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

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREA DENISE IVORY,

Defendant and Appellant.

F068002

(Super. Ct. No. MCR08917)

**OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Joseph A. Soldani, Judge.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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**SEE CONCURRING OPINION**

The Three Strikes Reform Act of 2012 (hereafter Proposition 36 or the Act) created a postconviction release proceeding for third strike offenders serving indeterminate life sentences for crimes that are not serious or violent felonies. If such an inmate meets the criteria enumerated in Penal Code section 1170.126, subdivision (e), he or she will be resentenced as a second strike offender unless the court determines such resentencing would pose an unreasonable risk of danger to public safety.<sup>1</sup> (§ 1170.126, subd. (f); *People v. Yearwood* (2013) 213 Cal.App.4th 161, 168.)

After the Act went into effect, Andrea Denise Ivory (defendant), an inmate serving a term of 25 years to life following conviction of a felony that was not violent (as defined by § 667.5, subd. (c)) or serious (as defined by § 1192.7, subd. (c)), filed a petition for resentencing under the Act. Following a hearing, the trial court found defendant to be an unreasonable risk of danger to the public and denied the petition.

We conclude the trial court did not abuse its discretion by finding resentencing defendant would pose an unreasonable risk of danger to public safety. In so holding, we reject defendant's claims the prosecution failed to meet its burden of proof. We further hold recently enacted section 1170.18, subdivision (c) did not modify section 1170.126, subdivision (f). We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On April 23, 2001, Valley State Prison Correctional Officer Lee approached defendant, an inmate at the prison, and asked her to give him an item she had put in her jacket pocket. Defendant complied. The object contained individually wrapped bindles of a substance that weighed .20 grams and tested positive for black tar heroin. On July 9, 2001, defendant pled no contest to possession of a controlled substance in prison (§ 4573.6) and admitted having suffered two prior strike convictions. On August 6, 2001,

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise stated.

she was sentenced to 25 years to life in prison, with the term to run fully consecutive to one she was already serving.

On January 28, 2013, defendant filed a petition for resentencing under section 1170.126. She represented she was statutorily eligible for such relief. She asserted she had worked hard to rehabilitate herself and prepare for release back into the community. She submitted numerous letters acknowledging her expressed interest in various building-related training and apprentice programs; certificates of achievement regarding education and vocational training, and laudatory “chronos”; information on potential postrelease housing; letters acknowledging her interest in postrelease residential recovery programs;<sup>2</sup> and a handwritten relapse prevention plan. Defendant also submitted a “comprehensive accommodation chrono” (some capitalization omitted) approving her, in 2012, for a ground floor cell, bottom bunk, walker with seat, shower chair, and other items. The chrono limited defendant to job assignments not involving operating machinery, heights, driving, or culinary work. Defendant also submitted a memorandum from 2004, showing that she had been placed on total disability, as well as some disciplinary information from 2001 and 2002.

The People opposed the petition. They implicitly conceded defendant was not disqualified from resentencing under the Act, but argued she should not be resentenced because doing so would result in an unreasonable risk of danger to public safety.<sup>3</sup> The People pointed to defendant’s criminal record, which included six convictions (including

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<sup>2</sup> One of the letters merely acknowledged defendant’s interest in the program and gave further information. The other, from A New Way of Life Re-Entry Project, stated defendant was found “suitable per [her] request in needs for assistance in living a productive life,” and expressed hope the program would “have the chance to welcome [defendant] into [its] community ....”

<sup>3</sup> In their opposition, the People stated the burden of proof as preponderance of the evidence, and quoted case law indicating the inmate must pose a current danger to society.

the commitment offense) since 1988, three of which were robbery strike priors; the fact she committed new violent felonies every time she was released from custody; her extensive record of in-prison discipline and commission of new crimes (the People listed 20 disciplinary actions between March 1998 and April 2012 that involved mutual combat, threatening other inmates and staff, battery on staff, and drug offenses); and her lack of parole and employment plans and apparent drug problem, as evidenced by her use of cocaine as recently as 2011. The People submitted various discipline reports and findings in support of their opposition.

Defendant filed a written response to the People's opposition. She conceded she had numerous prior convictions, but asserted she only had three serious convictions, with the rest being primarily for property and drug offenses. She denied having a long or consistent history of convictions for violent crimes, noted her current conviction was for a nonviolent drug offense, and observed her strike convictions were all more than 15 years old. She reiterated she had completed numerous vocational and educational programs, and represented she had also attended several substance abuse programs and had worked with the Scared Straight program. Defendant represented she would testify concerning her disciplinary record at the hearing on the petition. As for parole plans, defendant represented she had been tentatively accepted into the New Way of Life reentry program, which would provide housing and educational programs for a year or longer, as well as assistance in maintaining sobriety and with job placement and training, and she also had family support that would assist her reentry into the community and with housing when the New Way of Life program was completed. Finally, defendant pointed to her health problems as being relevant to whether she posed an unreasonable risk of danger to public safety. She represented she (1) suffered from several debilitating conditions that left her restricted to a wheelchair and required her to wear braces on her ankles, knees, back, and wrist; (2) could stand with the use of a cane but it was painful to do so; (3) fell and broke her tailbone the last time she attempted to walk with a cane,

requiring her to take morphine for pain management; (4) had lung damage that required her to use a device to keep her upright so her lungs did not fill with liquid; (5) could not get in or out of bed without assistance; (6) had high blood pressure and severe water retention; (7) had seizures resulting from a brain injury she received while incarcerated; and (8) had burns over most of her body as a result of child abuse, the scar tissue from which further restricted her movements. Defendant argued her physical condition alone made it highly unlikely she would return to a life of crime, and that there were insufficient facts for the court to find she posed an unreasonable risk of danger to public safety.

The petition was heard on August 30, 2013.<sup>4</sup> Defense counsel emphasized defendant helped start the Scared Straight program at Valley State Prison for Women, a program seeking to help young people “not to get into the same situation she got into.” Counsel argued this showed the appreciation defendant now had for what she did in the past and its effect on people. Defendant represented she and others started the program in 2005 and actually got it operational in 2006; it continued until the prison was closed. Defense counsel also highlighted defendant’s health problems, and noted defendant probably would be restricted to a wheelchair for the rest of her life. He represented defendant “basically would not have the energy, the health, to commit any crimes if she wanted to.”

Defendant personally addressed the court. She acknowledged her prior record was not good, but stated she was not the person she was back then. She related that she had taken herself off “psych meds” because she could not function on them, and she signed paperwork for a plea bargain for something she did not understand. Two years later, she found out she had a life sentence, and she decided “to learn to become a person and not

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<sup>4</sup> Because the judge who imposed defendant’s third strike term was no longer on the bench, the matter was heard by a different judge. (See § 1170.126, subd. (j).)

just a number.” She acknowledged being angry and making mistakes, but reiterated she was not the same person. She denied being on any drugs, and stated her desire to help children by making a program of her own. She acknowledged she fought a lot in prison, but explained that “if you put an animal in a cage and you treat them like an animal and all they know how to be is an animal, they’re going to act like an animal.” She represented, however, that she had not gotten into a physical confrontation with anyone in the last 10 years.

The prosecutor noted that although defendant’s robberies were committed several years earlier, they happened in short succession, and defendant had been in prison continuously since then. Moreover, defendant had numerous violent offenses while in prison, even within the last five years. The prosecutor acknowledged defendant had been taking steps to make her life more positive, but expressed concern about such issues and the frequency with which they had occurred.

The court and counsel then went through the various disciplinary reports to ascertain those as to which defendant was found not guilty or guilty of a lesser violation, or as to which there was no disposition. The court then stated:

“All right. In this matter, I appreciate all of the information that was provided to the Court. I appreciate Ms. Ivory’s statement to the Court. It was articulate. And she’s indicated her desire to change and to be part of this society.

“The problem is, Ms. Ivory, our actions speak louder than our words....

“I looked at your original offenses, the one you did the 15 years on, and there is some information about what the Court said during the sentencing. But he concluded saying you’re unwilling or unable to conform your conduct so that people are not endangered. He said your conduct has continued in the sense it’s been ongoing for the last 12 years. Crime involves some kind of violence, plus one additional crime.

“Got to be some point, Ms. Ivory, where you cannot go out and simply prey on the public and continue to do that. You went from there to

prison. And while in prison, I'm looking at your record. And you acknowledge that you didn't do well in prison, you didn't follow the rules. There's a number of violations. Some of them are significant and some of them are recent in time.

"I understand that ... you have health issues, that you have done some positive things. But my concern is that all of these violations and in reading through these reports and what's purported that you said and how you said it, when I look at everything combined, the Court does have a concern.

"And I believe that based upon all of the information, your prior record, your violations in prison, your medical condition, and the things that you've done to improve yourself while in prison, I looked at the totality of all of that and I still come up with the conclusion that you are, at this point, an unreasonable risk of danger to the public.

"I notice that there's ... no violations since 2012 that are alleged. I don't know if somehow you've managed to come to a point where you're not committing any other violations, or I just don't have the updated [*sic*], but that's not ... a long enough time ... for the Court to determine you're no longer a risk, unreasonable risk of danger to the public. Just because of your history, how long it has gone on, how many violations you have, the number of those violations.... I'm going to deny your motion to be re-sentenced. I do find that you are, based upon the totality of the record, an unreasonable risk of danger to the public.

"Regarding your health circumstances, I understand that limits your ability, but I note the offense from which I quoted the court was an offense you were involved with others in where you sort of came out, got somebody's attention and then lured them to a place where other folks were involved. So I don't think it keeps you from committing those offenses if you want to.

"I'd encourage you to continue to do what you're doing, continue to be violation free. But at this point I just can't come to any other conclusion than you are an unreasonable risk or [*sic*] danger to the public.

## DISCUSSION

### I

#### The trial court did not err by denying defendant's petition for resentencing.

Defendant contends the trial court erred when it found resentencing her would pose an unreasonable risk of danger to public safety, and the prosecution failed to meet its burden of proof to support that finding. We disagree.

In order to be eligible for resentencing as a second strike offender under the Act, the inmate petitioner must satisfy the three criteria set out in subdivision (e) of section 1170.126.<sup>5</sup> (*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 989.) If the inmate satisfies all of these criteria, as did defendant, he or she “shall be resentenced [as a second strike offender] unless the court, in its discretion, determines that resentencing the [inmate] would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f).) In exercising this discretion, “the court may consider: [¶] (1) The [inmate'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 [inmate's] disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its

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<sup>5</sup> “An inmate is eligible for resentencing if: [¶] (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7. [¶] (2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12. [¶] (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.” (§ 1170.126, subd. (e).)

discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.” (*Id.*, subd. (g).)

The plain language of subdivisions (f) and (g) of section 1170.126 calls for an exercise of the sentencing court’s discretion. “‘Discretion is the power to make the decision, one way or the other.’ [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) “Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]’ [Citation.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; see *People v. Williams* (1998) 17 Cal.4th 148, 162 [abuse-of-discretion review asks whether ruling in question falls outside bounds of reason under applicable law and relevant facts].) “‘[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 ... will not be set aside on review.’” [Citation.]” (*People v. Carmony, supra*, 33 Cal.4th at pp. 376-377.)

“Because ‘all discretionary authority is contextual’ [citation], we cannot determine whether a trial court has acted irrationally or arbitrarily ... without considering the legal principles and policies that should have guided the court’s actions.” (*People v. Carmony, supra*, 33 Cal.4th at p. 377.) “An abuse of discretion is shown when the trial court applies the wrong legal standard. [Citation.]” (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.)

Under the clear language of section 1170.126, we review the trial court’s ultimate determination whether to resentence a petitioner for abuse of discretion. Of course, if there is no evidence in the record to support the decision, the decision constitutes an abuse of discretion. (See *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1066.) Thus, the

questions arise which party has the burden of producing such evidence, and to what degree of certainty, and what level of support — what standard of proof — is required for a trial court to rely on such evidence? (See *People v. Mower* (2002) 28 Cal.4th 457, 476.)

Division Three of the Second District Court of Appeal has stated that, where a court’s discretion under section 1170.126, subdivision (f) is concerned, the People bear the burden of proving “dangerousness” by a preponderance of the evidence. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301-1305 & fn. 25 (*Kaulick*); see Evid. Code, § 115.) That court determined this is so — and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny do not apply — because “dangerousness is not a factor which enhances the sentence imposed when a defendant is resentenced under the Act; instead, dangerousness is a hurdle which must be crossed in order for a defendant to be resentenced at all.” (*Kaulick, supra*, at p. 1303.)

We agree with *Kaulick* that the applicable standard is preponderance of the evidence.<sup>6</sup> This does not mean, however, that the trial court must apply that standard in making its ultimate determination whether to resentence a petitioner, or we must review that determination for substantial evidence.<sup>7</sup> Nor does it mean evidence of

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<sup>6</sup> We have previously discussed *Kaulick* in the context of the initial determination whether an inmate is eligible for resentencing under the Act. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1058, 1060-1061; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1033, 1039-1040.) Nothing we say here should be taken as disagreement with or modification of those opinions. We deal here with a different aspect of the retrospective portion of the Act and a subject not before us in our prior cases.

<sup>7</sup> The substantial evidence test applies to an appellate court’s review of findings made under the preponderance of the evidence standard. (*People v. Wong* (2010) 186 Cal.App.4th 1433, 1444.) Under that test, the appellate court reviews the record in the light most favorable to the challenged finding, to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could make the finding by a preponderance of the evidence. The appellate court “resolve[s] all conflicts in the evidence and questions of credibility in favor of the [finding], and ...

dangerousness must preponderate over evidence of rehabilitation in order for resentencing to be denied. Instead, taking into account the language of subdivisions (f) and (g) of section 1170.126, we conclude it means the People have the burden of establishing, by a preponderance of the evidence, facts from which a determination resentencing the petitioner would pose an unreasonable risk of danger to public safety can reasonably be made.<sup>8</sup> Stated another way, evidence showing a petitioner poses a risk of danger to public safety must be proven by the People by a preponderance. The reasons a trial court finds resentencing would pose an unreasonable risk of danger, or its weighing of evidence showing dangerousness versus evidence showing rehabilitation, lie within the court’s discretion. The ultimate determination that resentencing would pose an unreasonable risk of danger is a discretionary one. While the determination must be supported by record evidence established by a preponderance, the trial court need not itself find an unreasonable risk of danger by a preponderance of the evidence. (See *In re Robert L.*, *supra*, 21 Cal.App.4th at pp. 1065-1067 [discussing abuse of discretion and preponderance of evidence standards].)

Such an interpretation is consistent with California’s noncapital sentencing scheme.<sup>9</sup> Under the determinate sentencing law (DSL) as it existed prior to *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), “three terms of imprisonment [were]

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indulge[s] every reasonable inference the [trier of fact] could draw from the evidence. [Citation.]” (*Ibid.*)

<sup>8</sup> Courts and parties have assumed whatever burden exists is on the People. (E.g., *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075-1076; *Kaulick*, *supra*, 215 Cal.App.4th at p. 1301, fn. 25.) Such allocation is in harmony with the language of section 1170.126, subdivision (f) that an eligible petitioner “shall be resentenced ... unless” the court makes the required determination.

<sup>9</sup> The determination of the appropriate penalty in a capital case “is “essentially moral and normative ..., and therefore ... there is no burden of proof or burden of persuasion. [Citation.]” [Citation.]’ [Citations.]” (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1362.)

specified by statute for most offenses. The trial court’s discretion in selecting among [those] options [was] limited by section 1170, subdivision (b), which direct[ed] that ‘the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.’” (*People v. Black* (2007) 41 Cal.4th 799, 808, fn. omitted.) Trial courts had “broad discretion” to impose the lower or upper term instead of the middle term of imprisonment (*People v. Scott* (1994) 9 Cal.4th 331, 349), and generally were required by the statutes and sentencing rules to state reasons for their discretionary sentencing choices (*ibid.*). Such reasons had to be “supported by a preponderance of the evidence in the record” and reasonably related to the particular sentencing determination. (*Ibid.*; see former Cal. Rules of Court, rule 4.420(b).) Even after the DSL was reformed and amended in response to *Cunningham*, so as to eliminate judicial factfinding in selection of the appropriate term when three possible prison terms are specified by statute, establishment of facts by a preponderance of the evidence remains necessary with respect to certain discretionary sentencing decisions. (See *In re Coley* (2012) 55 Cal.4th 524, 557-558.)<sup>10</sup>

In *People v. Sandoval* (2007) 41 Cal.4th 825, 850-851, the California Supreme Court stated that, in making its discretionary sentencing choices post-*Cunningham*, “the trial court need only ‘state [its] reasons’ [citation]; it is not required to identify aggravating and mitigating factors, *apply a preponderance of the evidence standard*, or specify the ‘ultimate facts’ that ‘justify[] the term selected.’ [Citations.] Rather, the

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<sup>10</sup> After *Cunningham* concluded the DSL violated a defendant’s Sixth Amendment right to a jury trial (*Cunningham, supra*, 549 U.S. at p. 281), the Legislature amended section 1170 so that now “(1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle or lower term based on reasons he or she states.” (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.) Subdivision (b) of section 1170 states the court “shall select the term which, in the court’s discretion, best serves the interests of justice.”

court must ‘state in simple language the primary factor or factors that support the exercise of discretion.’ [Citation.]” (Italics added.)

We do not read the foregoing statement as suggesting the People bear no burden in a proceeding to determine whether a petitioner should be resentenced under the Act. Subdivision (g) of section 1170.126 contemplates the trial court’s consideration of *evidence*. It stands to reason *someone* must produce that evidence. Under Evidence Code section 115, “[b]urden of proof” means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.... [¶] Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”

However, the trial court’s ultimate determination when considering a petition for resentencing under section 1170.126 — whether resentencing the petitioner would pose an unreasonable risk of danger to public safety — is analogous to an evaluation of the relative weight of mitigating and aggravating circumstances. Such an evaluation “is not equivalent to a factual finding.” (*People v. Black, supra*, 41 Cal.4th at p. 814, fn. 4.) It follows, then, that the trial court need not apply a preponderance of the evidence standard, in that it need not find resentencing the petitioner would, more likely than not, pose an unreasonable risk of danger to public safety. (See *Kaulick, supra*, 215 Cal.App.4th at p. 1305, fn. 28 [preponderance standard means “more likely than not”].)

*Kaulick* found the prosecution bears the burden of establishing “dangerousness” by a preponderance of the evidence against a claim the *Apprendi* line of cases requires proof beyond a reasonable doubt. (*Kaulick, supra*, 215 Cal.App.4th at pp. 1301-1302.) As a result, it had no real occasion to address the interplay between the burden of proof and the trial court’s exercise of discretion as that issue is presented here, or to clarify whether the prosecution is required to establish “dangerousness” in the sense of *facts* upon which the trial court may base the ultimate determination resentencing a petitioner would pose an unreasonable risk of danger to public safety, or in the sense of establishing

that determination itself. Nevertheless, we believe it supports our interpretation. *Kaulick* stated, in part: “The maximum sentence to which Kaulick, and those similarly situated to him, is subject was, and shall always be, the indeterminate life term to which he was originally sentenced. While [the Act] presents him with an opportunity to be resentenced to a lesser term, *unless certain facts are established*, he is nonetheless still subject to the third strike sentence based on the facts established at the time he was originally sentenced. As such, *a court’s discretionary decision to decline to modify the sentence in his favor can be based on any otherwise appropriate factor (i.e., dangerousness), and such factor need not be established by proof beyond a reasonable doubt to a jury.*” (*Id.* at p. 1303, italics added.) The court further stated: “[I]t is the general rule in California that once a defendant is eligible for an increased penalty, the trial court, *in exercising its discretion* to impose that penalty, may rely on *factors established by a preponderance of the evidence.* [Citation.]” (*Id.* at p. 1305, italics added.)

Finally, *Kaulick* rejected the suggestion a trial court could determine resentencing a petitioner would pose an unreasonable risk of danger to public safety, yet still have the discretion to resentence that petitioner to a second strike term. (*Kaulick, supra*, 215 Cal.App.4th at pp. 1293-1294, fn. 12.) The court explained: “The language of ... section 1170.126, subdivision (f), states that the petitioner shall be resentenced *unless* the court finds an unreasonable risk of danger. It does not state that if the court finds an unreasonable risk of danger, it can nonetheless resentence the petitioner. In any event, the ballot arguments in support of Proposition 36 emphasized that the Act would not benefit “truly dangerous criminals.” [Citation.] It is impossible to believe that the voters intended to allow a court the discretion to resentence defendants whose resentencing that court had already found would present an unreasonable risk of danger.” (*Ibid.*)

We concur with *Kaulick*’s rejection of the argument. Nevertheless, it seems to us that if the prosecution had the burden of proving *the ultimate issue* in a resentencing

proceeding, a trial court necessarily would be divested of its discretion to resentence in any case in which that burden of proof was met. Yet the language of section 1170.126, subdivision (f) expressly provides the petitioner shall be resented unless the court, in its discretion, makes a determination that resentencing would pose an unreasonable risk of danger. The statute does not say the petitioner shall be resented unless the People prove resentencing would pose such a risk.

To summarize, a trial court need not determine, by a preponderance of the evidence, that resentencing a petitioner would pose an unreasonable risk of danger to public safety before it can properly deny a petition for resentencing under the Act. Nor is the court's ultimate determination subject to substantial evidence review. Rather, its finding will be upheld if it does not constitute an abuse of discretion, i.e., if it falls within "the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) The facts or evidence upon which the court's finding of unreasonable risk is based must be proven by the People by a preponderance of the evidence, however, and are themselves subject to our review for substantial evidence. If a factor (for example, that the petitioner recently committed a battery, is violent due to repeated instances of mutual combat, etc.) is not established by a preponderance of the evidence, it cannot form the basis for a finding of unreasonable risk. (See *People v. Cluff* (2001) 87 Cal.App.4th 991, 998 [trial court abuses its discretion when factual findings critical to decision find no support in record]; cf. *People v. Read* (1990) 221 Cal.App.3d 685, 689-691 [where trial court erroneously determined defendant was statutorily ineligible for probation, reviewing court was required to determine whether trial court gave sufficient other reasons, supported by facts of case, for probation denial].)

Applying the foregoing principles to the trial court's ruling in the present case, we find no abuse of discretion. Several of defendant's assertions require discussion, however.

Defendant says the trial court’s treatment of her petition “was inconsistent with the statutory presumption that an eligible third-strike life prisoner will be resentenced as a second-strike defendant.” Parsing the trial court’s comments in denying the petition, defendant claims the court’s approach to the petition was that defendant was essentially asking the court for a favor. In reality, defendant argues, sentence reduction under the Act is now the rule, not the exception. To the extent defendant is claiming trial courts have only limited discretion to find unreasonable danger to public safety, we disagree.

Defendant points to the syntax of section 1170.126, subdivision (f). Relying on *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1141-1142, 1145 and its progeny (e.g., *People v. Murray* (2012) 203 Cal.App.4th 277, 282; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089), all of which deal with section 190.5, subdivision (b), defendant contends the “shall”/“unless” formulation employed in subdivision (f) of section 1170.126 establishes a strong presumption in favor of resentencing.<sup>11</sup>

The California Supreme Court recently disapproved the cases relied on by defendant. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1370, 1387.) Leaving aside constitutional questions raised by establishing a presumption in favor of life without parole for juveniles after the United States Supreme Court’s opinion in *Miller v. Alabama* (2012) 567 U.S. \_\_\_ [132 S.Ct. 2455], the state high court’s review of the text of section 190.5, subdivision (b) led it to conclude the syntax is ambiguous concerning any presumption. The court stated: “It is not unreasonable to read this text ... to mean that a court ‘shall’ impose life without parole unless ‘at the discretion of the court’ a sentence

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<sup>11</sup> Section 190.5, subdivision (b) provides, in pertinent part: “The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances ... has been found to be true ..., who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.”

of 25 years to life appears more appropriate. [Citation.] But it is equally reasonable to read the text to mean that a court may select one of the two penalties in the exercise of its discretion, with no presumption in favor of one or the other. The latter reading accords with common usage. For example, if a teacher informed her students that ‘you must take a final exam or, at your discretion, write a term paper,’ it would be reasonable for the students to believe they were equally free to pursue either option. The text of section 190.5[, subdivision ](b) does not clearly indicate whether the statute was intended to make life without parole the presumptive sentence.” (*People v. Gutierrez, supra*, 58 Cal.4th at p. 1371.)

The same example can be applied to subdivision (f) of section 1170.126. Thus, we do not agree with any suggestion resentencing to a second strike term is the generally mandatory disposition, subject only to circumscribed discretion to retain the indeterminate third strike term. A court considering whether to resentence an eligible petitioner under section 1170.126, subdivision (f) has circumscribed discretion in the sense it can only refuse to resentence if it finds that to do so would pose an unreasonable risk of danger to public safety on the facts of the particular case before it. This does not mean, however, its discretion is circumscribed in the sense it can only find dangerousness in extraordinary cases. To the contrary, it can do so in any case in which such a finding is rational under the totality of the circumstances.

Such a conclusion comports with the plain language of the statute. Moreover, a conclusion there is a strong presumption in favor of resentencing that will only be overcome in an occasional or extraordinary case, due to the trial court’s circumscribed discretion, would run directly contrary to the intent of the voters in passing the Act. (See *People v. Gutierrez, supra*, 58 Cal.4th at pp. 1371-1372 [examining legislative history and voter intent in attempt to resolve statutory ambiguity].) As we stated in *People v. Osuna, supra*, 225 Cal.App.4th at page 1036, “[e]nhancing public safety was a key purpose of the Act’ [citation].” Thus, although one purpose of the Act was to save

taxpayer dollars (*People v. Osuna, supra*, at p. 1037), “[i]t is clear the electorate’s intent was not to throw open the prison doors to *all* third strike offenders whose current convictions were not for serious or violent felonies, but *only* to those who were perceived as nondangerous or posing little or no risk to the public.” (*Id.* at p. 1038, second italics added.) Had voters intended to permit retention of an indeterminate term only in extraordinary or rare cases, they would have said so in subdivision (f) of section 1170.126, rather than employing language that affords courts broad discretion to find dangerousness. They also would not have afforded the court the power to consider any evidence it determined to be relevant to the issue as they did in subdivision (g)(3) of the statute. Voters could have, but did not, permit automatic resentencing, under any and all circumstances, of those eligible therefor. This demonstrates a recognition of two highly plausible scenarios: (1) Some inmates sentenced to indeterminate terms under the original version of the three strikes law for crimes not defined as serious or violent felonies may have started out not posing any greater risk of danger than recidivists who will now be sentenced to determinate terms as second strike offenders under the prospective provisions of the Act, but have become violent or otherwise dangerous while imprisoned, or (2) Enough time might have passed since some inmates committed their criminal offenses so that those offenses no longer make such inmates dangerous, but other factors do. Allowing trial courts to consider any evidence deemed relevant to the decision strongly indicates, particularly in light of the Act’s key purpose of enhancing public safety, that voters intended trial courts to find resentencing would pose an unreasonable risk of danger whenever it was rational to do so under the circumstances of a particular case, rather than to be able to make such a finding only in occasional or extraordinary cases.

Defendant contends the trial court mistakenly treated her petition as if the court were the parole board and the question was whether she was ready to have a parole date set. We disagree with defendant’s reading of the record, and do not believe it supports

the notion the court was confused concerning the nature of defendant's petition or the determination it was required to make. In our view, the trial court did not seem to believe defendant had multiple opportunities for resentencing, but rather was appropriately concerned with whether she currently was dangerous.<sup>12</sup>

Although we decline to decide how and to what extent parole cases inform the decision whether to resentence a petitioner under the Act or our review of such a decision, the proper focus in a resentencing proceeding under the Act, as in parole cases, is on whether the petitioner *currently* poses an unreasonable risk of danger to public safety. (Cf. *In re Shaputis* (2008) 44 Cal.4th 1241, 1254; *In re Lawrence* (2008) 44 Cal.4th 1181, 1214.) A trial court may properly deny resentencing under the Act based solely on immutable facts such as a petitioner's criminal history "*only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.]" (*In re Lawrence, supra*, at p. 1221.) "[T]he relevant inquiry is whether [a petitioner's prior criminal and/or disciplinary history], when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years [later]. This inquiry is ... an individualized one, and cannot be undertaken simply by examining the circumstances of [the petitioner's criminal history] in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citation.]' [Citation.]" (*In re Shaputis, supra*, at pp. 1254-1255.)

Defendant's true argument seems to be that the trial court came to the wrong conclusion in its assessment of whether she currently posed an unreasonable risk of danger to public safety. We conclude she has not borne her burden on appeal of

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<sup>12</sup> We similarly reject defendant's suggestion, which she supports by a selective reading of the court's comments, that it was as if her petition were a motion to dismiss a prior strike allegation under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and the burden was on her to demonstrate her entitlement to relief.

establishing the trial court’s ruling exceeds the bounds of reason. The court clearly took into consideration all the information before it. That information amply supported its decision to deny the petition.

## II

### **Section 1170.18, subdivision (c), enacted pursuant to Proposition 47, does not modify section 1170.126, subdivision (f).**

On November 4, 2014, voters enacted Proposition 47, “the Safe Neighborhoods and Schools Act” (hereafter Proposition 47). It went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) Insofar as is pertinent here, Proposition 47 renders misdemeanors certain drug- and theft-related offenses that previously were felonies or “wobblers,” unless they were committed by certain ineligible defendants. Proposition 47 also created a new resentencing provision — section 1170.18 — by which a person currently serving a felony sentence for an offense that is now a misdemeanor, may petition for a recall of that sentence and request resentencing in accordance with the offense statutes as added or amended by Proposition 47. (§ 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 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).)<sup>13</sup>

Hidden in the lengthy, fairly abstruse text of the proposed law, as presented in the official ballot pamphlet — and nowhere called to voters’ attention — is the provision at issue in the present appeal. Subdivision (c) of section 1170.18 provides: “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

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<sup>13</sup> Proposition 47 also created a process whereby eligible persons who have already completed their sentences may have the particular conviction or convictions designated as misdemeanors. (§ 1170.18, subds. (f), (g).)

of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.”  
Section 667, subdivision (e)(2)(C)(iv) lists the following felonies, sometimes called  
“super strike” offenses:

“(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.”

The question is whether section 1170.18, subdivision (c) now limits a trial court’s  
discretion to deny resentencing under the Act to those cases in which resentencing the  
defendant would pose an unreasonable risk he or she will commit a new “super strike”  
offense. Defendant says it does. The People disagree. We agree with the People.<sup>14</sup>

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<sup>14</sup> We solicited supplemental briefing concerning Proposition 47. Among the  
questions we asked counsel to answer were whether defendant met the criteria for  
resentencing under section 1170.18 and, if so, whether we needed to determine the  
applicability, if any, of section 1170.18, subdivision (c) to resentencing proceedings

“In interpreting a voter initiative ..., we apply the same principles that govern statutory construction. [Citation.]’ [Citation.] “The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]” [Citation.]” (*People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1014.) Thus, in the case of a provision adopted by the voters, “their intent governs. [Citations.]” (*People v. Jones* (1993) 5 Cal.4th 1142, 1146.)

To determine intent, “we look first to the words themselves. [Citations.]” (*People v. Superior Court (Cervantes)*, *supra*, 225 Cal.App.4th at p. 1014.) We give the statute’s words “a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language “in isolation.” [Citation.] Rather, we look to “the entire substance of the statute ... in order to determine the scope and purpose of the provision .... [Citation.]” [Citation.] That is, we construe the words in question “in context, keeping in mind the nature and obvious purpose of the statute ....’ [Citation.]” [Citation.] We must harmonize “the various parts of a statutory enactment ... by considering the particular clause or section in the context of the statutory framework as a whole.” [Citations.]’ [Citation.]” (*People v. Acosta* (2002) 29 Cal.4th 105, 112.) We “accord[] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided.... [S]tatutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.]” (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)

““When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.” [Citation.]’ [Citation.]” (*People v.*

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under section 1170.126. We are satisfied it is appropriate for us to reach the issue of applicability regardless of whether defendant might obtain resentencing under Proposition 47.

*Hendrix* (1997) 16 Cal.4th 508, 512.) On its face, “[a]s used throughout this Code,” as employed in section 1170.18, subdivision (c), clearly and unambiguously refers to the Penal Code, not merely section 1170.18 or the other provisions contained in Proposition 47. (See *People v. Bucchierre* (1943) 57 Cal.App.2d 153, 164-165, 166; see also *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1254-1255; *People v. Vasquez* (1992) 7 Cal.App.4th 763, 766.)

This does not mean, however, that the definition contained in section 1170.18, subdivision (c) must inexorably be read into section 1170.126, subdivision (f). (Cf. *Marshall v. Pasadena Unified School Dist.*, *supra*, 119 Cal.App.4th at p. 1255.) “The literal language of a statute does not prevail if it conflicts with the lawmakers’ intent .... [Citations.]” (*People v. Osuna*, *supra*, 225 Cal.App.4th at pp. 1033-1034.) “‘The apparent purpose of a statute will not be sacrificed to a literal construction.’ [Citation.]” (*Cossack v. City of Los Angeles* (1974) 11 Cal.3d 726, 733.) Rather, “the literal meaning of a statute must be in accord with its purpose.” (*People v. Mohammed* (2008) 162 Cal.App.4th 920, 927.) “[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, therefore, intent prevails over the letter of the law and the letter will be read in accordance with the spirit of the enactment. [Citation.]” (*In re Michele D.*, *supra*, 29 Cal.4th at p. 606; accord, *People v. Ledesma* (1997) 16 Cal.4th 90, 95.)

Thus, “we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]’ [Citation.] We also “refer to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.”

[Citation.]’ [Citation.]” (*People v. Osuna, supra*, 225 Cal.App.4th at p. 1034.) We consider “the consequences that will flow from a particular interpretation” (*Dyna-Med, Inc. v. Fair Employment & Housing Com., supra*, 43 Cal.3d at p. 1387), as well as “the wider historical circumstances” of the statute’s or statutes’ enactment (*ibid.*). “Using these extrinsic aids, we “select the construction that comports most closely with the apparent intent of the [electorate], with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.” [Citation.]’ [Citation.]” (*People v. Osuna, supra*, 225 Cal.App.4th at pp. 1034-1035.)

Proposition 47 and the Act address related, but not identical, subjects. As we explain, reading them together, and considering section 1170.18, subdivision (c) in the context of the statutory framework as a whole (see *People v. Acosta, supra*, 29 Cal.4th at p. 112; *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659; *In re Cindy B.* (1987) 192 Cal.App.3d 771, 781), we conclude its literal meaning does not comport with the purpose of the Act, and applying it to resentencing proceedings under the Act would frustrate, rather than promote, that purpose and the intent of the electorate in enacting both initiative measures (see *People v. Disibio* (1992) 7 Cal.App.4th Supp. 1, 5).

As is evidenced by its title, the Act was aimed solely at revising the three strikes law. That law, as originally enacted by the Legislature, was described by us as follows:

“Under the three strikes law, defendants are punished not just for their current offense but for their recidivism. Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses. [Citation.] The primary goals of recidivist statutes are: ‘... to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person’s most recent offense but also on the propensities he has demonstrated over a period of time during which

he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.’ [Citation.]

“By enacting the three strikes law, the Legislature acknowledged the will of Californians that the goals of retribution, deterrence, and incapacitation be given precedence in determining the appropriate punishment for crimes. Further, those goals were best achieved by ensuring ‘longer prison sentences and greater punishment’ for second and third ‘strikers.’” (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823-824.)<sup>15</sup>

A few months before the November 6, 2012, election, the California Supreme Court observed: “One aspect of the [three strikes] law that has proven controversial is that the lengthy punishment prescribed by the law may be imposed not only when ... a defendant [who has previously been convicted of one or more serious or violent felonies] is convicted of another serious or violent felony but also when he or she is convicted of any offense that is categorized under California law as a felony. This is so even when the current, so-called triggering, offense is nonviolent and may be widely perceived as relatively minor. [Citations.]” (*In re Coley, supra*, 55 Cal.4th at pp. 528-529.)

Clearly, by approving the Act, voters resolved this controversy in favor of strike offenders. Thus, one of the “Findings and Declarations” of the Act stated the Act would “[r]estore 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.” (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of proposed law, § 1, p. 105.)

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<sup>15</sup> The foregoing applies equally to the three strikes initiative measure that added section 1170.12 to the Penal Code. The following statement of intent preceded the text of the statute in Proposition 184, which was approved by voters on November 8, 1994: “‘It is the intent of the People of the State of California in enacting this measure 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.’” (See Historical and Statutory Notes, 50C West’s Ann. Pen. Code (2004 ed.) foll. § 1170.12, p. 239.)

Nowhere, however, do the ballot materials for the Act suggest voters intended essentially to open the prison doors to existing third strike offenders in all but the most egregious cases, as would be the result if the definition of “unreasonable risk of danger to public safety” contained in section 1170.18, subdivision (c) were engrafted onto resentencing proceedings under section 1170.126, subdivision (f). That voters did *not* intend such a result is amply demonstrated by the fact an indeterminate life term remains mandatory under the Act for a wide range of current offenses even if the offender does not have a prior conviction for a “super strike” offense (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)), and that an inmate is rendered ineligible for resentencing under section 1170.126 for an array of reasons beyond his or her having suffered such a prior conviction (§ 1170.126, subd. (e)(2)).

The Act clearly placed public safety above the cost savings likely to accrue as a result of its enactment. Thus, uncodified section 7 of the Act provides: “This act is an exercise of the public power of the people of the State of California *for the protection of the health, safety, and welfare of the people of the State of California*, and shall be liberally construed to effectuate those purposes.” (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), *supra*, text of proposed law, p. 110, original italics omitted, italics added.) As we explained in *People v. Osuna*, *supra*, 225 Cal.App.4th at page 1036, “Although the Act ‘diluted’ the three strikes law somewhat [citation], ‘[e]nhancing public safety was a key purpose of the Act’ [citation].”

In contrast, Proposition 47 — while titled “the Safe Neighborhoods and Schools Act” — emphasized monetary savings. The “Findings and Declarations” state: “The people of the State of California find and declare as follows: [¶] The people enact the Safe Neighborhoods and Schools Act to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment. This act ensures that

sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of proposed law, § 2, p. 70.) Uncodified section 15 of the measure provides: “This act shall be broadly construed to accomplish its purposes,” while uncodified section 18 states: “This act shall be liberally construed to effectuate its purposes.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, text of proposed law, p. 74.) Proposition 47 requires misdemeanor sentences for various drug possession and property offenses, unless the perpetrator has a prior conviction for a “super strike” offense or for an offense requiring sex offender registration pursuant to section 290, subdivision (c). (Health & Saf. Code, §§ 11350, subd. (a), 11357, subd. (a), 11377, subd. (a); §§ 459.5, subd. (a), 473, subd. (b), 476a, subd. (b), 490.2, subd. (a), 496, subd. (a), 666, subd. (b).) Section 1170.18 renders ineligible for resentencing *only* those inmates whose current offense would now be a misdemeanor, but who have a prior conviction for a “super strike” offense or for an offense requiring sex offender registration pursuant to section 290, subdivision (c). (§ 1170.18, subs. (a), (i).)

Nowhere in the ballot materials for Proposition 47 were voters given any indication that initiative, which dealt with offenders whose current convictions would now be misdemeanors rather than felonies, had any impact on the Act, which dealt with offenders whose current convictions *would still be felonies*, albeit not third strikes. For instance, the Official Title and Summary stated, in pertinent part, that Proposition 47 would “[r]equire[] resentencing for persons serving felony sentences for these offenses[, i.e., offenses that require misdemeanor sentences under the measure] unless court finds unreasonable public safety risk.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, official title and summary, p. 34.) In explaining what Proposition 47 would do, the Legislative Analyst stated: “This measure reduces penalties for certain offenders convicted of *nonserious and nonviolent property and drug crimes*. This measure also allows certain offenders *who have been previously convicted of such crimes* to apply for

reduced sentences.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35, italics added.) With respect to the resentencing provision, the Legislative Analyst explained:

“This measure allows offenders *currently serving felony sentences for the above crimes*[, i.e., grand theft, shoplifting, receiving stolen property, writing bad checks, check forgery, and drug possession] to apply to have their felony sentences reduced to misdemeanor sentences. In addition, certain offenders who have already completed a sentence for a felony that the measure changes could apply to the court to have their felony conviction changed to a misdemeanor. However, no offender who has committed a specified severe crime could be resentenced or have their conviction changed. In addition, 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. Offenders who are resentenced would be required to be on state parole for one year, unless the judge chooses to remove that requirement.” (*Id.* at p. 36, italics added.)

Similarly, the arguments in favor of and against Proposition 47 spoke in terms solely of Proposition 47, and never mentioned the Act. The Argument in Favor of Proposition 47 spoke in terms of prioritizing serious and violent crime so as to stop wasting prison space “on petty crimes,” stop “wasting money on warehousing people in prisons for nonviolent petty crimes,” and stop California’s overcrowded prisons from “incarcerating too many people convicted of low-level, nonviolent offenses.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, argument in favor of Prop. 47, p. 38.) The Rebuttal to Argument Against Proposition 47 reiterated these themes, and never suggested Proposition 47 would have any effect on resentencing under the Act. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, rebuttal to argument against Prop. 47, p. 39.) Although the Rebuttal to Argument in Favor of Proposition 47 asserted 10,000 inmates would be eligible for early release under the measure, and that many of them had prior convictions “for serious crimes, such as assault, robbery and home burglary” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, rebuttal to

argument in favor of Prop. 47, p. 38), there is no suggestion the early release provisions would extend to inmates whose current offenses remained felonies under the Act. The same is true of the discussion of resentencing contained in the Argument Against Proposition 47. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, argument against Prop. 47, p. 39.)

In light of the foregoing, we cannot reasonably conclude voters intended the definition of “unreasonable risk of danger to public safety” contained in section 1170.18, subdivision (c) to apply to that phrase as it appears in section 1170.126, subdivision (f), despite the former section’s preamble, “As used throughout this Code ....” Voters cannot intend something of which they are unaware.

We are cognizant one of the Act’s authors has taken the position Proposition 47’s definition of “unreasonable risk of danger” applies to resentencing proceedings under the Act. (St. John & Gerber, *Prop. 47 Jolts Landscape of California Justice System* (Nov. 5, 2014) Los Angeles Times <<http://www.latimes.com/local/politics/la-me-ff-pol-proposition47-20141106-story.html>> [as of Feb. 2, 2014].) Looking at the information conveyed to voters, however, this clearly was not *their* intent and so an author’s desire is of no import. (Cf. *People v. Garcia* (2002) 28 Cal.4th 1166, 1175-1176, fn. 5; *People v. Bradley* (2012) 208 Cal.App.4th 64, 83; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 30.)

We are also mindful “it has long been settled that ‘[t]he enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted’ [citation], ‘and to have enacted or amended a statute in light thereof’ [citation]. ‘This principle applies to legislation enacted by initiative. [Citation.]’ [Citation.]” (*People v. Superior Court (Cervantes)*, *supra*, 225 Cal.App.4th at p. 1015; accord, *In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11.) Thus, we presume voters were aware “unreasonable risk of danger to public safety,” as used in section 1170.126, subdivision (f), had been judicially construed as not being impermissibly vague, but as

nevertheless having no fixed definition. (*People v. Garcia* (2014) 230 Cal.App.4th 763, 769-770; *People v. Flores, supra*, 227 Cal.App.4th at p. 1075.) Because nowhere in the ballot materials for Proposition 47 was it called to voters' attention the definition of the phrase contained in section 1170.18, subdivision (c) would apply to resentencing proceedings under the Act, we simply cannot conclude voters intended Proposition 47 to alter the Act in that respect. Voters are not asked or presumed to be able to discern all potential effects of a proposed initiative measure; this is why they are provided with voter information guides containing not only the actual text of such a measure, but also a neutral explanation and analysis by the Legislative Analyst and arguments in support of and in opposition to the measure. As we have already observed, none of those materials so much as hinted that Proposition 47 could have the slightest effect on resentencing under the Act. (Cf. *Marshall v. Pasadena Unified School Dist., supra*, 119 Cal.App.4th at pp. 1255-1256 [legislative history of enactment included information bill would add definition of particular term to Public Contract Code].)<sup>16</sup>

We are asked to infer an intent to extend section 1170.18, subdivision (c)'s definition to proceedings under section 1170.126 because the phrase in question only appears in those sections of the Penal Code. We cannot do so. The only resentencing mentioned in the Proposition 47 ballot materials was resentencing for inmates whose current offenses would be reduced to *misdemeanors*, not those who would still warrant *second strike felony terms*. There is a huge difference, both legally and in public safety risked, between someone with multiple prior serious and/or violent felony convictions whose current offense is (or would be, if committed today) a misdemeanor, and someone

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<sup>16</sup> For the same reasons, we reject any suggestion the definition contained in section 1170.18, subdivision (c) was intended to clarify the true meaning of "unreasonable risk of danger to public safety" as used in section 1170.126, subdivision (f). (Cf. *Re-Open Rambla, Inc. v. Board of Supervisors* (1995) 39 Cal.App.4th 1499, 1511; *In re Connie M.* (1986) 176 Cal.App.3d 1225, 1238.)

whose current offense is a felony. Accordingly, treating the two groups differently for resentencing purposes does not lead to absurd results, but rather is eminently logical.

We recognize “[i]t is an established rule of statutory construction . . . that when statutes are *in pari materia* similar phrases appearing in each should be given like meanings. [Citations.]” (*People v. Caudillo* (1978) 21 Cal.3d 562, 585, overruled on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, 229, 237, fn. 6 & disapproved on another ground in *People v. Escobar* (1992) 3 Cal.4th 740, 749-751 & fn. 5; see *Robbins v. Omnibus R. Co.* (1867) 32 Cal. 472, 474.) We question whether Proposition 47 and the Act are truly *in pari materia*: That phrase means “[o]n the same subject; relating to the same matter” (Black’s Law Dict. (9th ed. 2009) p. 862), and the two measures (albeit with some overlap) address different levels of offenses and offenders. In any event, “canons of statutory construction are merely aids to ascertaining probable legislative intent” (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 521, fn. 10); they are “mere guides and will not be applied so as to defeat the underlying legislative intent otherwise determined [citation]” (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*, *supra*, 43 Cal.3d at p. 1391).

The Act was intended to reform the three strikes law while keeping intact that scheme’s core commitment to public safety. Allowing trial courts broad discretion to determine whether resentencing an eligible petitioner under the Act “would pose an unreasonable risk of danger to public safety” (§ 1170.126, subd. (f)) clearly furthers the Act’s purpose. Whatever the wisdom of Proposition 47’s policy of near-universal resentencing where *misdemeanants* are concerned — and “[i]t is not for us to gainsay the wisdom of this legislative choice” (*Bernard v. Foley* (2006) 39 Cal.4th 794, 813) — constraining that discretion so that all but the worst *felony* offenders are released manifestly does not, nor does it comport with voters’ intent in enacting either measure.

Accordingly, Proposition 47 has no effect on defendant’s petition for resentencing under the Act. Defendant is not entitled to a remand so the trial court can redetermine

defendant’s entitlement to resentencing under the Act utilizing the definition of “unreasonable risk of danger to public safety” contained in section 1170.18, subdivision (c).<sup>17</sup>

**DISPOSITION**

The judgment is affirmed.

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DETJEN, J.

I CONCUR:

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LEVY, Acting P.J.

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<sup>17</sup> Recently, the Third District Court of Appeal held section 1170.18, subdivision (c)’s definition of “unreasonable risk of danger to public safety” does not apply retroactively to defendants whose petitions for resentencing under the Act were decided before the effective date of Proposition 47. (*People v. Chaney* (2014) 231 Cal.App.4th 1391, 1395-1396, petn. for review pending, petn. filed Jan. 8, 2015.) *Chaney* did not decide whether Proposition 47’s definition applies prospectively to such petitions. (*Chaney, supra*, at p. 1397, fn. 3.) Were we to conclude section 1170.18, subdivision (c) modifies section 1170.126, subdivision (f), we would agree with *Chaney* that it does not do so retroactively. We believe, however, that a finding of nonretroactivity inexorably leads to the possibility of prospective-only application, and that prospective-only application of Proposition 47’s definition to resentencing petitions under the Act would raise serious, perhaps insurmountable, equal protection issues. “Mindful of the serious constitutional questions that might arise were we to accept a literal construction of the statutory language, and of our obligation wherever possible both to carry out the intent of the electorate and to construe statutes so as to preserve their constitutionality [citations]” (*People v. Skinner* (1985) 39 Cal.3d 765, 769), we rest our holding on the reasoning set out in our opinion, *ante*.

PEÑA, J.,

I concur in the judgment and the majority opinion with the exception of part II. I agree defendant Andrea Denise Ivory may not take advantage of Proposition 47's<sup>1</sup> newly enacted definition of "unreasonable risk of danger to public safety," as provided in Penal Code section 1170.18, subdivision (c) (1170.18(c)). I do so not because there is any ambiguity in the language used in section 1170.18(c) or the notion that the statute does not mean what it says, i.e., that the new definition applies "throughout this Code." Rather, in my view, there is no indication the electorate, in enacting section 1170.18(c), intended it to apply retroactively to resentencing determinations under Proposition 36, the Three Strikes Reform Act of 2012 (the Act).

**I. After November 4, 2014, the definition of "unreasonable risk of danger" in Section 1170.18(c) applies throughout the Penal Code**

Section 1170.18(c) provides: "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."

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(c) cannot apply to defendant. This is the only inquiry we must make to resolve the issue of whether the definition in section 1170.18(c) applies to defendant. However, the majority has opted to determine whether the new definition applies to any resentencing provisions under the Act, past, present, or future. I respectfully disagree with the majority's analysis and conclusion on this broader issue.

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<sup>1</sup>The Safe Neighborhood and Schools Act (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014)).

““When construing a statute, we must “ascertain the intent of the Legislature so as to effectuate the purpose of the law.”” [Citations.] “[W]e begin with the words of a statute and give these words their ordinary meaning.’ [Citation.] ‘If the statutory language is clear and unambiguous, then we need go no further.’ [Citation.] If, however, the language supports more than one reasonable construction, we may consider ‘a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.’ [Citation.] Using these extrinsic aids, we ‘select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.’ [Citation.]” (*People v. Sinohui* (2002) 28 Cal.4th 205, 211-212.)

Where the statutory language is so clear and unambiguous, there is no need for statutory construction or to resort to legislative materials or other outside sources.

(*Quarterman v. Kefauver* (1997) 55 Cal.App.4th 1366, 1371.) Absent ambiguity, it is presumed the voters intend the meaning apparent on the face of an initiative measure, and the courts may not add to the statute or rewrite it to conform to a presumed intent not apparent in its language. (*People v. ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 301.)

In determining whether the words enacted here are unambiguous, we do not write on a blank slate. For example, in *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1255, the court stated there “is nothing ambiguous about the phrase ‘as used in this code.’” It held the definition of “Emergency, as used in this code” applied to the entire Public Contract Code, and it was not limited to a particular chapter, article, or division of that code. Also, in *People v. Bucchierre* (1943) 57 Cal.App.2d 153, 166, the court held: “The words ‘as in this code provided’ (Penal Code, § 182) refer to the Penal Code.”

In a similar vein, the court in *People v. Leal* (2004) 33 Cal.4th 999, 1007-1008, applied the plain meaning rule as follows:

“The statutory language of the provision defining ‘duress’ in each of the rape statutes is clear and unambiguous. The definition of ‘duress’ in both the rape and spousal rape statutes begins with the phrase, ‘As used in this section, “duress” means ....’ (§§ 261, subd. (b), 262, subd. (c).) This clear language belies any legislative intent to apply the definitions of ‘duress’ in the rape and spousal rape statutes to any other sexual offenses.

“Starting from the premise that in 1990 the Legislature incorporated into the rape statute a definition of ‘duress’ that already was in use for other sexual offenses, defendant argues that the Legislature must have intended its 1993 amendment of the definition of ‘duress’ in the rape statute, and the incorporation of this new definition into the spousal rape statute, to apply as well to other sexual offenses that use the term ‘duress.’ Defendant observes: ‘The legislative history does not suggest any rationale for why the Legislature would want its 1993 amendment of the definition of “duress” to apply only to rape so that it would have one meaning when the rape statutes use the phrase “force, violence, duress, menace, or fear of immediate and unlawful bodily injury” but another, much more expansive meaning when the identical phrase is used in the statutes defining sodomy, lewd acts on a child, oral copulation and foreign object rape.’

“But the Legislature was not required to set forth its reasons for providing a different definition of ‘duress’ for rape and spousal rape than has been used in other sexual offenses; it is clear that it did so. ‘When “statutory language is ... clear and unambiguous there is no need for construction, and courts should not indulge in it.” [Citations.] The plain meaning of words in a statute may be disregarded only when that meaning is “repugnant to the general purview of the act,’ or for some other compelling reason ....” [Citations.] [Citation.] As we said in an analogous situation: ‘It is our task to construe, not to amend, the statute. “In the construction of a statute ... the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted ....” [Citation.] We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.’ [Citation.]”

The majority pays lip service to the plain meaning rule and then ignores it. While acknowledging the language used is unambiguous, it nonetheless engages in statutory construction to determine whether the electorate really intended to say what it actually enacted. The end result is a rewriting of the statute so that it comports with the majority’s

view of what the voters really intended. The majority has rewritten section 1170.18(c) so that it now states: “As used in this section only, ‘unreasonable risk of danger to public safety’ means ....” The majority does so without providing a compelling reason to do so and without showing the plain language used has a “meaning [that] is “repugnant to the general purview of the act.”” ( *People v. Leal, supra*, 33 Cal.4th at p. 1008.) Because the Act had not previously defined the phrase “unreasonable risk of danger to public safety,” the definition in section 1170.18(c) cannot be repugnant or contradictory to the Act, nor does the majority claim the definition is repugnant to the general purview of Proposition 47. For these reasons, I respectfully disagree with the majority on this part of the opinion.

## **II. Section 1170.18(c) has no application to defendant’s resentencing under the Act**

I do concur in the result because there is nothing in Proposition 47 to indicate the definition enacted under section 1170.18(c) is to be applied retroactively to defendant under the Act.

I begin my analysis with section 3 of the Penal Code, which provides that “[n]o part of it is retroactive, unless expressly so declared.” “Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent. When the Legislature has not made its intent on the matter clear,” section 3 provides the default rule. ( *People v. Brown* (2012) 54 Cal.4th 314, 319.) Proposition 47 is silent on the question of whether it applies retroactively to proceedings under the Act. The analysis of Proposition 47 by the legislative analyst and the arguments for and against Proposition 47 are also silent on this question. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) pp. 34-39.) Because the statute contains no express declaration that section 1170.18(c) applies retroactively to proceedings under the Act, and there is no clearly implied intent of retroactivity in the legislative history, the default rule applies.

Defendant cites *In re Estrada* (1965) 63 Cal.2d 740 to argue retroactive application.

In *Estrada*, the 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. 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.” (*In re Estrada, supra*, 63 Cal.2d at p. 745.)

One may argue that under the *Estrada* case, unless there is a “savings clause” providing for prospective application, a statute lessening punishment is presumed to apply to all cases not yet reduced to a final judgment on the statute’s effective date. (*In re Estrada, supra*, 63 Cal.2d at pp. 744-745, 747-748.) However, the *Estrada* case has been revisited by our Supreme Court on several occasions. In *People v. Brown, supra*, 54 Cal.4th at page 324 the court stated: “*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in [Penal Code] 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.” “The holding in *Estrada* was founded on the premise that “[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.”” (*Id.* at p. 325.) In *Brown*, the court did not apply the *Estrada* rule because “a statute increasing the rate at which prisoners may earn credits for good behavior 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.” (*People v. Brown, supra*, at p. 325.)

Similarly here, *Estrada* does not control because applying the definition of “unreasonable risk to public safety” in Proposition 47 to petitions for resentencing under the Act does not reduce punishment for a particular crime. Instead, the downward modification of a sentence authorized by the Act is dependent not just on the current offense but on any number of unlimited factors related to the individual offender, including criminal conviction history, disciplinary and rehabilitation records, and “[a]ny other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.” (Pen. Code, § 1170.126, subd. (g)(3).)

Because section 1170.18(c)’s definition of “unreasonable risk of danger to public safety” does not apply retroactively to the Act, the sentencing court applied the correct standard in exercising its discretion to not resentence defendant.<sup>2</sup> Since defendant has failed to show an abuse of that discretion, I concur in the majority’s affirmance of the judgment.

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PEÑA, J.

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<sup>2</sup>Recently in *People v. Chaney* (2014) 231 Cal.App.4th 1391, the Third District Court of Appeal held the definition of “unreasonable risk of danger to public safety” as provided in section 1170.18(c) does not apply retroactively. I agree.