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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN EARL WASHINGTON,

Defendant and Appellant.

F069663 & F071017

(Super. Ct. No. SC065008A)

OPINION

APPEALS from an order of the Superior Court of Kern County. Michael G. Bush,
Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and
Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant John Earl Washington, currently serving an indeterminate sentence of
25 years to life under the three strikes law, petitioned to be resentenced as a second strike

offender under Proposition 36, the Three Strikes Reform Act of 2012. Although defendant is eligible for resentencing, the superior court denied his petition, finding resentencing defendant “would pose an unreasonable risk of danger to public safety.” (Pen. Code,¹ § 1170.126, subd. (f).) Defendant appealed.

While his appeal was pending, California voters passed Proposition 47, the Safe Neighborhoods and Schools Act. Defendant filed a petition seeking to reduce his commitment felony to a misdemeanor and to have his current sentence recalled. The parties agreed defendant was eligible for resentencing. The superior court denied defendant’s petition, holding resentencing defendant “would pose an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b).)

On appeal, defendant contends (1) the definition of “unreasonable risk of danger to public safety” under the resentencing provisions of Proposition 47 applies retroactively to the resentencing proceedings under Proposition 36, and (2) the trial court abused its discretion in denying both of his petitions. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORY

Defendant’s Proposition 36 petition

On November 6, 2012, the electorate passed Proposition 36. In addition to amending the three strikes law, Proposition 36 created a postconviction release procedure for inmates currently serving a third strike indeterminate life sentence for crimes that are not serious or violent felonies. Section 1170.126, subdivision (e) sets forth several criteria for eligibility. If the inmate meets these criteria, he or she is entitled to resentencing to twice the term otherwise provided as punishment for the current felony “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).)

¹All further undefined statutory references are to the Penal Code unless otherwise indicated.

In August 2013, defendant filed a petition seeking to have his sentence recalled and to be resentenced as a second strike offender under Proposition 36. The following facts are derived from exhibits attached to the People's motion in opposition to defendant's petition.

Defendant's criminal history

In 1971, defendant suffered a juvenile adjudication for burglary.

In 1972, defendant suffered a juvenile adjudication for trespassing.

In 1973, defendant, then an adult, was convicted of trespassing. Two months later, defendant was arrested and later found guilty of second degree burglary. He was committed to the California Youth Authority (CYA).

In 1975, while on parole, defendant was convicted of reckless driving, and in a separate incident, he pleaded guilty to a misdemeanor gambling offense. He was sentenced to 30 days in jail for his reckless driving conviction and two years of probation for his gambling offense.

In 1976, defendant was convicted of possession of marijuana. A few months later, defendant was arrested for and subsequently pleaded guilty to three counts of first degree burglary, resisting arrest, and possession of cannabis. Defendant was sentenced to one year in jail.

While in custody, defendant was convicted of petty theft. He was sentenced to six months in jail to be followed by two years of probation. One month after he was released from jail, he was arrested for petty theft.

In 1978, defendant pleaded guilty to two counts of robbery, assault with a deadly weapon, inflicting great bodily injury, and use of a firearm.

The first robbery occurred in August 1977, when defendant entered a service station in Bakersfield. He asked the manager for change and then placed a handgun to the manager's chin and ordered him to bring money from the safe. The manager complied. Defendant ordered the manager to lay flat the ground, face down. As

defendant fled the store, he shot the manager through a glass window. The victim was struck in the back of the head. He underwent surgery to remove the bullet and bone fragments, but survived. The victim identified defendant as the perpetrator.

The second robbery occurred in September 1977. Defendant entered a Circle-K convenience store in Bakersfield, removed a handgun from his waistband, and demanded money from the store clerk. The clerk complied. Defendant ordered the clerk to the backroom of the store and then fled. Both offenses occurred while defendant was released on parole from the CYA, and on probation for his gambling conviction. Defendant was sentenced to seven years in prison.

In 1982, defendant was convicted of assault with a deadly weapon on a peace officer, aggravated assault, and personal use of a firearm. Defendant sold marijuana to an undercover police officer. When the officer identified himself, defendant fled. Defendant fired one round from a handgun at an officer who was pursuing him. He fired a second shot at another officer before climbing a chain-link fence. Neither officer was struck. When apprehended, defendant claimed a friend had given him the gun to hold, and when defendant attempted to throw the gun away, it discharged twice.

Defendant had been released from prison only five months and was on parole when he committed these offenses. He was sentenced to 13 years in prison.

Defendant was released on parole in 1990. That same year, he was convicted of resisting arrest and possession of fireworks without a permit.

In 1992, defendant was convicted of vandalism, and in a separate incident, he was convicted of first degree burglary after stealing a weed eater from an open garage. Defendant was sentenced to three years in prison.

On November 4, 1995, defendant, then 40 years old, grabbed three videotapes from a Food-4-Less grocery store, tucked the tapes into the back of his pants, and exited the store without paying for them. He was detained by store security, arrested, and ultimately convicted of second degree burglary for shoplifting. Defendant was on parole

when he committed the instant offense, and because of his prior strikes, he was sentenced to an indeterminate life term of 25 years to life under the three strikes law.

Defendant's conduct in custody

In 1979, defendant exposed his genitals to female staff.²

In 1986, defendant committed a sexual assault against a female correctional officer by grabbing her buttocks. That same year, defendant received an RVR for an unspecified act of deviant sexual behavior.

In July 1988 defendant was found guilty of committing an unspecified act of sexual behavior, and in October 1988, he was observed masturbating.

In 1993, defendant received RVR's for exhibiting his genitals and indecent exposure. During one of the incidents, he exhibited his genitals toward a female correctional officer while looking directly at her.

In 2002, defendant exposed his penis to a prison nurse as she was checking his blood pressure and began masturbating in front of her.

In 2003, defendant began stroking his penis inside his shorts in the presence of a female correctional officer. In June of that same year, he received an RVR for indecent exposure and masturbation. Later that month, defendant was observed committing five acts of deviant sexual behavior toward female correctional staff. He was counseled by prison staff about his behavior.

In 2004 and in 2005, defendant was observed masturbating in his cell. During both incidents, defendant was nude. During the 2005 incident, he began turning his cell light on and off in an attempt to get a female correctional officer's attention.

Between 2001 and 2006, he had approximately two dozen instances of either refusing to work or participate in classes, or failing to report to class or work.

In 2004, he violated prison rules by receiving a tattoo from his cellmate.

²Defendant's acts of sexually inappropriate behavior are documented by rules violation reports (RVR) and other California Department of Corrections and Rehabilitation (CDCR) records.

In 2006, defendant was observed masturbating in his cell. He positioned himself so he was in the direct line of sight of a correctional officer in a control booth. He would masturbate when the officer looked at him, but would stop when the officer looked away. He was found guilty of indecent exposure.

In June 2012, defendant tested positive for THC (tetrahydrocannabinol). In November of that same year, defendant was observed in a bladed fighting stance against another inmate. Both inmates had their fists clenched and raised in the air.

Defendant has also received positive feedback for his in-custody conduct. In 2000, he had completed four steps of a 12-step program for alcohol and narcotics addiction. In 2005, he received a laudatory “chrono” for helping an inmate by preventing the inmate from hanging himself. In 2014, he participated in individual therapy. Between 2001 and 2009, and in 2011, defendant received several satisfactory, above average, and exceptional work reports.

Other Relevant Factors

In 1978, a probation officer’s report stated defendant had “engaged in a pattern of violent conduct which indicates a serious threat to society.” In a 1983 report, he was classified a “serious danger to society.” Several psychological reports and rules violation reports indicated defendant has a long history of hearing voices. He has been diagnosed as having paranoid schizophrenia and has been in an enhanced outpatient program “for many years.”

Defendant’s Proposition 36 hearing

In June 2014, the trial court held a hearing on defendant’s petition for resentencing under Proposition 36. Defendant, then 58 years old, testified at the hearing.

When questioned about his 1978 robbery conviction in which a store clerk was shot in the head, defendant minimized his culpability for the incident. He claimed his friend, “Jimmy McGee,” handed him a gun after shooting up the store and told defendant

to “[j]ust take the gun and run.” Jimmy was unable to run because he had a wooden leg and defendant took the gun because Jimmy was his friend.

Defendant also denied shooting at officers in 1982. He claimed police caught him with a gun as he was throwing it away. When he threw the gun, it discharged accidentally.

Defendant testified his prior burglary and theft-related convictions were necessitated by the fact he was living in poverty and he was young. He denied using drugs or alcohol when he committed the offenses. When defense counsel questioned defendant why he would obtain a gun after having previously been sent to prison for possession of a gun, defendant admitted his decisions were thoughtless.

Defendant has an eleventh grade education. During the time defendant was in high school, he was in special education for dyslexia and other learning disorders. After repeated visits to juvenile hall, defendant was unable to complete high school. Defendant’s CDCR records indicate he is mentally handicapped.

With respect to his commitment offense, defendant admitted he did not originally intend to steal the videotapes, but once he passed the counter unnoticed, he decided to walk out of the store with them. He became angry that he was sentenced to 25 years to life for stealing three videotapes and began committing sexually inappropriate behavior while he was incarcerated. He also claimed he committed the inappropriate acts because “[he] really didn’t care,” it was “[his] way of resisting,” and it calmed him down.

Defendant asserted his 2002 rule violation for masturbating was a mistake. According to defendant, he was cleaning himself in his cell when a female correctional officer walked by. Following the incident, he claimed the women in the prison were on “a witch hunt.” When counsel asked defendant about the incident in which he exposed himself to a prison nurse while he was having his blood pressure taken, he claimed he could not recall it.

He also told the court he had never used alcohol or marijuana, but in June 2012, he tested positive for marijuana. When confronted with this fact, he claimed the results of his test were “a blatant lie” because “[he] does not smoke ... weed.” The positive test results, according to defendant, were likely the result of the medication he was taking at the time.

Defendant’s aunt attended his hearing. Defendant indicated he would like to stay with her after he completes a re-entry program when he is released. He told the court he had been participating in various groups and activities in prison, including anger management and an awareness group, which had been teaching him to think before he speaks. Defendant attended groups every day and saw his prison psychologist once a week.

When released, he wants to attend school to help him become literate. He would be willing to attend therapy once a week, but “but [not] if [he] was pushed.” He expressed concern he would be locked up if he told a doctor he was having suicidal thoughts, and that he would go right back to jail if he told a parole officer anything. If his petition were granted, he told the court he would initially go into a halfway home. The record indicates defendant was accepted into a sober-living transitional housing program. He stated he would work in the citrus fields in Bakersfield to support himself.

Defendant acknowledged he was diagnosed with paranoid schizophrenia in 2012. He told the court he hears voices in his head, but claimed the voices tell him not to do bad things.

The superior court’s decision

On June 23, 2014, the trial court denied defendant’s petition, explaining:

“The court notes the very dangerous facts surrounding [defendant’s] priors, at least one in which [defendant] fired a gun at a victim and one in which he fired a gun at police officers. (The court does not believe his denials as to these facts.) In addition, the court has considered [defendant’s] overall mental health issues and in-custody behavior, all of which support a denial of the petition.”

Defendant filed a timely appeal.

Proposition 47

While defendant's appeal was pending, voters passed Proposition 47. The act went into effect on November 5, 2014. (Cal. Const., art. II, § 10, subd. (a).) Proposition 47 renders as misdemeanors certain drug- and theft-related crimes previously classified as felonies or wobblers. Proposition 47 also added section 1170.18 to the Penal Code, a resentencing provision for persons currently serving felony sentences for offenses altered by the act.

Under the resentencing provision, persons currently serving a felony sentence for an offense now classified as a misdemeanor under Proposition 47 may petition the court for a recall of their sentence. (§ 1170.18, subd. (a).) A person who satisfies the criteria in subdivision (a) of section 1170.18 shall have his or her sentence recalled and will 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." (*Id.*, subd. (b).)

Under subdivision (c) of section 1170.18 (hereafter, 1170.18(c)), an "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." These felonies, referred to as "super strikes," include sexually violent offenses,³ sex crimes against

³"Sexually violent offense" means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261 [rape], 262 [spousal rape], 264.1 [rape in concert], 269 [aggravated sexual assault of a child], 286 [sodomy], 288 [lewd acts on a child or a dependent person], 288a [oral copulation], 288.5 [continuous sexual abuse of a child], or 289 [penetration by a foreign object] of the Penal Code, or any felony violation of Section 207 [kidnapping], 209 [aggravated kidnapping], or 220 [assault] of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code." (Welf. & Inst. Code, § 6600, subd. (b).)

children, homicide or attempted homicide, solicitation to commit murder, assault with a machine gun on a peace officer or firefighter, possession of a weapon of mass destruction, or any serious and/or violent felony punishable in California by life imprisonment or death. (§ 667, subd. (e)(2)(C)(iv).)

Defendant’s Proposition 47 petition and the trial court’s decision

In November 2014, defendant filed a petition seeking resentencing under Proposition 47. His petition came before the same superior court judge who decided defendant’s Proposition 36 petition for resentencing. Defendant did not request a hearing on his motion. In February 2015, the trial court summarily denied defendant’s petition.

ANALYSIS

I. Section 1170.18(c) does not retroactively apply to defendant’s petition for resentencing under Proposition 36.

Defendant initially contends the definition of “unreasonable risk of danger to public safety” under section 1170.18(c) applies to the phrase as it is used under Proposition 36. Under section 1170.18(c), “unreasonable risk of danger to public safety” means an unreasonable risk that the petitioner will commit a new super strike offense. The People assert Proposition 47’s definition of dangerousness does not apply to petitions for resentencing under Proposition 36 because the electorate did not intend to modify the Three Strikes Reform Act in enacting Proposition 47. The People further contend that even if Proposition 47’s definition of dangerousness does apply to Proposition 36, it does not apply retroactively to petitions like defendant’s—those decided before the passage of Proposition 47, but currently pending on appeal.⁴ We agree with the People.

The resolution of this issue turns on whether the plain language of section 1170.18(c), or the voter’s intent in enacting the statute, limits a trial court’s discretion to deny resentencing under Proposition 36 to those cases in which resentencing the

⁴The issue is currently pending before the Supreme Court. (See, e.g., *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted Feb. 18, 2015, S223676; *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825; *People v. Guzman* (2015) 235 Cal.App.4th 847, review granted June 17, 2015, S226410.)

petitioner would pose an unreasonable risk he or she will commit a new super strike offense. In construing a voter initiative, the usual rules of statutory interpretation apply. (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) Our fundamental task is to ascertain and effectuate the intent of the electorate who passed the initiative measure. (*Ibid.*) The plain language of the initiative is the most reliable indicator of the voters' intent. (*Ibid.*) Therefore, our first step is to scrutinize the statute's words, assigning them their usual and ordinary meanings and construing them in the context of the overall statutory scheme. (*Ibid.*)

If the language of the statute allows for more than one reasonable interpretation, we will look to ““other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.”” (*People v. Briceno, supra*, 34 Cal.4th at p. 459.) However, where the language of a statute is clear and unambiguous, there is no need to engage in further construction. (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.) This does not mean, however, that the purpose of a statute will be sacrificed to a literal construction. (*Cossack v. City of Los Angeles* (1974) 11 Cal.3d 726, 733.) “[I]t is settled that the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the [voters] did not intend” (*In re Michele D.* (2002) 29 Cal.4th 600, 606), or would “frustrate[] the manifest purposes of the legislation as a whole.” (*People v. Williams* (1992) 10 Cal.App.4th 1389, 1393.) To this extent, the language of a statute must be read in accord with its purpose. (*In re Michele D., supra*, at p. 606.)

The plain language of section 1170.18(c) provides the following, in relevant part: “*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.*” (Italics added.) The phrase “As used throughout this Code” unambiguously refers to the Penal Code and is not limited to section 1170.18. (See *People v. Bucchierre* (1943) 57

Cal.App.2d 153, 166 [“The words ‘as in this code provided’ [in section 182] refer to the Penal Code”].) However, because such an interpretation would lead to consequences the voters did not intend when they enacted Proposition 47, we conclude section 1170.18(c)’s definition of dangerousness does not apply to Proposition 36.

Proposition 36 and Proposition 47 were designed to achieve similar, but not identical, goals. The Three Strikes Reform Act aimed to achieve the following objectives: (1) “Restor[ing] the Three Strikes law to the public’s original understanding by requiring life sentences only when a defendant’s current conviction is for a violent or serious crime”; (2) “Sav[ing] hundreds of millions of taxpayer dollars every year ... [by] no longer pay[ing] for housing or long-term health care for elderly, low-risk, non-violent inmates serving life sentences for minor crimes”; and (3) “Prevent[ing] the early release of dangerous criminals who are currently being released early because jails and prisons are overcrowded with low-risk, non-violent inmates serving life sentences for petty crimes.” (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1, p. 105.)

Proposition 47, on the other hand, emphasized (1) “ensur[ing] that prison spending is focused on violent and serious offenses”; (2) “maximiz[ing] alternatives for nonserious, nonviolent crime”; and (3) “invest[ing] the savings generated from this act into prevention and support programs for K–12 schools, victim services, and mental health and drug treatment.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.) The ballot arguments in favor of Proposition 47 also explain the initiative (1) “Stops wasting prison space on petty crimes and focuses law enforcement resources on violent and serious crime by changing low-level nonviolent crimes such as simple drug possession and petty theft from felonies to misdemeanors”; (2) “Authorizes felonies for registered sex offenders and anyone with a prior conviction for rape, murder or child molestation”; and (3) “Stops wasting money on warehousing people in prisons

for nonviolent petty crimes, saving hundreds of millions of taxpayer funds every year.” (*Id.*, argument in favor of Prop. 47, p. 38.)

Defendant asserts the purpose and intent of the Three Strikes Reform Act is furthered by applying section 1170.18’s definition of “unreasonable risk of danger to public safety,” to the act. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1033-1034.) He contends this court has erroneously interpreted a key purpose of Proposition 36 to be enhancing the public safety, and while the voters undoubtedly intended to protect the public safety in the passage of the act, this objective was not placed above the goal of cost savings. In any event, defendant argues the goal of protecting the public safety is already met by the factors which statutorily disqualify certain offenders from resentencing.

We disagree. As noted, the purpose of the Three Strikes Reform Act plainly demonstrates the public safety was placed *above* any cost savings resulting from its passage. As its name implies, the Three Strikes Reform Act was intended to reform the three strikes law. As this court explained in *People v. Blakely* (2014) 225 Cal.App.4th 1042, “[t]he purpose of the three strikes law has been variously stated as being “‘to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses’” [citation] and ‘to promote the state’s compelling interest in the protection of public safety and in punishing recidivism’ [citation]. Although the [Reform] Act ‘diluted’ the three strikes law somewhat [citation], ‘[e]nhancing public safety was a key purpose of the [Reform] Act.’” (*Id.* at p. 1054.)

The goals sought to be achieved by the Three Strikes Reform Act suggest cost savings would be achieved only from the release of low-risk and nonviolent inmates serving a third strike sentence, rather than by resentencing all but the most dangerous offenders—those offenders likely to commit a super strike offense. Significantly, neither the ballot materials nor the plain language of Proposition 36 suggests that all but the most

serious offenders would be entitled to resentencing under the act. In our view, it is unlikely the electorate understood that in permitting offenders with convictions for relatively minor drug- and theft-related offenses to be resentenced under Proposition 47, they were also amending Proposition 36, such that inmates with as many as seven prior strikes may be entitled to resentencing. Because applying Proposition 47's definition of dangerousness to Proposition 36 would frustrate the electorate's intent in enacting Proposition 36, we conclude the definition does not apply.

Even assuming the electorate did intend to so alter Proposition 36's definition of dangerousness, nothing within section 1170.18(c) suggests this new definition is to be retroactively applied to petitions under Proposition 36 that have already been decided and denied but are pending appeal, such as defendant's petition. Rather, the amendment would apply as of November 5, 2014, the date Proposition 47 went into effect.

Section 3 states, "No part of [the Penal Code] is retroactive, unless expressly so declared." There is, however, a narrow presumption of retroactivity under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). In *Estrada*, our Supreme Court stated the following:

"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. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Id.* at p. 745.)

As the court made clear, the presumption of retroactivity under *Estrada* applies to a statute lessening punishment for a particular criminal offense, rather than a particular criminal defendant. Proposition 47 does not automatically reduce the punishment of a petitioner previously convicted of felony offenses altered by the act. In fact, whether a

petitioner is ultimately granted relief under the initiative depends on the superior court's determination of whether resentencing the inmate would pose an unreasonable risk of danger to public safety. Thus, the narrow rule of retroactivity under *Estrada*, which applies to statutes lessening punishment for a criminal offense rather than a criminal offender, does not apply here.

The plain language of Proposition 47, the legislative analysis of the act, and the ballot materials are conspicuously silent as to whether the definition of dangerousness applies retroactively. (Voter Information Guide, Gen. Elec., *supra*, pp. 34-39.) Because the default rule under section 3 applies, we conclude Proposition 47's definition of "unreasonable risk of danger to public safety" does not retroactively apply to Proposition 36 petitions decided before the enactment of Proposition 47.

II. The trial court did not abuse its discretion in denying defendant's petition for resentencing under Proposition 36.

Defendant asserts the trial court abused its discretion by finding resentencing defendant would pose an unreasonable risk of danger to public safety. We disagree.

As noted, under Proposition 36, statutorily eligible petitioners "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).) In exercising its discretion, subdivision (g) of section 1170.126 permits the court to consider the following: "(1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety."

When reviewing a lower court's discretionary acts, we reverse only if "the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72; see *People v. Carmony* (2004) 33 Cal.4th 367, 377

[“[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it”].) Here, the record provides us with ample grounds for concluding the trial court’s decision was within the bounds of reason.

Defendant’s probation report bears out a lengthy criminal history, including 19 adult convictions and seven prior strike convictions. He has spent most of his adult life in prison.

While defendant’s most serious offenses are remote in time, including his act of shooting a store clerk in the head and firing a gun at police, one of the incidents resulted in serious injuries to the victim. Perhaps most disturbing is defendant’s persistent unwillingness to admit responsibility for the commission of these offenses, even though he pleaded guilty to these crimes. When questioned about the shootings, defendant offered a version of events that made him appear less culpable. He denied shooting the store manager, and with respect to the incident where he fired a gun at two police officers, he claimed his gun accidentally discharged.

Significantly, defendant’s most serious offenses occurred while he was out of custody and while on probation or parole. While in custody, defendant has sustained numerous violations for lewd behavior. On nearly a dozen prior occasions, defendant was documented to have been masturbating in front of, or exposing his genitals to, female prison staff. On one occasion, he grabbed the buttocks of a female correctional officer, and during another incident, he masturbated in front of a prison nurse while she was taking his blood pressure. Some of his RVR’s indicate he positioned himself in the direct line of sight of female correctional officers while he was masturbating and made eye contact with them. His conduct, while remote in time, demonstrates a disturbing and predatory pattern of behavior. Moreover, defendant’s insistence that his prior acts were the result of the fact he was angry over his lengthy prison sentence is not credible.

Defendant committed similar acts of lewd behavior when he was incarcerated in 1979, 1986, 1988, and 1993—well before he began serving his third strike sentence.

Defendant was diagnosed with polysubstance dependence in 2013, although he is in institutional remission.⁵ He has also been diagnosed with paranoid schizophrenia and has a history of hearing voices, including “demon voices.” While defendant claims the voices tell him not to do bad things, he previously told prison staff the voices tell him “he [is] never getting out [of prison]” and that he should “kill himself.” Defendant admitted he had been hearing voices when he was found in a fighting stance against another inmate in 2012.

While defendant appears to be amenable to in-custody therapy, he expressed reluctance about attending therapy postrelease if he were required to do so. He indicated he would attend weekly therapy but “but [not] if [he] was pushed.” Defendant was not asked how he would manage his mental illness on a long-term basis if he were to be released.

Defendant has made positive changes while incarcerated, including attending Alcoholics Anonymous/Narcotics Anonymous, enrolling in academic courses, participating in therapy programs, and helping save an inmate from committing suicide. However, given his criminal history—including the violent nature of his prior offenses, the serious injury he inflicted upon the individual he shot, the length of time he has been in prison, his pattern of sexually deviant behavior while in custody, and his mental illness—defendant’s positive changes fail to persuade us that the trial court abused its discretion in determining resentencing him would pose an unreasonable risk of danger to public safety. We conclude the trial court did not abuse its discretion in denying defendant’s Proposition 36 petition for resentencing.

⁵Polysubstance dependence is a psychological addiction to being in an intoxicated state without a preference for one particular substance.

III. The trial court did not abuse its discretion in denying defendant’s petition for resentencing under Proposition 47.

In his final claim on appeal, defendant contends the trial court abused its discretion in denying his petition for resentencing under Proposition 47 because there is no evidence he is likely to commit a new super strike offense if resentenced. We disagree.

As noted, under Proposition 47, an “unreasonable risk of danger to public safety” means an unreasonable risk that the petitioner will commit a new violent felony,” referred to as a “super strike.” These offenses include the following:

“(I) A ‘sexually violent offense’ as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.

“(II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289.

“(III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.

“(IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.

“(V) Solicitation to commit murder as defined in Section 653f.

“(VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.

“(VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.

“(VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death.” (§ 667, subd. (e)(2)(C)(iv).)

With respect to Proposition 36 petitions for resentencing, the People bear the burden of establishing that an otherwise eligible defendant presents an unreasonable risk of danger to the public safety. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301.) The People must only prove facts from which the trial court

may reasonably conclude resentencing a defendant would pose an unreasonable risk of danger to public safety by a preponderance of the evidence. (*Id.* at p. 1305.) We apply this same standard to Proposition 47 petitions for resentencing.

In reviewing a trial court’s decision for an abuse of discretion, we are guided by two fundamental precepts.

“First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” [Citation.] Second, a “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony, supra*, 33 Cal.4th at pp. 376–377.)

Here, the superior court summarily denied defendant’s petition for resentencing. Although the court did not explain the basis for its ruling, the record demonstrates the court’s decision was based on its finding that resentencing defendant would pose an unreasonable risk of danger to public safety. The People specifically argued resentencing should be denied for three reasons: (1) defendant is likely to commit a “sexually violent offense” as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code; (2) defendant is likely to commit or attempt a homicide offense; and (3) defendant is likely to commit any serious and/or violent felony offense punishable in California by life imprisonment. Thus, we analyze whether the trial court’s finding of dangerousness was an abuse of discretion based on these three grounds.

First, the People contend defendant’s prior criminal behavior in 1986 when he grabbed the buttocks of a female correctional officer demonstrates he is at risk of committing a sexually violent offense if he were to be resentenced, specifically, lewd and lascivious within the meaning of section 288, subdivision (a). A section 288, subdivision

(a) offense involves lewd or lascivious conduct against a child under the age of 14 years old.

We agree with defendant. There is no evidence defendant is currently likely to commit a sexually violent offense if he is resentenced. At most, the record indicates there is only a possibility he will commit such an offense.

We are cognizant of the fact that had defendant been criminally prosecuted and convicted of his more egregious sexually deviant acts, he may have been required to register as a sex offender under section 290. Mandatory lifetime sex offender registration is required for a conviction for indecent exposure (§ 314). (§ 290, subd. (c); *People v. Honan* (2010) 186 Cal.App.4th 175.) Further, section 1170.18 provides: “The provisions of this section shall not apply to persons who have one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.” (*Id.*, subd. (i), italics added.) However, defendant was not criminally convicted for his prior acts, and his most recent act occurred nearly 10 years ago.

While defendant’s prior acts are disturbing, this evidence does not demonstrate he is *currently* at risk of committing a sexually violent offense. For example, there is no evidence in the record that defendant’s inappropriate behavior escalated in seriousness, that his prior acts were inextricably linked to his mental illness, nor is the nature of defendant’s prior acts alone sufficient for us to infer he is currently at risk of committing a sexually violent offense within the meaning of Section 6600 of the Welfare and Institutions Code.⁶

The only inference that can be drawn from the evidence is that defendant’s mental illness *may* be linked to his prior acts of lewd behavior. In 2003, defendant received a

⁶We note defendant was arrested for rape in 1977. Because this charge was subsequently dismissed and the arrest report relating to this incident could not be found, we make no inferences from his arrest.

rule violation for exposing his genitals. A prison mental health clinician wrote, “After review of medical records, consultation with EOP clinician, and interview with inmate it appears inmate’s mental condition may have contributed to behavior leading to RVR.” No conclusions can be drawn from this statement.

Contrary to defendant’s assertions, the People are not required to present doctors’ reports or evaluations to prove defendant is likely to commit a sexually violent offense if resentenced. Defendant contends the People should have submitted a report, such as a Static-99 psychological test, to support their claim defendant is likely to commit a sexually violent offense if released. A Static-99 test is administered for purposes of determining whether sexually violent predators who have served their full sentences should be recommitted. Proposition 47, on the other hand, is an act of lenity, intended to mitigate the harsh penalties associated with relatively minor offenses previously classified as felonies. Nothing within section 1170.18 suggests the trial court may conclude a petitioner is likely to commit a sexually violent offense only where the petitioner has previously been deemed a sexually violent predator. The standard by which the prosecution must prove facts supporting a finding of dangerousness is by a preponderance of the evidence, not beyond a reasonable doubt.

Second, the People contend if defendant is released he is likely to commit homicide or attempted homicide. Defendant’s prior strike offenses were extremely violent. We agree these acts are remote in time, but defendant has demonstrated no empathy for his victims, nor does he appear to comprehend the seriousness of these offenses. Indeed, defendant attempted to minimize his culpability as to both his prior incidents by claiming he did not shoot the store manager and by denying he intentionally shot at police.

Defendant asserts his denial of the shootings may be the product of “confusion, mistake, or a faulty memory” rather than dishonesty. However, his claim is not credible given the fact he pleaded guilty to these charges, his probation reports indicate he has

always denied committing the shootings, and in light of the fact defendant made many inconsistent, and presumably dishonest, claims in his testimony at his petition hearing. For example, defendant denied smoking marijuana despite testing positive for THC, he denied committing the more serious of his sexually deviant acts, and while he admitted some of his less serious acts, he also claimed they were the result of a witch hunt.

Notably, if the store clerk had died as a result of his injuries or if one of the police officers pursuing defendant had been struck when defendant fired his gun, defendant would likely have been statutorily disqualified from resentencing. We fail to see why his prior acts should be minimized even if they are remote in time because he fortuitously did not have a more accurate aim.

We also observe defendant was on parole when these acts and most of his other prior strikes were committed, which suggests he does not function well in an unstructured environment. Although he has incurred no rules violations for violent incidents while in prison, as recently as 2012, defendant was discovered in a fighting stance against another inmate. The RVR related to the incident notes the following finding by Dr. Lobenstein, dated November 2012: “The inmate’s mental health disorder does appear to contribute to the behavior that led to the RVR. Specifically, [defendant] has a long history of hearing voices. He [was] increasingly anxious prior to the day this RVR occurred and reports he was hearing voices and was anxious during this RVR.”

It is true this incident did not result in violence, but the incident demonstrates defendant’s willingness to engage in violence and supports the inference his mental illness may be linked to this incident. We, again, note there is no indication from the record as to how defendant plans to manage his mental illness long term.

Reasonable jurists could disagree as to whether defendant is likely to commit a new super strike offense if released into the community. While defendant asserts the trial court’s decision was based solely on convictions occurring more than 30 years ago, the

record demonstrates the court's finding of dangerousness was based on defendant's past crimes, his conduct while in prison, as well as his current mental health.

We may find an abuse of discretion only where there is no evidence in the record to support the trial court's decision (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1066), and here there is evidence to support the trial court's conclusion defendant is likely to commit a new violent felony within the meaning of section 667, subdivision (e)(2)(C)(iv), specifically, homicide or attempted homicide. Because we find no abuse of discretion on this basis, we do not reach the issue of whether an unreasonable risk of danger includes the risk that a petitioner with two or more prior strikes will commit any serious or violent offense.

DISPOSITION

The order is affirmed.

MCCABE, J.*

WE CONCUR:

HILL, P.J.

FRANSON, J.

*Judge of the Merced Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.