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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

RALPH GEROME VEGA,

Defendant and Appellant.

E060724

(Super.Ct.No. INF1200668)

OPINION

APPEAL from the Superior Court of Riverside County. Dale R. Wells, Judge.

Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Heather M. Clark, Deputy Attorneys General, for Plaintiff and Respondent.

# I

## INTRODUCTION

On January 9, 2014, a jury found defendant and appellant Ralph Gerome Vega guilty of two counts of possession of methamphetamine (counts 1 and 3; Health & Saf. Code, § 11377, subd. (a)), and two counts of possession of paraphernalia (counts 2 and 4; Health & Saf. Code, § 11364.1). In a bifurcated proceeding, the trial court found true that defendant had two prison convictions for robbery (Pen. Code, § 211), which were serious and violent felonies (Pen. Code, §§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). The court also found true that defendant had six prior prison terms within the meaning of Penal Code section 667.5, subdivision (b), which consisted of four convictions for possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), robbery (Pen. Code, § 211), and burglary (Pen. Code, § 459). On February 21, 2014, the trial court sentenced defendant to a total prison term of 10 years.

Defendant appeals. For the reasons set forth *post*, we shall affirm the judgment.

## II

### STATEMENT OF FACTS<sup>1</sup>

#### A. *Counts 1 and 2*

On March 12, 2012, a deputy stopped when he noticed that defendant and others were standing next to a disabled, but running motorcycle at an intersection. No one had a helmet, and one of the individuals told the deputy that he may have an outstanding warrant. A records check revealed that the man had a felony warrant; he was arrested. When the officer spoke with defendant about his friend's warrant, the officer noticed that defendant had symptoms of being under the influence of a stimulant. Based on his symptoms, the officer arrested defendant for being under the influence of a controlled substance. A search incident to arrest yielded a clear plastic bag containing .2 grams of methamphetamine, along with a used hypodermic needle. After defendant was given his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, he admitted using methamphetamine by injection.

#### B. *Counts 3 and 4*

On July 10, 2012, while defendant was released on bail, he was found by a security guard in a restricted parking lot of a casino. Defendant consented to a search, which yielded a glass pipe with white residue and a clear bag containing .3 grams of

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<sup>1</sup> The only issue on appeal relates to defendant's sentence. Therefore, the facts are summarized from the probation report.

methamphetamine. When the arresting officer placed defendant in the patrol car, the pipe fell to the ground; it did not break. Defendant then stepped on the pipe and broke it.

### III

#### ANALYSIS

##### *A. The Trial Court Did Not Abuse Its Discretion in Denying Defendant's Motion to Reduce the Two Possession Convictions to Misdemeanors or to Dismiss His Priors*

Defendant contends that the trial court abused its discretion in denying his motion to reduce his convictions on counts 1 and 3 to misdemeanors, or alternatively to dismiss his prior strike convictions and “some or all” of his six prison priors.

##### *1. Background*

Defense counsel moved jointly to dismiss and reduce. The motion and oral argument focused on the “minimal” amount of methamphetamine found in defendant's possession, his history of drug addiction, his cooperation with law enforcement, his commitment to seeking treatment for his addiction, his willingness to live a law-abiding life, and his age. Defendant also focused on the fact that his two strike convictions were remote and had been committed to support his addiction, his other prior convictions were primarily theft and drug related, a shorter sentence would not pose a danger to society, and his past does not indicate he is a violent individual.

The People opposed. It noted defendant's lengthy criminal history, including 10 felony convictions, several misdemeanor convictions, and 19 parole violations. The People argued that defendant's crime was not minor, as he was out on bail on the first

two charges when he committed the second two crimes, and was on misdemeanor probation. The People also argued that the nature and number of defendant's prior convictions, and his continued pattern of criminal activity, did not warrant dismissal of his strikes or reduction of his felonies to misdemeanors. The People noted that defendant was no longer young and impulsive, yet he continued to commit new offenses. Any remoteness of the prior strikes was outweighed by the violence involved in the crime,<sup>2</sup> the length of the sentence was not a proper consideration, and there was no evidence that defendant made any attempts to address his drug problems or lead a life free of crime.

The court noted that it had read and considered the probation report, the People's sentencing memorandum, the defense sentencing brief and *Romero*<sup>3</sup> motion, and the People's reply. The court then ruled as follows:

"I'm going to deny the defense motion to strike the strikes, and I'm also going to deny the request to reduce this pursuant to [Penal Code section] 17[, subdivision] (b). [¶] This is a situation where regardless of what his personal situation is with regard to addiction, he has done nothing to address it and he's gone to jail repeatedly because of it. That's not in the People's best interests either or the State's best interests either. [¶] So the request to strike the strike is denied, and the request to reduce this pursuant to [Penal Code section] 17[, subdivision] (b) to a misdemeanor is also denied."

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<sup>2</sup> Defendant admitted using a knife while robbing someone at a convenience store.

<sup>3</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

Thereafter, the court announced its tentative sentencing decision and noted, “I did select the lower term because of the nature of the current offense. It is such that it could have been reduced to a misdemeanor but for the defendant’s extensive criminal history.”

When the court announced its final sentencing decision, it noted:

“There are, as [the prosecutor] has pointed out, circumstances in aggravation—the prior prison term, the fact that he was on probation or parole when the crime was committed. [¶] And while it’s true that he cooperated from the outset and acknowledged wrongdoing, he did not do so . . . at the early stage of the proceedings. [¶] . . . [¶]

“[T]his is a gentleman who is 50 years old. It’s long since past time for [defendant] to have addressed his problems—long since past time. [¶] He was not granted Prop 36 because of his history. The indicated sentence was withdrawn because of his history. It’s nobody’s fault but [defendant’s]. That’s the sum total of this whole situation. It’s nobody’s fault but his. Every time he’s had a prison prior, he’s known that the next time it’s going to add a year to his term. When he committed the strike offenses, . . . it was made known that if he gets in trouble again it’s going to double his punishment. He has nobody to blame but himself.”

2. *The trial court did not abuse its discretion in denying his motion to reduce the possession convictions to misdemeanors*

Possession of methamphetamine is a wobbler offense; it is punishable by a term in county jail for a period of time not more than one year, or by imprisonment under the provisions of Penal Code section 1170, subdivision (h). (Health & Saf. Code, § 11377, subd. (a); *People v. Morales* (2014) 224 Cal.App.4th 1587, 1596.)

Penal Code section 17, subdivision (b), gives the trial court discretion to reduce a wobbler offense from a felony to a misdemeanor. (*People v. Mendez* (1991) 234 Cal.App.3d 1773, 1779.) To establish error, a defendant must show a clear abuse of that discretion. An abuse of discretion occurs only when the trial court exceeds the bounds of reason in light of all of the surrounding circumstances. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

In *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968 (*Alvarez*), the court explained that the discretion to reduce felonies to misdemeanors is based on a “broad generic standard,” i.e., that the discretion exercised must be controlled and guided by fixed legal principles, conform with the spirit of the law, further rather than impede the ends of justice, and must not be capricious, arbitrary, unreasonable, or prejudiced. (*Id.* at p. 977.) The court acknowledged that this discretion is not unlimited and must be based on reasoned consideration of a particular offender’s background and circumstances. (*Id.* at pp. 977-978.)

In *Alvarez, supra*, 14 Cal.4th at pages 977-978, the Supreme Court further noted that two precepts operate in an appellate challenge to reduction of wobblers: (1) the appealing party must clearly show that the sentence was reduced irrationally or arbitrarily, or the trial court “is presumed to have acted to achieve legitimate sentencing objectives”; and (2) such a sentence will not be reversed merely because reasonable people might disagree with the trial court’s decision.

In making its determination, the court should consider “the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.” (*Alvarez, supra*, 14 Cal.4th at p. 978.) Further, “the fact a wobbler offense originated as a three strikes filing will not invariably or inevitably militate against reducing the charge to a misdemeanor. Nonetheless, the current offense cannot be considered in a vacuum; given the public safety considerations underlying the three strikes law, the record should reflect a thoughtful and conscientious assessment of all relevant factors including the defendant’s criminal history. [Citations.]” (*Id.* at p. 979.)

In this case, the record reflects that the trial court undertook a reasoned consideration of defendant’s background and circumstances. (*Alvarez, supra*, 14 Cal.4th at p. 980.) After reviewing defendant’s motion, the People’s opposition, and hearing argument, the trial court concluded that reducing counts 1 and 3 to misdemeanors was not warranted because of defendant’s circumstances and criminal history. At the time of sentencing, defendant was 50 years old and still violating the law, with a criminal history

dating back to when he was only 18 years old. Defendant's past felony convictions included two burglaries (Pen. Code, § 459) in 1985 and 1991; two serious and violent robberies (Pen. Code, § 211) in 1991; six felony convictions for unlawful possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) between 1996 and 2007; at least 11 misdemeanor convictions between 1983 and 2012; and numerous parole violations. In fact, defendant was on probation when he committed the instant offenses, and committed the offenses in counts 3 and 4 while he was out on bail for the offenses charged in counts 1 and 2.

Furthermore, despite defendant's long history of drug abuse, when asked by the probation officer about his drug treatment history, defendant acknowledged "being sent to CRC and the ABC Recovery Center; however, he has never worked a 12-step program." The trial court evaluated defendant's failure to address his drug problem and the resulting repeated convictions and punishment, and properly concluded that the possession convictions should not be reduced to misdemeanors.

Defendant's reliance on *Alvarez*, *supra*, 14 Cal.4th 968, is misplaced. Unlike defendant, the strike offenses by the defendant in *Alvarez* did not include violent offenses. (*Id.* at p. 981.) Moreover, in *Alvarez*, the Supreme Court found that the sentencing judge did not abuse his discretion in reducing the defendant's offense to a misdemeanor under the "extremely deferential" standard of review and the facts of the case. However, the court noted that since the issue was "admittedly close," under that same standard of review and facts, the court also would have found no abuse of

discretion had the trial court reached the opposite result. (*Id.* at pp. 980-981.)

“[W]hatever conclusions other reasonable minds might draw, on balance we find the decision tolerable given the court’s broad latitude.” (*Id.* at p. 981.)

Based on the trial court’s careful review, as summarized *ante*, we find no abuse of discretion in rejecting defendant’s request to reduce his convictions to misdemeanors.

3. *The trial court did not abuse its discretion in denying defendant’s Romero motion to dismiss his prior strike convictions*

Defendant argues that the trial court abused its discretion in denying his *Romero* motion to strike one or both of his prior strike convictions. We disagree.

Rulings on *Romero* motions are reviewed for abuse of discretion. (*People v. Myers* (1999) 69 Cal.App.4th 305, 309; see also *People v. Carmony* (2004) 33 Cal.4th 367, 374.) Discretion is abused where the trial court’s decision is “irrational or arbitrary.” (*People v. Myers, supra*, at p. 310.) Discretion is also abused when the trial court’s decision to strike or not to strike a prior is based on improper reasons (*Romero, supra*, 13 Cal.4th at p. 531; *People v. Benevides* (1998) 64 Cal.App.4th 728, 735, fn. 7, overruled on another ground in *People v. Carmony, supra*, at p. 375) or the decision is not in conformity with the “spirit” of the law (*People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Myers, supra*, at p. 310).

“It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the

spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance. [Citation.]" (*People v. Myers, supra*, 69 Cal.App.4th at p. 310.) Once the trial court has exercised its discretion and does not strike a prior conviction, this court's role on appeal is very limited. Thus, it is a rare case in which the trial court abuses its discretion in declining to strike a prior conviction of a recidivist offender.

In making such a determination, this court must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams, supra*, 17 Cal.4th at p. 161; see also *People v. Garcia* (1999) 20 Cal.4th 490, 498-499.)

Thus, the "Three Strikes" law "establishes a sentencing norm" and "creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) "In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances" such as where the trial court was not aware of its discretion to dismiss a prior strike or where the court considered impermissible facts in declining to dismiss a prior strike. (*Ibid.*)

Here, the trial court considered arguments made by both parties. During argument at sentencing, the court noted that defendant had “cooperated from the outset and acknowledged wrongdoing.” The court, however, also noted that defendant failed to acknowledge wrongdoing at the early stages of the proceedings, had a prior prison term, and was on probation when the instant crimes were committed. The court also noted that it was “long since past time for [defendant] to have addressed his problems” since he’s not young; he was 50 years old. Furthermore, defendant’s criminal history was substantial and nearly continuous, as discussed *ante*. As the trial court explained, “This is a situation where regardless of what his personal situation is with regard to addiction, he has done nothing to address it and he’s gone to jail repeatedly because of it.” The court specifically noted that society’s interests would not be served by striking defendant’s prior strikes: “That’s not in the People’s best interests either or the State’s best interests either.” The court pointed out that every time defendant had a prison prior, he knew that the next time he would get an additional year to his term. Moreover, “[w]hen he committed the strike offenses . . . it was made known that if he gets in trouble again it’s going to double his punishment.” Defendant had fair warning and was in no way new to criminal proceedings. A repeat, career criminal, like defendant, falls squarely within, and NOT outside, the spirit of the Three Strikes law. (*People v. Strong* (2001) 87 Cal.App.4th 328, 331-332 [reviewing court found trial court’s dismissal of a prior strike conviction as an abuse of discretion].)

We note that longer sentences for career criminals who commit at least one serious or violent felony go to the heart of the statute’s purpose. (*People v. Strong, supra*, 87 Cal.App.4th at pp. 331-332.) Therefore, appellate courts regularly reverse when trial courts dismiss strikes of defendants with long and continuous criminal careers. (*Id.* at p. 338; see also *People v. Gaston* (1999) 74 Cal.App.4th 310, 320 [court reversed order vacating 17-year-old strike because “[a]s we observed at the outset, [defendant] is the kind of revolving-door career criminal for whom the Three Strikes law was devised”]; *People v. Thornton* (1999) 73 Cal.App.4th 42, 49 [court reversed order dismissing two of three strikes, where defendant had a long history of felonies, misdemeanors, drug use, and parole violations, which showed that his background, character, and prospects were “dismal, and cannot be said to be outside the spirit of the three strikes law”]; *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 [court reversed order dismissing prior robbery conviction that was nearly 20 years old where “the defendant has led a continuous life of crime after the prior,” including drug use, two counts of burglary, robbery, and the current conviction of grand theft]; *People v. DeGuzman* (1996) 49 Cal.App.4th 1049, 1054 [defendant’s record of felonies and parole violations from 1969 to 1994 “establishes that it would have been a manifest abuse of the trial court’s limited discretion to strike appellant’s prior felony conviction allegations ‘in furtherance of justice’ under [Penal Code] section 1385”]; *People v. McGlothlin* (1998) 67 Cal.App.4th 468, 475 [court reversed dismissal of strike where defendant’s criminal history “extends

back to 1972 when he was 15 years of age,” including seven previous felonies, various misdemeanors, and seven parole and probation violations].)

In this case, defendant argues that the trial court failed to consider the remoteness of his prior strikes or his age, and that the nature of the prior crimes demonstrates that he is a nonviolent offender who commits victimless crimes. We disagree. The record on appeal shows that the trial court considered these factors as defense counsel specifically argued at length in his motion and during the hearing that the remoteness and nature of defendant’s crimes, as well as his age, warranted striking the strikes. Moreover, “a defendant who falls squarely within the law’s letter does not take himself outside its spirit by the additional commission of a virtually uninterrupted series of nonviolent felonies and misdemeanors over a lengthy period.” (*People v. Strong, supra*, 87 Cal.App.4th at p. 331.) Furthermore, middle age alone does not take a defendant outside the spirit of the law. (*Id.* at p. 332.)

Furthermore, defendant speculates that the trial court failed to consider “that a lengthy incarceration would likely only result in continuing the cycle of drug use and incarceration.” However, the defendant’s conduct while out of incarceration demonstrated that he continued to abuse drugs and did nothing to break his cycle of drug abuse. Moreover, the probation report, which the trial court read and considered, noted that “[i]t is genuinely hoped by this officer that while the defendant is incarcerated for a significant period of time, that he finally participates in a 12-step program.” Furthermore, defendant was ordered to participate in a counseling or educational program

with a substance abuse component. The record indicates that the trial court considered this issue and may have decided that defendant could break the cycle because he could attend treatment while incarcerated.

In sum, the record reflects that the trial court was aware of its discretion and the applicable factors it must consider in dismissing a prior strike. Given defendant's continuous and extensive criminal history, his parole and probation violations, the seriousness of his past offenses and his seemingly dim prospects for rehabilitation based on his underlying drug addiction and lack of meaningful crime-free periods, we cannot say that the trial court abused its discretion when it declined to strike defendant's prior strike convictions.

*B. Defendant Is Not Entitled to Automatic Resentencing Under Proposition 47*

We granted defendant's request to file a supplemental brief arguing the provisions of Proposition 47 apply retroactively to reduce his convictions for possession of methamphetamine to misdemeanors.

On November 4, 2014, California voters approved Proposition 47, the "Safe Neighborhoods and Schools Act." In sum, Proposition 47: (1) requires a misdemeanor sentence instead of a felony sentence for certain drug possession offenses; (2) requires a misdemeanor sentence instead of a felony sentence for the crimes of petty theft, receiving stolen property, and forging/writing bad checks, when the amount involved is \$950 or less; (3) allows a felony sentence (excluding a defendant from a misdemeanor sentence) for the crimes specified above if a defendant has a prior conviction listed under Penal

Code section 667, subdivision (e)(2)(C)(iv), or a prior conviction for an offense requiring sex offender registration under Penal Code section 290; and (4) requires resentencing for defendants serving felony sentences for the crimes specified above unless the trial court finds an unreasonable public safety risk. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) Official Title and Summary, pp. 34, 70; see, e.g., Pen. Code, §§ 459.5, subd. (a), 473, subd. (b), 476a, subd. (b), 490.2, subds. (a), (b), 496, subd. (a), 666, subds. (a), (b); Health & Saf. Code, §§ 11357, subd. (a), 11377, subds. (a), (b).) The initiative became effective on November 5, 2014. (Cal. Const., art. II, § 10, subd. (a) [“An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise”].)

When assessing a claim under Proposition 47 on appeal, the first determination is whether the defendant was convicted of a felony offense that qualifies for misdemeanor sentencing. Here, in both counts 1 and 3, defendant was convicted of possession of methamphetamine under Health and Safety Code section 11377, subdivision (a). Section 11377, as amended by Proposition 47, mandates that punishment for that crime shall not be more than one year in county jail. (Health & Saf. Code, § 11377, subd. (a).) Proposition 47 does not set a limit on the number of section 11377 convictions a defendant may have in order to receive misdemeanor sentencing.<sup>4</sup> (Health & Saf. Code, § 11377, subd. (a).) Therefore, defendant’s two convictions under section 11377,

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<sup>4</sup> The only repeat offense exclusion for a Proposition 47 qualifying offense involves writing bad checks under Penal Code section 476, subdivision (b).

subdivision (a), of the Health and Safety Code are felonies that qualify for misdemeanor sentencing under Proposition 47.

The second determination is whether the defendant is excluded from misdemeanor sentencing under Proposition 47. Health and Safety Code section 11377, like the other qualifying offenses under Proposition 47, excludes from misdemeanor sentencing, and allows punishment under Penal Code section 1170, subdivision (h), when a defendant has one or more prior convictions for: (1) crimes listed under Penal Code section 667, subdivision (e)(2)(C)(iv), known as “super strike” offenses; or (2) offenses requiring sex offender registration under Penal Code section 290, subdivision (c). (Health & Saf. Code, § 11350, subd. (a).) Here, the record does not indicate that defendant has been convicted of any crimes that would exclude him from misdemeanor sentencing under Proposition 47.

The next determination is the issue in dispute on appeal: Whether defendant is entitled to a remand for automatic misdemeanor resentencing for his two convictions under the newly modified Health and Safety Code section 11377. To make this determination, we must assess Proposition 47’s creation of Penal Code section 1170.18. Section 1170.18, states, in relevant part:

“(a) A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (‘this act’) had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of

conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code . . . as those sections have been amended or added by this act.

“(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to 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, [as] those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety . . . .

“(c) 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.”

Here, defendant argues, under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), that he is entitled to a remand to receive automatic misdemeanor resentencing under section 11350, subdivision (a) of the Health and Safety Code, and is not required to file a petition for recall of sentence under Penal Code section 1170.18, because his case is not final.

Penal Code section 3<sup>5</sup> embodies the general rule of statutory construction that, when a statute does not have an express retroactivity provision, it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively in the absence of clear extrinsic sources that the Legislature intended retroactive application. (*People v. Brown* (2012) 54 Cal.4th 314, 319; *People v. Floyd* (2003) 31 Cal.4th 179, 184.) Sharply departing from the language of Penal Code section 3, *Estrada* held that an amendatory act imposing a lighter punishment could be applied constitutionally to acts committed before its passage provided that the judgment convicting the defendant was not final.<sup>6</sup> (*People v. Brown, supra*, at pp. 323-324; *People v. Floyd, supra*, at p. 184; *Estrada, supra*, 63 Cal.2d at pp. 742-748.) *Estrada* is “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.” (*People v. Brown, supra*, at p. 324.)

However, *Estrada* does not apply if there is an express savings clause or its equivalent in the statute. (*People v. Floyd, supra*, 31 Cal.4th at pp. 184-185; *People v. Nasalga* (1996) 12 Cal.4th 784, 793; *Estrada, supra*, 63 Cal.2d at p. 747.) When the

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<sup>5</sup> Penal Code section 3 states: “No part of it is retroactive, unless expressly so declared.”

Legislature repeals a statute but intends to save the rights of litigants in pending actions, it may do so with an express savings clause in repealing the statute. (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1284.) However, an express savings clause is not required if the Legislature demonstrates its intention with sufficient clarity that a reviewing court can discern and effectuate it. (*People v. Yearwood, supra*, 213 Cal.App.4th at p. 173; *Bourquez v. Superior Court, supra*, at p. 1284.)

The interpretation of a ballot initiative is governed by the same rules that apply to construing a statute enacted by the Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796.) First, the language of the statute is given its ordinary and plain meaning. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) Second, the statutory language is construed in the context of the statute as a whole and within the overall statutory scheme to effectuate the voters' intent. (*Ibid.*) And, statutes addressing the same subject matter and enacted at the same time should be construed together. (*People v. Honig* (1996) 48 Cal.App.4th 289, 327; *Stickel v. Harris* (1987) 196 Cal.App.3d 575, 590.) Third, where the language is ambiguous, the court will look to "other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Robert L. v. Superior Court, supra*, at p. 901; *People v. Floyd, supra*, 31 Cal.4th at pp. 187-188.) Any ambiguities in an initiative statute are "not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent

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<sup>6</sup> A judgment is not final if the courts may provide a remedy on direct appellate review, including time within which to petition the United States Supreme Court for a  
[footnote continued on next page]

with apparent legislative intent.” (*People v. Cruz* (1996) 13 Cal.4th 764, 783.)

Ultimately, the court’s duty is to interpret and apply the language of the initiative “so as to effectuate the electorate’s intent.” (*Robert L. v. Superior Court, supra*, at p. 901.)

As to Proposition 47, there is no clear and unavoidable implication of retroactivity. Therefore, under Penal Code section 3, it must be presumed that the voters intended Proposition 47 to operate prospectively and not retroactively.

Moreover, as noted above, Penal Code section 1170.18, subdivision (a), states that, “A person currently serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (‘this act’) had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction.” The ordinary and plain meaning of those words is that Penal Code section 1170.18 applies to any defendant who was serving a sentence for a Proposition 47 qualifying offense when that initiative became effective, regardless of whether the judgment of conviction was final. Section 1170.18 could have been drafted to apply only to defendants whose judgments were final before the proposition’s effective date. It was not. There is no ambiguity. Hence, the finality of judgment is not determinative for purposes of Penal Code section 1170.18, subdivision (a), and it operates as the functional equivalent of a savings clause giving amended Health and Safety Code section 11350, and other amended sections under the act, prospective-only application.

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writ of certiorari. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 171-172.)

Furthermore, to the extent there is any ambiguity, that interpretation of Penal Code section 1170.18, subdivision (a), is consistent with the voters' intent in passing Proposition 47, as evidenced in the General Election Voter Information Guide for November 4, 2014. In the Official Title and Summary on page 34 of the voter guide, it states that Proposition 47 "[r]equires resentencing for persons serving felony sentences for these offenses unless [the] court finds unreasonable public safety risk." Under the title "Resentencing of Previously Convicted Offenders" on page 36, it states that "[t]his measure allows offenders currently serving felony sentences for the above crimes to apply to have their felony sentences reduced to misdemeanor sentences." It continues later on page 36 that "the measure states that a court is not required to resentence an offender currently serving a felony sentence if the court finds it likely that the offender will commit a specified severe crime." Under the title "State Effects of Reduced Penalties," on page 36, it states in the fourth sentence of the first paragraph that, "the resentencing of inmates currently in state prison could result in the release of several thousand inmates."

Additionally, in the official argument against Proposition 47, on page 39 of the voter guide, opponents argued:

*"Prop. 47 will require the release of thousands of dangerous inmates. Felons with prior convictions for armed robbery, kidnapping . . . 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 . . . .”

In the official rebuttal argument of Proposition 47, on page 39, proponents of Proposition 47 responded:

*“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.”*

Thus, from the analysis and arguments from the voter guide, one of the major issues over Proposition 47 that was presented to the voters was whether dangerous criminals would be released automatically from custody. The voters were repeatedly assured by proponents that dangerous criminals would not be released because there was the safeguard of a trial court making a determination of an unreasonable risk to public safety. In fact, the voters were told that there would be no “automatic release.”

Proposition 47 proponents assured the public that those who were already incarcerated would not be granted automatic misdemeanor resentencing and released from incarceration. Instead, they could only be granted resentencing if a trial court determined that each of the incarcerated criminals was not an unreasonable risk to public safety.

Because an incarcerated defendant’s potential dangerousness is not related to whether his appeal is still pending, there is nothing in Proposition 47 to support defendant’s argument that those already sentenced would receive automatic misdemeanor resentencing because their case was not final.

Therefore, we find that Health and Safety Code section 11377, and other amended sections under Proposition 47, have prospective-only application because there is “no clear and unavoidable implication” of retroactivity under Penal Code section 3. Moreover, the *Estrada* rule does not apply because Penal Code section 1170.18, subdivision (a), is the functional equivalent of a savings clause, and a prospective-only application is consistent with the public safety purpose of not granting misdemeanor resentencing without a determination of a defendant’s risk of dangerousness.

Penal Code section 1170.18, subdivision (m), does not alter this conclusion.

Section 1170.18, subdivision (m), states:

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

To interpret Penal Code section 1170.18, subdivision (m), as allowing automatic resentencing would be to render subdivisions (a) and (b) surplusage because a defendant already sentenced for a Proposition 47 qualifying crime would not have to file, as subdivisions (a) and (b) require, a petition for recall of sentence. This 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 the legislative purpose. (*People v. Canty* (2004) 32 Cal.4th 1266, 1276-1277.) Penal Code section 1170.18, subdivision (m), simply protects defendants who have already been sentenced from being forced to choose between filing a petition for recall of sentence and pursuing remedies to which

they may be entitled, such as filing an appeal or a petition for writ of habeas corpus. Penal Code section 1170.18, subdivision (m), does not have any impact on whether amended Health and Safety Code section 11350, or other sections amended by Proposition 47, operate prospectively or retroactively.

Furthermore, a trial court does not have jurisdiction over a cause during the pendency of appeal as to anything that may affect the judgment. (*People v. Flores* (2003) 30 Cal.4th 1059, 1064; *People v. Johnson* (1992) 3 Cal.4th 1183, 1257.) Thus, a Penal Code section 1170.18 petition for recall of sentence under Proposition 47 must be filed once the judgment is final and jurisdiction of the case has been returned to the trial court. Here, defendant's eligibility for recall of sentence should be determined at that time. A petition for recall of sentence under Penal Code section 1170.18 can be filed within three years after the effective date of Proposition 47 or a later date upon a showing of good cause. (Pen. Code, § 1170.18, subd. (j).) The pendency of appellate proceedings and consequent lack of jurisdiction in the trial court would necessarily constitute good cause for a filing delay. (See *People v. Yearwood, supra*, 213 Cal.App.4th at p. 177 [appellate proceedings constitute good cause for delayed filing of a petition under Penal Code section 1170.126, subdivision (b), of the Three Strikes Reform Act of 2012].) Therefore, the length of the appellate process does not foreclose defendant from seeking relief by filing a petition for recall of sentence under Penal Code section 1170.18.

In conclusion, because defendant is currently serving a sentence for felony convictions that have changed to misdemeanors under Proposition 47, he must file a

petition for recall of sentence in the trial court after his judgment is final for the trial court to determine if he is excluded from Proposition 47 resentencing by posing an unreasonable risk of danger to public safety.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER  
\_\_\_\_\_ J.

We concur:

RAMIREZ  
\_\_\_\_\_ P. J.

MILLER  
\_\_\_\_\_ J.