions shall be to section 1170.18.

of its electorate in mind, then the application of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and *In re Kirk* (1963) 63 Cal.2d 761 (*Kirk*) to individuals such as appellant is readily understood.

THE INTENT OF THE ELECTORATE IN ENACTING PROPOSITION 47 WAS THE WIDE-SCALE AMELIORATION OF CRIMINAL PUNISHMENT. THE RATIONALES IN *CONLEY*, *SUPRA*, APPLICABLE TO THE RESENTENCING OF THREE STRIKERS – FOR WHICH THE INTENT OF THE PROPOSITION 36 ELECTORATE WAS TO RESTORE THE ORIGINAL INTENT OF THE THREE STRIKES LAW – ARE INAPPOSITE TO PROPOSITION 47.

In *Conley, supra,* 63 Cal.4th at page 655, "[i]n answering the question presented," this court first identified common ground, i.e., the statutory provisions of section 1170.126, and segued to a commencement of a consideration of *Estrada, supra,* i.e., "'the problem . . . is one of trying to ascertain the legislative ***intent*** – did the [legislative body] intend the old or new statute to apply? . . . .'" (*Conley, supra*, 63 Cal.4th at p. 656, quoting *Estrada, supra*, 63 Cal.2d at p. 744, emphasis added.)

This court understood the importance of "intent" as the word appears 11 times in the majority decision and another four times in the concurrence.[3] In contrast, in respondent's supplemental letter of February 14, 2017, the word "intent" or "intended" appears infrequently, and scarcely, if at all, in respect to Proposition 47. Thus, "intent" first appears in an introductory paraphrase of the *Conley* opinion's description of *Estrada*'s "presumptive intent" (Resp. Supp. p. 2, citing *Conley, supra*, at pp. 657-658) and then embedded in two direct quotations from *Conley* regarding the intent of electorate in enacting ***Proposition 36*** (Resp. Supp., p. 2, citing *Conley, supra*, at pp. 658-659 & p. 659. This is not to say that the *Conley* discussion of the Proposition 36's electorate's intent regarding section 1170.126 or "dangerousness" is completely irrelevant to our case. However, the extent of *Conley's* relevance is a function of the degree of similarity between the intents of the electorates of the two propositions. *If* the intents were highly similar, the Attorney General's bare conclusions, while unreasoned, would have some attractiveness.

But appellant's Supplemental Letter Brief demonstrated that the intents of the two

---

[3]As noted in Appellant's Supplemental Letter Brief, the express language of Proposition 36 was to restore the "original intent" of the Three Strikes Law, but *that* specific intent was not noted in the opinion.

propositions are *not* similar. While Proposition 36 was to restore the "original intent" of the Three Strikes Law, Proposition 47 undertook broad-sweeping reforms in criminal law of which section 1170.18, though admittedly generating a good bit of appellate litigation, is but one small part of the legislation, and its import will diminish over the years while the preponderance of Proposition 47 will have far-reaching effects for decades to come.

Indeed, the intent of the Proposition 47 electorate is a question with which respondent has yet to come to terms. On the one hand, the Attorney General cannot argue that, in its totality, the proposition does not effect a comprehensive reform on a broad scale; to fail to do is to lose credibility. On the other hand, once the Attorney General concedes the large-scale reform effected by the proposition, then a fortiori, his parallel comparison to Proposition 36, the intent of its electorate, and by extension, *Conley, supra*, collapses.

The Attorney General states that "section 1170.18's petitioning procedure is strikingly similar to the resentencing procedure at issue in *Conley,* and appellant makes the same arguments this court rejected in that case." (Resp. Supp. p.2.) Appellant has conceded the similarity, but not controlling identity of certain wording. Recently, the United States Supreme Court in *Yates v United States* (Feb. 25, 2015, No. 13–7451) _ U.S. _ [135 S.Ct. 1074, 1082, 191 L.Ed.2d 64, in ruling on the meaning of "tangible object," cited to its precedent, *Atlantic Cleaners & Dyers v. United States* (1932) 286 U.S. 427 [52 S.Ct. 607, 76 L.Ed. 1204]. In *Atlantic Cleaners* at page 433, with emphasis added (but internal citations omitted) the highest court wrote:

> [T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. *Where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.*

So too in our case, although we are not dealing with language in the "same act." Here, the subject matter is different in each act and the scope of Proposition 47 is far broader than Proposition 36. When one considers the language of Proposition 47 as a whole, the purposes it expresses, and the circumstances under which the language of both the entire proposition and specifically section 1170.18 was used, it becomes apparent the meaning of the

"petitioning process" is different than that employed in Proposition 36. Moreover, appellant is not making the same arguments this court rejected in *Conley*. Quite the contrary; while the conclusion appellant seeks, that appellants whose appeals are not final are entitled to *Estrada* relief, was rejected in the *Proposition 36* context, appellant puts forth altogether different arguments – the differing electorate intents, the meaning of "currently" versus "completed," etc. – which compel a different a conclusion.

The Attorney General then writes, "As with Proposition 36, Proposition 47 'is not silent on the question of retroactivity,' but rather expressly addresses that question in section 1170.18. (*Conley, supra*, 63 Cal.4th at p. 657.)" (Resp. Supp. p.2.) Of course, the citation to *Conley* says nothing about section 1170.18, which is, in fact, the question at issue here. Respondent would have us believe the electorate of Proposition 47 was walking lock-step with the earlier electorate of Proposition 36 to achieve identical goals and, hence, the same question was at issue for both electorates – but neither is true.

Respondent continues: "Also similar to section 1170.126's resentencing procedure, section 1170.18, subdivision (a), extends retroactive relief to those 'currently serving a sentence,' through a petitioning procedure in the trial court. Also, by drawing no distinction between persons serving final sentences and those serving non-final sentences, section 1170.18 extends relief beyond the reach of *Estrada* to those serving a *final* sentence. (*Conley, supra*, 63 Cal.4th at pp. 657-658.)." (Resp. Supp. at pp. 2-3.) But there are crucial distinctions between Proposition 36/section 1170.126 and Proposition 47/section 1170.18 which respondent fails either to realize or appreciate and which undermine respondent's conclusions.

First, that both section 1170.126, subdivision (b) and section 1170.18(a) employ similar procedures when each is applied, does *not* answer the question *whether and when* section 1170.18(a) *should* apply. Stated otherwise, given that in enacting Proposition 36, the electorate expressly stated that its purpose was "to restore the original intent of California's Three Strikes Law," and Three Strikers were by definition felons with a recidivist history of two or more serious or violent felonies who had been imprisoned for yet another felony, one could conceive of a voter being concerned with dangerousness.

But, with Proposition 47, the analogy of an identical concern with dangerousness – at least in comparison to Proposition 36 – breaks down. Even for those (1) to whom *Estrada, supra*, assuredly applies (i.e., not sentenced prior to November 5, 2014), or (2) whose offense was not committed until on/after that date, or (3) applicants whose sentences have been completed (subd. (f)), misdemeanor eligibility is premised in the first instance on the offender not having previously been convicted of a so-called super-Strike or sex registration offense. In other words, the disqualifying priors prevent misdemeanor treatment

of new offenders, *Estrada* defendants, *Kirk* defendants, section 1170.18(a) petitioners, and subdivision (f) applicants; Proposition 47 does not distinguish between any of these categories of defendants in this regard.

By comparison, the "dangerousness" preclusion for a petitioner currently serving a sentence (e.g., whose judgment is final) is the unreasonable risk of committing a so-called super-Strike (a registrable sex offense is not also included) *in the future*. (Subds. (b), (c).) This predictability would, by definition, have to be predicated other than on a history of a super-Strike because a super-Strike would preclude eligibility in the first instance.

So, under what circumstances would an individual without a history of super-Strikes be imaginably a risk of committing a super-Strike in the future? One such and most likely scenario would be that of a Third Striker, imprisoned for 25 years-to-life, whose most recent Strike was a Proposition 47 potential misdemeanor – an individual who, for whatever reason was ineligible for Proposition 36 treatment. But having been incarcerated for a decade-plus, in the milieu of the prison environment, lifestyle, gang climate, could very well unfortunately be believed to be a risk to commit a super-Strike. That regrettable turn of events would be a product of time, time during which a judgment would have become final, but the individual was still serving his or her sentence.

Future "dangerousness," therefore, has a place in the Proposition 47 scheme, by playing a role in whether a section 1170.18(a) petitioner whose judgment is final may gain misdemeanor relief. But it adds precious little to the legal interpretation, in the Proposition 47 context, as to whether the electorate intended the presumptive *Estrada-Kirk* principle to apply or annex appellants whose judgments are not final to those whose judgments are.

Respondent also argues (Resp. Supp. p. 3), "Nothing indicates the voters intended for defendants serving sentences that are not yet final to be able to obtain resentencing outside the confines of a section 1170.18 petition for recall of sentence and without the corresponding public safety inquiry." First, as to "public safety," in essence, that was addressed immediately above. The public's concern with "safety" is its concern with "danger," and to the extent that a super-Strike or registrable sex offense history prohibits Proposition 47 implementation, public safety is, to the largest degree, addressed in eligibility in the first instance.

Second, as far as "nothing" indicating a voter intention, we must once again return to a diametrically opposed perspective of appellant and respondent. Respondent apparently views the issue solely through the lens of section 1170.18(a). Appellant eyes the issue as the electorate's intent of Proposition 47 as a whole – section 1170.18 being only one aspect of a vast legislative transformation – and, then, even when considering section 1170.18, one

must compare its various subdivisions to determine how they interface with each other. How components of an act interplay with each other should give greater meaning to their words than the apparent similarity of some of those words to an act with different intent. Far from "nothing," the electorate's intention is consistent with application with *Estrada-Kirk.*

The *Estrada* rule was based on the premise that "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law." (*Estrada, supra*, 63 Cal.2d at p. 745.) "Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can . . . serve no purpose other than to satisfy a desire for vengeance," a motive the court was unwilling to attribute to the Legislature. (*Ibid.*) The court concluded the inference was "inevitable . . . that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Ibid.*)

Estrada, supra, dealt with the mitigation of a single crime, that of escape without force or violence. (*Estrada, supra*, 63 Cal.2d at pp. 743-744.) Proposition 47 has mitigated an extensive range of drug and theft-type offenses, a couple of felonies, most wobblers, and has gone far beyond, providing relief for defendants whose judgments have long since been final.

This court in *Conley, supra*, at 63 Cal.4th at page 661, noted, "we have expressly rejected the notion that *Estrada* 'dictate[s] to legislative drafters the forms in which laws must be written to express the legislative intent.' ([*In re Pedro T.* (1994) 8 Cal.4th 1041], 1048–1049.) '[W]hat *is* required is that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it." (*Id.* at p. 1049.)" Thus, here, given the *Estrada* presumption, can it be said, in a review of a review of the entirety of Proposition 47 or section 1170.18 in particular, that the electorate had demonstrated its intention to override such presumption with sufficient clarity to the degree this court can discern and effectuate such intent? The answer is, No.

What was at issue in *Pedro T.* was the ameliorative effect when the sun set via a sunset clause on a temporary increased punishment, and the punishment reverted back to the previous lesser amount. Justice Werdegar, writing for a 4-3 majority, "infer[red] the Legislature understood a difference existed between a limited-duration penalty increase and a permanent penalty amelioration, and so found a saving clause unnecessary," i.e., both the Legislature and the court could find *Estrada* was distinguishable. (*Pedro T., supra,* 8 Cal.4th at p. 1049.) In her *Conley* concurrence – joined by Justices Liu and Cuellar – Justice Werdegar contrasted *Pedro T.* and section 1170.126 (*Conley, supra*, 63 Cal.4th at pp. 662-

663), concluding that in *Pedro T.* the legislative intention was not to mitigate, but rather to enhance penalties, in contrast to Proposition 36, where "the recall provision both function[ed] as a saving clause and clearly signal[ed] the drafters' intent that the revised penalty provisions appl[ied] prospectively" (*Conley, supra*, at p. 663, emphasis omitted).

But here, it is *not* so "clear" the drafters' intent was for section 1170.18(a) to serve both functions. First, appellant need not show the electorate's intent to employ the *Estrada* rule. Rather, the default position should be that the *Estrada* rule *presumptively* applies – unless the court can discern the electorate demonstrated its contrary with sufficient clarity.

Second, that similar though not identical language was used in section 1170.126, subdivision (b) and section 1170.18(a) is not dispositive, because the intent of the respective electorates as to each proposition individually is paramount. (See App. Supp. Letter, pp. 4-6.)

Third, the respective intents were quite different, in Proposition 36, restoring the original intent of The Three Strikes Law, while in Proposition 47, enacting a wide-sweeping amelioration, with the greatest emphasis on a revised regime of new misdemeanors in lieu of former wobblers/felonies.

And the Proposition 47 electorate, of course, did not have the luxury of the court's elucidation in *Conley*, though it would have the discourse of *Estrada-Kirk, supra*, through the decades through various applications/non-applications of same.[4] Against this landscape, the electorate predominantly faced in Proposition 47 a de-escalation of a wide swath of many

---

[4]E.g., *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1194-1196 [applied; inapplicability of firearm enhancement, retroactive]; *People v. Brown* (2012) 54 Cal.4th 314, 323-324 [not applied; new enhanced conduct credits prospective only]; *People v. Nasalga* (1996) 12 Cal.4th 784, 787 [applied; increase of amount of property loss required for one-year enhancement, retroactive]; *Pedro T., supra,* 8 Cal.4th at p. 1049 [not applied; sunset clause equivalent of savings clause]; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 301 [applied; death penalty special circumstances]; *People v. Enriquez* (1967) 65 Cal.2d 746, 749 [applied; § 476a, subd. (b), "not sufficient funds" checks]; see also *People v. Todd* (1994) 30 Cal.App.4th 1724, 1729-1730 [applied; drug trafficking near school yards]; *People v. Figueroa* (1993) 20 Cal.App.4th 65, 69-71 [same]; *People v. Vasquez* (1992) 7 Cal.App.4th 763, 767-768 [applied; gas-pressured pellet gun not considered firearm for § 12001 purposes]. See *Pedro T., supra*, 8 Cal.4th at pages 1054-1055, footnote 3 (dis. opn. of Arabian, J.) for a comprehensive list of cases that had applied *Estrada* as of the time of *Pedro T.*

theft-type and some drug crimes. That was the main focus of the-then Attorney General's Summary, the non-biased Legislative Analysis, and the text of the proposition itself. Even when the voter would have turned her/his attention to section 1170.18, (s)he would have found two "systems," one for those who are "currently" serving and one for those who had "completed" their sentences. It would be most reasonable to place these two modifiers in contradistinction – section 1170.18, subdivisions (a) and (f) should be read as a way of distinguishing the procedures and prerequisites for reduction for those individuals (those still serving and those who have completed their sentences) whose judgments are indeed final – rather than to use "currently" to take the far-ranging mitigating design of Proposition 47 out of the *Estrada-Kirk* realm. (See App. Supp. Ltr. pp. 10-11.)

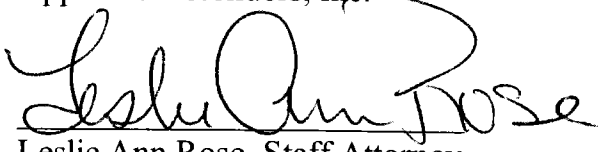
CONCLUSION

The holding of *Conley*, *supra*, is inapplicable to Proposition 47. The *Estrada-Kirk* rule does apply to appellant. This court should reverse the Court of Appeal.

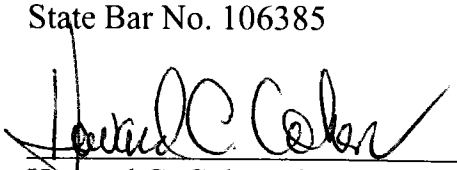
Respectfully Submitted,

Dated: 2-28-17

Appellate Defenders, Inc.



Leslie Ann Rose, Staff Attorney
State Bar No. 106385



Howard C. Cohen, Staff Attorney
State Bar No. 53313

Attorneys for Petitioner
Veronica Lorraine DeHoyos

PROOF OF SERVICE BY MAIL
(Cal. Rules of Court, rules 1.21, 8.50.)

Case Name: People v. Veronica L. Dehoyos
Supreme Court No. S228230
Court of Appeal No. D065961
Superior Court No. SCD252670

I, Will Bookout, declare: I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is 555 West Beech Street, Suite 300, San Diego, California 92101-2939.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

I caused to be served the following document(s):

APPELLANT'S SUPPLEMENTAL REPLY LETTER BRIEF

by placing a true copy of each document in a separate envelope addressed to each addressee, respectively as follows:

California Supreme Court
Earl Warren Building
350 McAllister Street Room 1295
San Francisco, CA 94102-4738

William C. Sharp
Alternate Public Defender
450 B Street Suite 1200
San Diego, CA 92101

San Diego County District Attorney
DA.Appellate@sdcda.org

San Diego County Superior Court
Appeals.Central@SDCourt.ca.gov

Veronica L. Dehoyos
53620 Avenida Velasco
La Quinta, CA 92253

Court of Appeal
Fourth District Division One
(via TrueFiling)

Attorney General
SDAG.docketing@doj.ca.gov

I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on February 28, 2017, at 10:27 am.

Will Bookout
(Typed Name)

Will Bookout
(Signature)