IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **LEWIS JENKINS,** **Defendant and Appellant.**	**A138139** **(Solano County Superior Court No. VCR153619)**

APPELLANT'S SUPPLEMENTAL BRIEF ON PROPOSITION 47

Appeal From The Judgment Of The Superior Court Of The State Of California For Solano County

Hon. Mike Nail Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE RULES AND STATUTES

California Rules of Court

Penal Code

Welfare and Institutions Code

OTHER AUTHORITIES

Statutes and Ballot Initiatives

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INTRODUCTION

On November 4, 2014, the California electorate enacted Proposition 47, the "Safe Neighborhoods and Schools Act," by a vote of approximately 58.5% to 41.5%.[1] The new initiative reduces various theft and drug felonies to misdemeanors and also establishes a resentencing mechanism for inmates currently in custody on such offenses. Most significantly for purposes of this *Proposition 36* appeal, Proposition 47 parallels and interlocks with Proposition 36. *The newly-adopted proposition redefines the "danger to public safety" standard governing resentencing petitions under both initiatives*.

> *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

[1] Concurrently with this supplemental brief, Lewis Jenkins is filing a motion for judicial notice of Proposition 47 and its ballot materials, including the text of the initiative (Ex. A), the Legislative Analyst's Summary (Ex. B), and the ballot arguments (Ex. C).

> section 667. (New Penal Code § 1170.18(c) (emphasis added) (enacted by Prop. 47, § 14).)[2]

By making the new definition applicable to that term ("unreasonable risk of danger, etc.") "as used throughout this Code," Proposition 47 unquestionably applies to the identical term governing the dangerousness determination under section 1170.126(f), the Prop. 36 resentencing mechanism, as well as to section 1170.18, the felony-to-misdemeanor resentencing mechanism established by Prop. 47.

By its cross-reference to section 667(e)(2)(C)(iv), the new enactment dramatically limits the dangerousness exceptions to resentencing under both sections 1170.18 and 1170.126. A court may deny resentencing only if it finds an unreasonable risk that the inmate will commit homicide or attempted homicide, sexual assault or molestation, or one of a handful of other egregious violent offenses (e.g., possession of a weapon of mass destruction, assault with a machine gun on a peace officer).

Finally, because both sections 1170.18 and 1170.126 are *retrospective, remedial* mechanisms to reduce sentences which the electorate has determined are disproportionate, the new dangerousness definition necessarily applies to Lewis Jenkins' currently pending Prop. 36 appeal. Because the trial court did not have the benefit of that definition and Jenkins could not possibly be deemed to pose a risk of one of the extreme offenses enumerated in section 667(e)(2)(C)(iv), that denial cannot stand.

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[2] All statutory references are to the Penal Code, unless otherwise indicated. References to Proposition 47 (including the new statutes it enacts, such as section 1170.18) are to the text of initiative from the Secretary of State's web site (Exhibit A to the accompanying Motion for Judicial Notice).

PROPOSITION 47'S NARROWING DEFINITION OF "UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY" APPLIES TO LEWIS JENKINS' PENDING APPEAL OF THE DENIAL OF HIS SECTION 1170.126 PETITION. THIS COURT MUST REMAND THE MATTER FOR RECONSIDERATION UNDER THE NEW DEFINITION.

A. Overview of Proposition 47.

In November 2012, the California voters adopted Proposition 36, the "Three Strikes Reform Act." Proposition 36 reduced "third strike" sentences going forward, by providing for "second strike" determinate terms, rather than "third strike" life terms, for most cases in which the current offense is not "serious or violent" (subject to exceptions not relevant here). It also established a retrospective mechanism, section 1170.126, for an inmate currently serving such a term to seek resentencing, subject to an exception for those inmates found to pose "an unreasonable risk of danger to public safety."

Two years after Proposition 36, at the just-concluded November 4, 2014, election, the voters have enacted a new far-reaching sentencing reform initiative, Proposition 47, the "Safe Neighborhoods and Schools Act." Proposition 47 both parallels and interlocks with Proposition 36. Proposition 47 prospectively reduces many theft and drug possession offenses from felonies (or "wobblers") to straight misdemeanors. Among other such reductions, the initiative provides that, "[n]ot withstanding Section 487 or any other provision of law defining grand theft," a theft conviction shall qualify as a felony *only* if the value of the stolen property exceeds $950. (New § 490.2(a) (added by Prop. 47, § 8).)[3]

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[3] An exception allows felony treatment if the defendant has a previous conviction for one of the offenses listed in section 667(e)(2)(C)(iv) or an offense requiring sex offender registration. The section 667(e)(2)(C)(iv) list

Much like Prop. 36, the new initiative also establishes a retrospective resentencing mechanism for inmates to seek reduction of felony sentences for theft and drug possession offenses to misdemeanors. (New § 1170.18 (added by Prop. 47, § 14).)[4] However, a court may deny resentencing if it finds an inmate would pose an "unreasonable risk of danger to public safety." (§ 1170.18(b).) That, of course, is the identical dangerousness standard governing Proposition 36's mechanism for reduction of third-strike to second-strike sentences, section 1170.126(f). Section 1170.18(b) also includes the identical list of factors which a "court may consider" in making that determination. (Compare 1170.126(g).) However, as discussed fully in Part B, section 1170.126(c) also establishes an explicit and very narrow definition of "unreasonable risk of danger to public safety," "as used throughout this Code."

Proposition 47's "Findings" and "Intent" sections (Prop. 47, §§ 2, 3) and its supporting ballot arguments further illuminate its overall purpose. Proposition 47 was enacted "to ensure that prison spending is focused on violent and serious offenses" and to retain severe sentences "for people convicted of dangerous crimes like murder, rape, and child molestation." (Prop. 47, § 2.) The ballot arguments similarly state its remedial purpose of

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of offenses also plays a crucial role in Proposition 47's new definition of "unreasonable risk of danger to public safety," as discussed in Part B.

[4] Lewis Jenkins' underlying 2000 crime of "theft from the person" (§ 487(c)) would constitute only a misdemeanor under Proposition 47, because the value of the stolen property ($22) was far below $950. (New § 490.2(a).) Consequently, Jenkins is eligible to file a section 1170.18 petition to reduce his underlying offense to a misdemeanor. However, because that remedy will require the filing of a new superior court petition, under section 1170.18, Jenkins will confine this brief to the effect of Proposition 47on his pending appeal from the denial of his section 1170.126 petition.

reducing the population of "California's overcrowded prisons" and "focus[ing] law enforcement dollars on violent and serious crime while providing new funding for education and crime prevention programs that will make us all safer." (Motion for Judicial Notice, Ex. C: Argument in Favor of Proposition 47.)

B. Proposition 47's Definition of "Unreasonable Risk of Danger to Public Safety," "As Used Throughout this Code," Necessarily Governs the Identical Section 1170.126 Standard.

Like resentencing under the Prop. 36 statute, section 1170.126(f), Proposition 47's new mechanism requires resentencing – reduction of the former felony sentence to misdemeanor treatment – subject to an exception where the court finds the inmate would pose "an unreasonable risk of danger to public safety." (§ 1170.18(b).) Unlike Proposition 36, however, **Proposition 47 also promulgates an explicit and very narrow definition of that term and makes it applicable to resentencing petitions under both initiatives:**

> *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. (New § 1170.18(c) (emphasis added).)

The cross-reference is to a subdivision of the Three Strikes statute, section 667, *as amended by Proposition 36 in 2012*. Specifically, section 667(e)(2)(C)(iv) is the list of extreme violent crimes – sometimes called "super strikes" or "super priors" – which will subject a new offender to a third-strike life sentence (§ 667(e)(2)) and will render an inmate ineligible to seek resentencing (§ 1170.126(e)(3)), even if the current commitment offense is not a serious or violent felony:

> (I) A "sexually violent offense" as defined in [Welf. & Inst. Code § 6600(b)].
> (II) Oral copulation with a child ... under 14 ... who is more than 10 years younger than [defendant] as defined by [§] 288a, sodomy with [a child] under 14 years ... and more than 10 years younger than [defendant] as defined by [§] 286, or sexual penetration with [a child] under 14 ... who is more than 10 years younger than [defendant] as defined by [§] 289.
> (III) A lewd or lascivious act involving a child under 14 years of age, in violation of [§] 288.
> (IV) Any homicide [or] ... attempted homicide ... in [§§] 187 to 191.5....
> (V) Solicitation to commit murder as defined in [§] 653f.
> (VI) Assault with a machine gun on a peace officer or firefighter, as defined in [§ 245(d)(3)]....
> (VII) Possession of a weapon of mass destruction, as defined in [§ 11418(a)(1)].
> (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death. (§ 667(e)(2)(C)(iv).)

By incorporating the section 667(e)(2)(C)(iv) list of offenses into the definition of "danger to public safety," section 1170.18(c) plainly limits that term to an "unreasonable risk" of commission of one of those egregious violent crimes. That list consists of specified sexual assaults and molestation offenses ((I), (II) & (III)), homicide and attempted homicide ((IV & V)), and a handful of other crimes of extreme violence, such as machine gun assault on a peace officer ((VI)), possession of a weapon of mass destruction ((VII))), and miscelleneous offenses "punishable by life" ((VIII)) (such as kidnap-for-robbery (§ 207) or aggravated mayhem (§ 205)). That discrete set of extreme crimes is much more narrow than the statutory catalogs of "serious felonies" and "violent felonies," which qualify as "strikes." (Compare §§ 1192.7(c), 667.5(c).)

By tethering the dangerousness standard to the section 667(e)(2)(C)(iv)

list, rather than "serious" or "violent" felonies generally, Proposition 47 provides that a court may only deny resentencing to an eligible inmate if it finds "an unreasonable risk" that he will commit one of those egregious offenses. A more generalized risk of recidivism or even of violent recidivism will not satisfy that standard and will not permit a court to deny resentencing. Thus, a perceived risk that the inmate might commit some other felony, such as robbery or burglary, would not come within that definition and would not allow a court to deny resentencing.[5]

It is equally clear that the section 1170.18(c) definition of "unreasonable risk of danger to public safety" applies not only to that statute's mechanism for reduction of theft and drug possession felonies to misdemeanors, but also to the section 1170.126(f) standard for relief from third-strike sentences. By its express terms, section 1170.18(c)'s definition governs that term "as used throughout this Code." That broad application to the rest of the Penal Code necessarily includes section 1170.126(f), which employs the identical term as the dispositive standard for an eligible third-strike inmate's resentencing petition. Indeed, section 1170.126(f) (added by Prop. 36) represents the model for Proposition 47's adoption of that same term.

The drafters of Prop. 47 have taken the additional steps of adding an explicit and very narrow definition of that formulation and, most crucially for

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[5] The particularity of the section 667(e)(2)(C)(iv) list underscores the narrowing function of its incorporation in the section 1170.18(c) dangerousness definition. For example, any assault with a deadly weapon qualifies as a serious felony and thus as a "strike." (§ 1192.7(c)(31).) But the risk of some other kind of felony assault on a police officer would not support a "danger to public safety" denial. Instead, the risk finding must concern the likelihood of assault "with a machine gun" on an officer. (§ 667(e)(2)(C)(iv)(VI).)

present purposes, have made that new definition applicable to that term "as used throughout this Code." Where the literal terms of a new enactment are so clear and unambiguous, there is no cause to .resort to any other tools of statutory construction. "'Clear statutory language no more needs to be interpreted than pure water needs to be strained.'" (*People v. Baker* (1985) 169 Cal.App.3d 58, 62.)

Not only does the plain language of section 1170.18(c) – "this Code" – require the definition's application to section 1170.126. Section 1170.126, added by Prop. 36 in 2012, and section 1170.18, added by Prop. 47 in 2014, are *the only two statutes in the Penal Code which employ the term "unreasonable risk of danger to public safety."* Consequently, it is evident that *the entire purpose of the "this Code" language was to ensure the new definition's application to section 1170.126 review*.

C. Because Sections 1170.18 and 1170.126 Are Retrospective and Remedial Statutes, the New Definition Necessarily Governs Any Pending Appeal of a Section 1170.126 Denial.

Under elementary principles of statutory construction, Prop. 47's new definition of "unreasonable risk of danger to public safety" governs this Court's disposition of Lewis Jenkins' pending section 1170.126 appeal, because the matter was not yet final on the date of the initiative's adoption, November 4, 2014.

"If the judgment is not yet final because it is on appeal, the appellate court has a duty to apply the law as it exists when the appellate court renders its decision. [Citations.]" (*Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489; *Kuykendall v. State Board of Equalization* (1994) 22 Cal.App.4th 1194, 1207.) "[T]he law as it exists" now is that "unreasonable risk of danger to public safety" is defined as a risk of an inmate's commission of one of the

specific crimes of extreme violence listed in section 667(e)(2)(C)(iv). That is the standard this Court must apply in evaluating the trial court's denial of Jenkins' section 1170.126 petition.

Generally, a court must apply any intervening legislation which redefines or clarifies a statutory standard, even where that definition or clarification was enacted after the original denial of the claim at issue. (See *Negrette v. California State Lottery Commission* (1994) 21 Cal.App.4th 1739, 1743-1745 (applying intervening legislative definition of statutory "substantial proof" standard); accord, e.g., *Re-open Rambla, Inc. v. Board of Supervisors* (1995) 39 Cal.App.4th 1499, 1510-1511.)

Moreover, a "remedial" or "curative" statutory amendment is ordinarily given full retroactive effect. (*Kuykendal*, 22 Cal.App.4th at 1209, 1211 fn. 20; *Johnston v. Sanchez* (1981) 121 Cal.App.3d 368, 375.) "A statute which affects a penalty is considered to be remedial in nature and will be given retroactive effect if it has the effect of mitigating the penalty. [Citation.]" (*Johnston* at 375.)

Even in the civil context, where a ballot initiative has an "express remedial purposes, the inference is virtually inescapable that the electorate intended [the initiative] to apply as soon and as broadly as possible." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1232.) "When legislation seeks to remedy an existing inequity or to impose a less severe penalty than under the former law, the courts of this state have long held that the enacting body must have intended that the statute should apply to matters that occurred prior to its enactment." (*Ibid.*)

That general principle carries still greater weight when the "penalty" being mitigated is criminal punishment. Under the rule of *In re Estrada* (1965) 63 Cal.2d 740, legislation which "mitigates punishment" is presumed

to apply retroactively to any case not yet "final" at the time of the enactment, unless the legislation contains a "savings" clause or other express indication of legislative intent to apply it prospectively only. (*People v. Nasalga* (1994) 12 Cal.4th 784, 790-794 (and additional cases discussed there).)[6] "[W]here the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Estrada*, 63 Cal.2d at 748; *Nasalga*, 12 Cal.4th at 792.)

Most *Estrada* issues concern intervening provisions which directly lessen the sentences for particular offenses. The California Supreme Court has granted review to consider whether Proposition 36's amendments of the Three Strikes statutes themselves, sections 667 and 1170.12, apply to sentences which were not yet final at the time of that initiative. (*People v. Conley* (2013) 215 Cal.App.4th 1482, review gr. Aug. 14, 2013 (S211275).) Thus, the question in *Conley* is whether the revisions of sections 667 and 1170.12, which prescribe second-strike rather than third-strike life sentences for certain offenses, apply to cases not yet final at the time of Prop. 36, so that those inmates would be entitled to automatic reduction of their sentences without the necessity of a section 1170.126 hearing on "unreasonable risk of danger to public safety."

Those courts which have rejected the *Estrada* argument in that context have done so by distinguishing Proposition 36's prospective components (the amendments of sections 667 and 1170.12) from its retrospective mechanism, the section 1170.126 resentencing procedure. That is, those courts have found

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[6] For these purposes, "a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. [Citations.]" (*Nasalga*, 12 Cal.4th at 790 fn. 5.)

the sections 667/1170.12 amendments purely prospective, precisely because the section 1170.126 procedure is intended to be fully retroactive. (See *People v. Yearwood* (2013) 213 Cal.App.4th 161, 175-177.) The section 1170.126 resentencing procedure "is correctly interpreted to apply to all prisoners serving an indeterminate life sentence imposed under the former three strikes law." (*Id*. at 175.)

But the issue here concerns the definition governing the retrospective statute itself, section 1170.126. Consequently, application of Proposition 47's definition of the "danger to public safety" standard presents a much more compelling case for fidelity to the *Estrada* principle than the Third Strike amendments at issue in *Conley* and *Yearwood* (§§ 667, 1170.12). The clarified definition concerns what everyone agrees is a retrospective mechanism. Indeed, both the statutes implicated by the new Prop. 47 definition, section 1170.126 and new section 1170.18 are retrospective and remedial.

Legislation concerning *a remedial resentencing mechanism* is entitled to the fullest retroactive application. (*Holder v. Superior Court* (1969) 269 Cal.App.2d 314.) Like this case, *Holder* concerned a statutory procedure for recall and reconsideration of a sentence. An intervening amendment to section 1168 allowed a trial court to "recall" a previously-imposed prison sentence and to resentence the defendant "if it is deemed warranted" by a diagnostic study. (*Id.* at 315.) In view of the legislation's remedial and rehabiliative objects, "the statute should be read and applied literally *and without qualification*." (*Id.* at 318 (emphasis added).) The *Holder* court saw no reason "why the Legislature might have intended earlier offenders should not have available to them the contemporaneous approaches to supervision and rehabilitation which are implicit" in the amendment's resentencing provision. (*Ibid*.)

Holder's analysis is equally applicable to the anomalies and injustice which would result from any disparate application of the Prop. 47's dangerousness definition to different groups of inmates, depending upon the timing of their resentencing applications:

> A recognized goal of the criminal punishment process is to minimize the population of penal institutions and to maximize rehabilitory efforts. Remedial measures should be open to all who can qualify and not be restricted arbitrarily to a group having no logical basis for differentiated treatment. (*Holder*, 269 Cal.App.2d at 318.)

Nor is there any "logical basis" to deny the benefits of the revised definition to those inmates whose section 1170.126 petitions are pending on appeal at the time of this new initiative. As reflected in its findings and ballot materials, Proposition 47 too is a remedial and rehabilitative measure intended to reduce prison overcrowding.[7]

There is a further compelling basis for applying that principle here, due to the timing of Proposition 47 in relation to the remedial mechanism established two years ago by Proposition 36. As discussed in Part B, the entire object of Proposition 47's application of the new definition as the term is used "throughout this Code" is to ensure its application to section 1170.126, for that is the only other Penal Code statute employing "unreasonable risk of danger to public safety." However, as it happens, Proposition 47 has enacted the new definition of that term at the very time that the two-year deadline for filing a Proposition 36 petition (enacted Nov. 6, 2012) has expired. (§ 1170.126(a).) Consequently, as a practical matter, any construction of the definition as purely prospective would render the legislation's applicability to

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[7] See Prop. 47, §§ 2, 3 ("Findings & Declarations" and ""Purpose & Intent"); Ballot Argument in Support of Prop. 47 (Mot. Judicial Notice, Ex. C).

section 1170.126 nugatory.

It would be especially unjust to deny the benefit of the revised standard to inmates such as Jenkins whose section 1170.126 petitions were filed and heard soon after Proposition 36's enactment. A prospective-only construction of the definition would have the perverse effect of penalizing the most diligent inmates, such as Jenkins, who filed early in the process, and of rewarding those who sat on their rights and waited almost two years to seek relief.

Every applicable principle of statutory construction compels application of the newly-promulgated "unreasonable risk" definition to Lewis Jenkins' pending appeal from the trial court's denial of section 1170.126 relief. That denial was based on an "unreasonable risk" finding that could not possibly pass muster under the clarified legal standard. The denial was not yet final at the time of Proposition 47's enactment, and the definition concerns a statutory mechanism which it itself remedial and retrospective. Because the section 1170.126(a) deadline has now expired, the only way to give effect to the voters' intent is to ensure the definition's application to all already-filed petitions, including those pending on appeal.

D. Because the Trial Court Did Not Apply the New Definition, this Court Should Reverse the Denial and Remand the Matter.

As applied to a third-strike inmate like Lewis Jenkins, Proposition 47's definition of "unreasonable risk of danger to public safety" is truly a game changer. As discussed in the earlier briefing, it is ludicrous enough that the trial court purported to find any "unreasonable risk" here, even without the benefit of the electorate's intervening clarification of that standard. After all, Lewis Jenkins is a non-violent man in his mid-50's, whose only strikes were two robberies in the 1970's, whose current commitment crime was a $22 theft,

and who has maintained a good prison disciplinary record.

But the many questions surrounding the legality of the court's disposition under the then-undefined "unreasonable risk" standard are now essentially moot. It is inconceivable that any judge could possibly find that Lewis Jenkins poses an unreasonable risk of committing any of the egregious offenses specified in section 667(e)(2)(C)(iv), such as murder, rape, or assault with a machine gun on a police officer. Jenkins has never been convicted or even accused of committing any crime remotely approaching those listed in that subdivision. Yet, as discussed in Part B, the section 1170.18(c) definition requires a court to grant resentencing unless it makes a finding of an unreasonable risk of commission of one of those offenses.

There is not a scintilla of evidence – much less substantial evidence – that Jenkins poses "an unreasonable risk of danger to public safety" under Prop. 47's clarification of that term. Accordingly, the proper disposition is for this Court to reverse the matter outright, with directions to the trial court to grant Jenkins'resentencing petition.

At the very least, elementary principles of appellate review require a remand for the trial court to reconsider the matter under the proper standard. A trial court's decision cannot stand where it appears that the court was operating under a mistaken or superseded understanding of the governing standard, especially where there has been an intervening clarification or change in that standard. (See generally, e.g., *People v. Belmontes* (1983) 34 Cal.3d 335, 348 fn. 8; *People v. Rodriguez* (1998) 17 Cal.4th 253, 257.)

There have been a number of noteworthy applications of that longstanding general principle just within the past year. The California Supreme Court and the appellate courts have ordered sentencing courts to reconsider life-without-parole sentences imposed on juveniles, in view of the

U.S. Supreme Court's intervening clarification of the factors which must guide and limit discretionary imposition of that punishment. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391-1392; see also, eg., *People v. Chavez* (2014) 228 Cal.App.4th 18, 33-34; *People v. Windfield* (2014) 228 Cal.App.4th 1408, 1438-1439.) "Unless the record demonstrates that the sentencing court would have arrived at the same sentence," had it been aware of the intervening clarification of the standard, "remand is appropriate for such consideration." (*Windfield* at 1439.)

The same is true where there has been an intervening change or clarification of the standard governing a defendant's post-commitment petition for release. (*People v. Olsen* (2014) 229 Cal.App.4th 981.) In *Olsen*, a sex offender committed as a sexually violent predator (SVP) appealed from the denial of his post-commitment petition for release from the SVP commitment regimen. The appellate court remanded upon finding that "the trial court did not apply the correct standard" in dismissing the release petition as frivolous. The appellate court recognized that, at the time of its ruling, the trial court "lacked guidance with respect to the proper standard for the threshold determination of frivolous." (*Id.* at 998-999.) The reviewing court "outlined the appropriate standard" for that determination in its opinion and remanded for reconsideration under that clarified standard. (*Id*. at 999.)

Here it is the electorate which has provided the necessary "guidance" for the "unreasonable risk" determination by promulgating a quite specific and narrow definition of that term. (§ 1170.18(c).) It is patently obvious that the trial court's putative finding of dangerousness did not represent any finding that Lewis Jenkins posed an "unreasonable risk" of committing any of the extraordinarily aggravated offenses identified in section 667(e)(2)(C)(iv). Indeed, it is very doubtful that the trial court's denial of relief even rested on

any finding of a likelihood of future *violence*. Instead, the trial court appears to have relied on its perception of a more generic risk of recidivism, rather than a risk of violence – "whether he'll continue to commit crimes" or a "risk to reoffend." (RT 26, 34; see AOB 41-45)

Proposition 47's definition of "unreasonable risk of danger to public safety" (§ 1170.18(c)) governs this appeal. That definition permits denial of an eligible inmate's resentencing petition only upon a finding of an "unreasonable risk" of commission of murder, rape, possession of a weapon of mass destruction or one of the other egregious crimes listed in section 667(e)(2)(C)(iv). Because the trial court did not and could make any such finding, its denial cannot stand.

CONCLUSION

Proposition 47's definition of the "unreasonable risk" standard, which governs disposition of a section 1170.126 petition, is dispositive of this appeal. The Proposition 47 definition effectively moots all the other claims raised in the appeal itself and in Jenkins' related habeas corpus petition (A143048). This Court should reverse the denial of the resentencing petition and remand the matter. The Court should either direct the trial court to grant the petition outright or, at a minimum, to reconsider it under the section 1170.18(c) standard. For the foregoing reasons, Lewis Jenkins respectfully urges this Court to reverse the disposition and to remand the matter.

DATE: November 7, 2014

Respectfully submitted,
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/s/ J. Bradley O'Connell
J. BRADLEY O'CONNELL
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CERTIFICATE OF WORD COUNT

Counsel for Lewis Jenkins hereby certifies that this brief consists of **4682** words (excluding tables, proof of service, and this certificate), according to the word count of the computer word-processing program. (California Rules of Court, rule 8.360(b)(1).)

Dated: Nov. 7, 2014

/s/ J. Bradley O'Connell
J. BRADLEY O'CONNELL

DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE BY TRUEFILING

Re: *In re Lewis Jenkins* **Case No.: A143038**

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business address is 730 Harrison Street, Suite 201, San Francisco, CA 94107. My electronic service address is eservice@fdap.org. On November 7, 2014, I served a true copy of the attached **Appellant's Supplemental Brief on Proposition 47** on each of the following, by placing same in an envelope(s) addressed as follows:

Clerk's Office
Solano County Superior Court
Hall of Justice, 600 Union Ave.
Fairfield, CA 94533
Attn: Hon. Mike Nail, Judge

Solano County District Attorney
675 Texas St. Ste. 4500
Fairfield, CA 94533

Lewis Jenkins
(Appellant)

Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in San Francisco, California, on that same day in the ordinary course of business.

On November 7, 2014, I transmitted a PDF version of this document by TrueFiling to the following:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 7, 2014, at San Francisco, California.

/s/ Bonnie Palmer

Bonnie Palmer, Clerk