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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. DEREK HARMON, Defendant and Appellant.	E060808 (Super.Ct.No. RIF109651) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Warren Williams and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

On June 24, 2004, a jury found defendant and appellant Derek Donson Harmon guilty of four counts of selling a controlled substance, cocaine base (Health & Saf. Code, §§ 11352, subd. (a), 11054, subd (f)(1); Pen. Code, § 1203.073, subd. (b)(7)), on three different dates; and, one count of selling methamphetamine (Health & Saf. Code, § 11379, subd. (a)).

On June 25, 2004, the trial court made a true finding that defendant had served a prior prison term (Pen. Code, § 667.5, subd. (b))[1], and had two prior strike convictions—1985 assault with a deadly weapon and 1995 assault with a deadly weapon (Pen. Code, §§ 245, subd. (a)(1), 1170.12, subd. (c)(1)). On July 16, 2004, the court sentenced defendant to a total prison term of 75 years to life, plus one year, as follows: consecutive terms of 25 years to life (counts 1, 3, 5); concurrent terms of 25 years to life (counts 2, 4); one year (prior prison term). The court struck the enhancements for counts 1 through 5.

It was over 8 years later, on December 6, 2012, defendant filed an in propria persona Proposition 36 petition for resentencing under section 1170.126. On December 17, the trial court appointed a public defender to represent defendant.

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

On February 26, 2013, the trial court provided the parties with subpoenaed records. Thereafter, defense counsel filed 38 pages of documentation to supplement the documents provided to the court by the parties. On October 28, 2013, the People filed an opposition to defendant's petition for resentencing.

On February 21, 2014, the trial court found that defendant was ineligible for resentencing and denied the petition.

On March 17, 2014, defendant filed his notice of appeal. On December 18, 2014, we granted defendant's request to file a supplemental brief to address the impact of Proposition 47's enactment to defendant's petition.

For the reasons set forth *post*, we shall affirm the trial court's denial of defendant's petition.

II

ANALYSIS[2]

On appeal, defendant argues that the trial court erred in denying his petition to recall his sentence.

A. *Proposition 36—The Reform Act Generally*

The Reform Act amended sections 667 and 1170.12 and added section 1170.126; it changed the requirements for sentencing some third strike offenders. "Under the original version of the three strikes law a recidivist with two or more prior strikes who is

[2] The facts of the underlying case are not relevant. The only issue on appeal relates to defendant's sentence. Therefore, a separate statement of facts is not necessary.

convicted of any new felony is subject to an indeterminate life sentence. The [Reform] Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender. [Citations.] The [Reform] Act also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168 (*Yearwood*).)

"Thus, there are two parts to the [Reform] Act: the first part is *prospective* only, reducing the sentence to be imposed in future three strike cases where the third strike is not a serious or violent felony [citations]; the second part is *retrospective*, providing *similar, but not identical*, relief for prisoners already serving third strike sentences in cases where the third strike was not a serious or violent felony (Pen. Code, § 1170.126)." (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1292 (*Kaulick*), italics in original.) "The main difference between the prospective and the retrospective parts of the [Reform] Act is that the retrospective part of the [Reform] Act contains an 'escape valve' from resentencing prisoners whose release poses a risk of danger." (*Id*. at p. 1293.)

It is undisputed that defendant's current commitment felony offenses of sale of controlled substances (cocaine base and methamphetamine) under Health and Safety Code sections 11352, subdivision (a) and 11379, subdivision (a), are not serious or violent felonies under Penal Code section 667.5, subdivision (c), or Penal Code section 1192.7, subdivision (c). However, the inquiry does not end with whether or not the current convictions are serious or violent felonies. As previously noted, if the petition satisfies the criteria contained in subdivision (e) of Penal Code section 1170.126, the inmate shall be resentenced as a second strike offender "'unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' ([Pen. Code,] § 1170.126, subd. (f).) In exercising this discretion the trial court may consider the prisoner's criminal history, disciplinary record and record of rehabilitation while incarcerated and any other relevant evidence. ([Pen. Code,] § 1170.126, subd. (g).)" (*Yearwood*, *supra*, 213 Cal.App.4th at pp. 170-171.)

In approving the Reform Act, the voters found and declared that its purpose was to prevent the early release of dangerous criminals and relieve prison overcrowding by allowing low-risk, nonviolent inmates serving life sentences for petty crimes, such as shoplifting and simple drug possession, to receive twice the normal sentence instead of a life sentence. (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1, subds. (3), (4) & (5), p. 105; see *People v. White* (2014) 223 Cal.App.4th 512, 522 (*White*) (review den. Apr. 30, 2014, S217030).) The electorate also mandated that the Reform Act be liberally construed to effectuate the protection of the health, safety, and

welfare of the people of California. (Voter Information Guide, *supra*, text of Prop. 36, § 7, p. 110; see *White*, at p. 522.) Accordingly, we liberally construe the provisions of the Reform Act in order to effectuate its foregoing purposes; and note that findings in voter information guides may be used to illuminate ambiguous or uncertain provisions of an enactment. (See *White*, at p. 522; *Yearwood*, *supra*, 213 Cal.App.4th at pp.170-171.)

B. *Denial of Petition*

Defendant contends the trial court erred in finding that resentencing him posed an unreasonable risk of danger, because "the People failed to meet their burden to prove that [defendant] currently creates an unreasonable risk of danger to public safety." Defendant's argument suggests that "substantial evidence" is the appropriate standard for our review. It is not. The abuse of discretion standard applies to our review, as explained *post*, and we structure the discussion accordingly.

Review of the trial court's ruling on the petition involves more than one issue. In part, we are called upon to determine the meaning of section 1170.126, particularly the provision that states: "*the petitioner shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety*." (§ 1170.126, subd. (f), italics added.) We independently determine issues of law, such as the interpretation and construction of statutory language. (*People v. Love* (2005) 132 Cal.App.4th 276, 284.) The principles of statutory interpretation apply to voter initiatives, as well as to enactments of the Legislature. (*Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, 727.)

Beyond any issues of statutory interpretation, we are also called upon to review the trial court's discretionary ruling, finding that a new sentence would represent an unreasonable risk of danger to the public. "[S]ection 1170.126 entrusts the trial court with discretion that may be exercised to protect the public. A court may deny a section 1170.126 petition if, after examination of the prisoner's criminal history, disciplinary record while incarcerated, and any other relevant evidence, it determines that the prisoner poses 'an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f).)" (*Yearwood*, *supra*, 213 Cal.App.4th at p. 176.)

"Where, as here, a discretionary power is statutorily vested in the trial court," we apply the abuse of discretion standard. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) Reviewing courts often apply that standard to the review of discretionary postconviction decisions. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 531 [decision to dismiss or strike a prior conviction allegation under § 1385]; *People v. Carmony* (2004) 33 Cal.4th 367, 375 [refusal to dismiss or strike a prior conviction allegation under § 1385]; *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 974, 977 [decision whether to reduce a wobbler offense to a misdemeanor under § 17, subd. (b)].)

We conclude the abuse of discretion standard applies to the review of the trial court's section 1170.126 discretionary risk-of-danger finding. As such, we review the record to determine if the trial court abused its discretion in finding by a preponderance of the evidence that defendant "would pose an unreasonable risk of danger to public

safety." (§ 1170.126, subd. (f); *Kaulick*, *supra*, 215 Cal.App.4th at p. 1301.) When the standard of review is abuse of discretion, the reviewing court "examines the ruling of the trial court and asks whether it exceeds the bounds of reason or is arbitrary, whimsical or capricious. [Citations.] This standard involves abundant deference to the trial court's rulings." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018; see *People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1124-1125.) Where the record shows the trial court balanced the relevant facts and reached an impartial decision in conformity with the law, we affirm. (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 961.)

Here, the trial court exercised its discretion not to resentence defendant in the manner prescribed by section 1170.126. The court balanced the relevant factors and concluded defendant continued to pose an unreasonable risk of danger to public safety.

In his propria persona petition, defendant claimed that he qualified for resentencing because his current offenses were neither serious nor violent, and he had never been convicted of any of the crimes set forth in section 667, subdivision (e)(2)(C)(i)-(iv). Defendant included the probation report from his current offenses as an exhibit. After defendant filed his petition, the court assigned counsel and subpoenaed defendant's prison records, which were distributed to the parties.

The prosecution filed an opposition to defendant's petition. The prosecution documented defendant's extensive criminal history, starting as a juvenile. The prosecutor also chronicled defendant's poor performance while incarcerated for his current three strikes offenses.

In 1985, at the age of 16, defendant belonged to the 87th Street Gangster Crips criminal street gang. As a gang member, he committed assault with a deadly weapon causing great bodily injury to an innocent infant bystander during a gang fight. The juvenile court made true findings on two counts of assault under section 245, subdivision (a)(2), with enhancements for personal use of a firearm and causing great bodily injury under former sections 12022.5 and 12022.7. Although the victim was healthy prior to the shooting, she became paralyzed, blind, unable to talk, and unable to care for herself. She died 20 years later.

While placed in the Department of Youth Authority (CYA) and still a juvenile, defendant admitted committing an unlawful vehicle taking under Vehicle Code section 10851. This resulted in revocation of his parole. The prosecutor included exhibits that chronicled defendant's poor performance on parole, resulting in multiple revocations.

In November 1994, at the age of 25, less than one month after his release from CYA and while on parole, defendant got into an argument with his sister. During the argument, defendant slashed his sister with a knife, and threatened to kill her and her family. Defendant pled guilty to assault with a deadly weapon. Despite his two priors, the court only sentenced defendant to two years. Following his release from prison, defendant committed six additional felonies between 1997 and 2003, resulting in multiple parole revocations and releases until he committed his current offenses in 2004.

While defendant was incarcerated for his current strike offenses, on five separate occasions between 2007 and 2012, defendant exposed himself and masturbated in front of prison staff, making eye contact with them and refusing to stop when ordered to do so. Defendant committed several of these acts while housed in the secured housing unit; they resulted in written reprimands. Defendant's prison records established that defendant committed these acts intentionally and defiantly in front of women prison staff, including a doctor and a psychiatric technician.

In its opposition, the People argued that defendant's 1985 assault with a deadly weapon causing great bodily injury, which ultimately resulted in death, should result in the court denying defendant's petition for resentencing. The prosecutor acknowledged that defendant was eligible for consideration under section 1170.126. The prosecutor, however, argued that defendant posed an unreasonable risk of danger to the public under section 1170.126, subdivision (f), based upon defendant's other violent offenses and his poor performance both on parole and while incarcerated. For example, while defendant was on parole in 2001 and living in New Mexico, he was charged with brandishing a weapon, committing robbery, and threatening a witness. In 2002, while on parole, defendant admitted using cocaine and failed to attend parole outpatient clinics. In 2002, defendant threatened and assaulted a woman with whom he was living. A 2001 report concluded that defendant's "disregard for the Law and his Conditions of Parole makes him a serious threat to public safety."

Defense counsel submitted documents to the court. The documents included certificates of achievement from April 2006 through January 2007 for completing various classes; certificate of recognition for attending Alcoholics Anonymous for approximately one year, and anger management classes; a certificate of baptism in 2011; certificates related to religious studies completed in 2007, 2008, and 2010; documentation from the district attorney's office purportedly declining to prosecute defendant for indecent exposure; paperwork indicating defendant did not refuse to accept assigned housing; and a prison review report.

On February 21, 2014, the trial court conducted a hearing on defendant's petition, and indicated that it had received and reviewed the documentation filed by both parties. Defendant told the court about his past and tried to downplay his violations. Throughout this dialogue, defendant repeated that when he first went to prison, he was "playing around and not really trying to do nothing with my life," but claimed he had changed. The court acknowledged that defendant dropped out of his gang in 2009. The court, however, noted that at the age of 34, when defendant was last paroled, he used the opportunity to develop a "sophisticated operation of drug sales" dealing heroin and methamphetamine.

While the court acknowledged that in 2007, defendant's behavior in custody started to improve, the court expressed concern about the circumstances of defendant's masturbation rule violations. Defendant tried to minimize his actions by claiming that they simply resulted from a lack of privacy and he didn't know anyone was watching

him. The court acknowledged that there was lack of privacy in prison, but also expressed concern about defendant's mischaracterization of the incidents and the chronic nature of them. The court told defendant:

"[Y]ou actually made eye contact. You refused to stop. You continued. Your intent was actually to get a reaction from the person. That's a different guy to me than the guy that says, 'Oh, I'm sorry. I don't have any privacy. I didn't know you were there.' It's a guy that matches your crimes of violence when you're out. It's a guy that's intending to intimidate by his behavior. And that's what, frankly, concerns me about you."

Defendant then acknowledged that on one occasion, he got "overexcited" and acted improperly. However, he claimed that the other incidents were overstatements by those who reported them.

Throughout the hearing, defense counsel reiterated defendant's lack of violence while incarcerated for the last 10 years, his numerous certificates, his religion, and the fact defendant was trying. The court acknowledged defendant's improvements while currently incarcerated—leaving the gang and completing his programs. The court, however, expressed concern over the violence of his crimes. The court stated, "they scare me."

While the court acknowledged the minor nature of defendant's drug offenses compared to his prior violent offenses, the court expressed concern about his lack of compassion for humans and his prior violent crimes, especially those in which he hurt

people he loved, noting that it is the "explosive part of [defendant's] personality that is scary." The court also expressed concern that at the age of 44, defendant spent most of his life in custody without a chance to work a real job, support children, or have a family. While the court heard defendant's claims that he had changed, the court stated that despite his previous seven or eight other opportunities to "change," he had failed to do so.

The prosecutor added that the documents submitted for the court's consideration indicated that before defendant's current offense in 2003, those familiar with his parole record saw his potential for violence and found him to be "a danger not only to himself but to the community as well." The prosecution emphasized the fact that defendant called prison staff over while he masturbated even when housed in the Administrative Segregation Unit.

The court, in denying defendant's petition, stated:

"I wish I could say to myself, 'No, I can let him out and maybe he could commit a theft offense.' I'm afraid that's not the case. You've committed violent offenses over and over. And drug sales, you know, while they are not categories of crimes of violence, they do tons of violence. It isn't a crime of violence like a WalMart burglary. It's a serious offense that affects whole neighborhoods like it affects University. Nothing much has changed since you were there in '03. It's just as bad as it was. It affects communities. It destroys kids, teenagers, people like you. You got destroyed from drugs. You got wrecked from the people selling to you, and yet you sold again. You

perpetuated the destruction of other human beings. And that's along with the crimes of violence.

"So for all the reasons I've indicated, the Court has considered everything, and I do find that it is likely that [defendant] would be a danger to the community in a way that he would be likely to do a violent offense, and therefore I'm going to deny the petition."

Based on the above, it simply cannot be said that the trial court's determination that defendant remained an unreasonable risk to public safety was an arbitrary, whimsical, or capricious conclusion. (See, e.g., *People v. Nocelotl* (2012) 211 Cal.App.4th 1091, 1097.)

Defendant appears to argue that the phrase "unreasonable risk of danger to public safety" in the Reform Act was not intended for inmates like him, but for inmates who are violent offenders. We reject this contention.

While the voter information guide or the ballot pamphlet for the Reform Act notes the intent of the Reform Act was to keep violent offenders off the streets and to release nonviolent inmates to save taxpayer money (see Voter Information Guide, *supra*, text of Prop. 36, § 1, subds. (3), (4) & (5), p. 105), the Reform Act clearly gives the trial court discretion to determine whether resentencing would pose an "unreasonable risk of danger to public safety." The Reform Act clearly had a dual purpose—that of ameliorating unduly harsh third strike sentences and protecting the public. The Reform Act does not define the phrase "'unreasonable risk of danger to public safety'. . . . The word 'unreasonable' '"is a widely used and well understood word and clearly so

when juxtaposed"' with 'risk of danger.' (. . . *People v. Morgan* (2007) 42 Cal.4th 593, 606 . . . ['"As the Supreme Court stated in *Go-Bart Importing Co. v. United States* (1931) 282 U.S. 344, 357 [75 L.Ed. 374, 51 S.Ct. 153], 'There is no formula for the determination of reasonableness.' Yet standards of this kind are not impermissively vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind"'].)" (*People v. Flores* (2014) 227 Cal.App.4th 1070, 1075 (*Flores*) [appellate court recently rejected inmate's claim that the phrase "unreasonable risk" is not impermissibly vague].)

"Surely a superior court judge is capable of exercising discretion, justly applying the public safety exception, and determining whether a lesser sentence would pose an unreasonable risk of harm to the public safety. (See, e.g., *People v. Espinoza* (2014) 226 Cal.App.4th 635 [grant of relief where a lesser sentence would not impose an unreasonable risk of harm to the public safety].) This is one of those instances where the law is supposed to have what is referred to by Chief Justice Rehnquist as '"play in the joints."' (*Locke v. Davey* (2004) 540 U.S. 712, 718, 158 L.Ed.2d 1, 124 S.Ct. 1307.) 'This is a descriptive way of saying that the law is flexible enough for the . . . trial court to achieve a just result depending on the facts, law, and equities of the situation.' [Citation.]" (*Flores*, *supra*, 227 Cal.App.4th at p. 1075, fn. omitted.)

There is likely some level of trauma or victimization in the commission of almost any type of offense. However, it is no less true that the facts applicable to some criminal offenses will show them to be less traumatizing, and the offender perhaps less dangerous

to public safety than the facts in other cases. There is no blanket determination that all offenders who commit property crimes or fraud crimes are less dangerous than other offenders. Regardless of whether or not defendant's actions while in custody were violent or nonviolent, he had demonstrated a lack of ability to conform his conduct to society's standards and continued to pose an unreasonable risk to public safety should he be released from prison. The trial court was well aware of the positive factors defendant cites on appeal, but determined that based on a weighing of all the factors, including the negative ones we have recounted that demonstrate dangerousness, the court reasonably believed defendant presented an unreasonable risk of danger to public safety. Thus, defendant has not shown the trial court's exercise of its discretion was an abuse of that discretion.

C. *Application of Proposition 47*

In a supplemental brief, defendant argues that this court should apply the definition of the phrase "unreasonable risk of danger to public safety" as defined in section 1170.18, subdivision (c), to the phrase as it appears in section 1170.126, subdivision (f).[3] Defendant also argues that section 1170.18 applies retroactively and that under the definition of "unreasonable risk of danger to public safety" as defined in section 1170.18, subdivision (c), and as applied in section 1170.126, subdivision (f), resentencing defendant under section 1170.126 would not pose an unreasonable risk of

danger to public safety. We find that Proposition 47 is not retroactive, and therefore we need not decide defendant's remaining contentions.

Proposition 47 created a new resentencing provision, section 1170.18, under which "[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 . . ." and request resentencing. (§ 1170.18, subd. (a).) Under that provision, an eligible defendant shall be resentenced to a misdemeanor "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Proposition 47 also provides that, "*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." (§ 1170.18, subd. (c), italics added.)

"No part of [the Penal Code] is retroactive, unless expressly so declared." (§ 3.) The California Supreme Court "ha[s] described section 3, and its identical counterparts in other codes (e.g., Civ. Code, § 3; Code Civ. Proc., § 3), as codifying 'the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the

[3] Section 1170.18 was enacted by the voters at the November 4, 2014 general election as part of the Safe Neighborhoods and Schools Act, otherwise known as and

[footnote continued on next page]

Legislature . . . must have intended a retroactive application.'" (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*).) "In interpreting a voter initiative, we apply the same principles that govern our construction of a statute." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006.)

Proposition 47 is silent as to its retroactive application to proceedings under the Reform Act. Similarly, the analysis of Proposition 47 by the legislative analyst, the arguments in favor of Proposition 47, and the arguments against Proposition 47 are silent as to the retroactive application to proceedings under the Reform Act. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of Prop. 47 & analysis by Legis. Analyst, pp. 34-39.) Thus, there is "no clear and unavoidable implication" of retroactivity that "arises from the relevant extrinsic sources." (*Brown*, *supra*, 54 Cal.4th at p. 320.) As noted earlier, this section and subdivision were enacted on November 4, 2014, when California voters passed Proposition 47, long past the time of defendant's resentencing hearing. Unless the legislation was designed or intended to apply retroactively, the definition in section 1170.18, subdivision (c), cannot apply to defendant.

Nevertheless, defendant contends that the principle enunciated in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) compels a finding of retroactivity here. As we explain, *Estrada* does not apply.

referred to herein as Proposition 47.

In *Estrada*, our Supreme Court stated: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference 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." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) This includes "acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Ibid*.) Accordingly, a statute lessening punishment is presumed to apply to all cases not yet reduced to final judgment on the statute's effective date, unless there is a "saving clause" providing for prospective application. (*Id*. at pp. 744-745, 747-748.)

Contrary to defendant's assertion, *Estrada* does not apply here because applying the definition of "unreasonable risk to public safety" in Proposition 47 to petitions for resentencing under the Reform Act does not reduce punishment for a particular crime. Rather, it changes the lens through which the dangerousness determinations under the Reform Act are made. Using the words of *Brown*, that "does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent." (*Brown*, *supra*, 54 Cal.4th at p. 325.) As the California Supreme Court explained in *Brown*, "*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." (*Id.* at p. 324.)

Brown addressed the 2010 amendment to former section 4019 that increased the rate at which eligible prisoners could earn conduct credit for time spent in local custody. (*Brown*, *supra*, 54 Cal.4th at pp. 317-318.) In passing this amendment, the Legislature did not "express[ly] declar[e] that increased conduct credits [we]re to be awarded retroactively, and [there was] no clear and unavoidable implication to that effect . . . from the relevant extrinsic sources, i.e., the legislative history." (*Id*. at p. 320.) Thus, the California Supreme Court applied the "default rule" in section 3 that "'No part of [the Penal Code] is retroactive, unless expressly so declared.'" (*Brown*, at pp. 319-320.) In doing so, our Supreme Court rejected the defendant's argument that *Estrada* "should be understood to apply more broadly to any statute that reduces punishment in any manner, and that to increase credits is to reduce punishment." (*Brown*, at p. 325.) The court rejected the defendant's argument for two reasons: "First, the argument would expand the *Estrada* rule's scope of operation in precisely the manner we forbade . . . . Second, the argument does not in any event represent a logical extension of *Estrada*'s reasoning. We do not take issue with the proposition that a convicted prisoner who is released a day early is punished a day less. But, as we have explained, the rule and logic of *Estrada* is specifically directed to a statute that represents '"a legislative mitigation of the penalty for a particular crime"' [citation] because such a law supports the inference that the Legislature would prefer to impose the new, shorter penalty rather than to '"satisfy a desire for vengeance"' [citation]. The same logic does not inform our understanding of a law that rewards good behavior in prison." (*Ibid.*, italics omitted.)

Expanding the *Estrada* rule's scope of operation here to the definition of "unreasonable risk to public safety" in Proposition 47 in a petition for resentencing under the Reform Act would conflict with section 3's "default rule of prospective operation" (*Brown*, *supra*, 54 Cal.4th at p. 324) where there is no evidence in Proposition 47 that this definition was to apply retrospectively to petitions for resentencing under the Reform Act and would be improper given that the definition of "unreasonable risk to public safety" in Proposition 47 does not reduce punishment for a particular crime. For these reasons, we hold that the definition of "unreasonable risk to public safety" in Proposition 47 does not apply retroactively to a defendant such as the one here whose petition for resentencing under the Reform Act was decided before the effective date of Proposition 47.[4]

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[4] We note that the California Supreme Court granted review of *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted February 18, 2015, S223676, which held that the definition of "unreasonable risk of danger to public safety" from Proposition 47 does not apply retroactively to petitions for recall and resentencing under the Reform Act. On this same date, the California Supreme Court also granted review of *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825, which held that the literal meaning of section 1170.18, subdivision (c), as added by Proposition 47 does not comport with the purpose of the Reform Act, and applying it to resentencing proceedings under the Reform Act would frustrate, rather than promote, that purpose and the intent of the electorate in enacting both initiative measures.

III

DISPOSITION

The order denying defendant's petition for a recall of his sentence under the Reform Act is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

KING
J.

MILLER
J.